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Supply, Offtake, and Consent Risks

SUPPLY, OFFTAKE, AND CONSENT HAZARDS

Supply Hazards

Supply is defined as "the amount of goods produced or available at a given price."[1] A supplier is "[a] person engaged, directly or indirectly, in making product available to consumers."[2] Where supply refers to a stock of goods, supplier refers to a person who furnishes such goods to consumers. Goods, services, and other items of value are furnished by firms to other firms long before they reach consumers' hands. A person obtaining such an item from another engages in a transaction. A person who obtains an item from another to fulfill a commitment to a third person engages in two transactions, one with its supplier and a second with the third party. In a supply or supply chain transaction, for purposes of this text, an obligor in one transaction is expected by its performance in that transaction to complete or to enable or help its obligee to complete a task in a second transaction. That task may be performance by an obligor of its obligation in the second transaction. It may be satisfaction of conditions that will effectuate a commitment to perform in the second transaction, enabling the obligee in the first transaction to realize the benefits of both transactions.

The following are examples of such supply relationships:

- *Alamance Board of Education v. Bobby Murray Chevrolet, Inc.*[3]: A car dealer successfully bid to supply school bus chassis to a number of school boards. It expected to obtain the chassis from General Motors (GM) under its contract, which stated that orders did not bind GM until they were accepted; and they were accepted when GM "released" the order for production. The supply of the chassis in the transaction between GM and the dealer, the first transaction, would have enabled the dealer to perform its obligation to the school boards in the second transaction. The case is further discussed in this chapter.[4]
- *State Fuel Co. v. Gulf Oil Corp.*[5]: During the war, kerosene shipped to the northeast United States had to be contained in barrels and carried in box cars because tankers and tank cars were in short supply. Unloading barrels increased the distributors' delivery costs. The federal government established a program to reimburse kerosene distributors for such costs, subject to a maximum amount. The supplier would credit the distributor for its excess unloading costs and apply for the reimbursement. A government-owned corporation would review the application and, if satisfied, reimburse the seller for such excess unloading costs. It could have such costs audited. Although the supply chain for the sale of kerosene was that seller and distributor were supplier and supplied, respectively, the supply chain was reversed for purposes of collecting the subsidy: the distributor supplied documentation to the supplier, and the supplier provided that documentation to the government corporation. The supplier did not have a commitment to the government corporation to supply proper documentation. The supplier had to satisfy conditions to obligate the government corporation to pay the subsidy. That reimbursement would yield the benefit of the regulatory relationship with the government corporation and one of the benefits of the contract with the distributor. This case, further discussed in this chapter,[6] illustrates how the supply of an item of value in a first transaction enables a party receiving that item to effectuate a third party's commitment in a second transaction, enabling that party to realize benefits in one or both transactions.

This chapter narrowly focuses on the supply transaction in which the supply of an item of value in one transaction enables or facilitates the party receiving such item to perform an obligation to a third party in the second transaction. A supply failure occurs when an obligor (P1) in a first transaction fails to supply an item of value that an obligee (P2) in that transaction expected to receive and to use to perform its obligation to an obligee (P3) in a second transaction. P2 may be unable to perform because of the supply failure. P1 may or may not be excused. In all instances P1's failure to supply the item P2 expects increases the chances that P2 will be unable to complete the task P3 expects P2 to complete in the second transaction.

Supplier Mismatch and Breach. P2's dependence upon P1 to fulfill a commitment to P3 will create the first and may create the second of the following two risks:

- a risk that P2 will be liable to P3 if P1 fails to perform its commitment to P2 and, as a result, P2 cannot fulfill its commitment to P3, and
- a risk that P1 will not be liable to P2 because P1 has not committed to perform or its failure to perform is excused, but P2's performance is not correspondingly excused or otherwise discharged.

In all cases, the chance that P1 might not perform is a threat to P2 because P2 may be unable to perform its commitment to P3. This is true even when responsibility for P1's breach has been allocated to P3. The second risk is a mismatch between P2's commitment to P3 and P1's commitment to P2. P1 might not always be liable to P2 when P2 fails to perform its commitment to P3 because P1 failed to perform its commitment to P2.

The following cases illustrate such mismatch and liability assumption risks:

- *Sassower v. Blumenfeld*[7]: This case is summarized in chapter 8.[8] A buyer of real property deposited $180,000 of a purchase price of $1,800,000, agreeing to forfeit the down payment if he failed to pay the balance, which he intended to pay with the cash he would receive upon liquidation of investments he had in Bernard Madoff's funds. Madoff's fraudulent scheme was discovered between the times the buyer signed and closed, leaving the buyer with no cash, and because he had lost his investments, with no ability to borrow moneys with which to pay the balance. Madoff was P1, who was obligated to supply the funds the buyer P2 required to pay the seller P3, and the contract between P1 and P2, the contract pursuant to which the buyer invested in Madoff's funds, and the contract between P2 and P3, the contract for the sale of the property. P2's commitment to P3, a firm obligation to pay the purchase price, was matched by an equally strong commitment by P1 to pay P2 the liquidated value of P2's investments. P2 had a claim against P1, the amount of which would have covered the losses recovered by P3 from P2.[9]
- *World of Boxing, LLC v. King*[10]: King (K), a boxing promoter, agreed with World of Boxing (WB), another boxing promoter, to cause boxer Guillermo Jones (J) to participate in a rematch with boxer L on a specific date. On that date, boxer J tested positive for an illicit, performance-enhancing diuretic and was disqualified from participating in the fight; the fight was canceled. J, K, and WB were P1, P2, and P3, respectively. K's commitment to WB to cause P1's participation in the fight was matched by an equally strong commitment from P1 to participate. P1's breach of his contract with P2 caused P2's breach of its contract with P3.[11]
- *Alamance Board of Education*[12]: The facts in the case, previously summarized,[13] illustrate a commitment mismatch: from the outset, GM's commitment to the dealer, on which the dealer depended to perform, was conditional, unlike the dealer's commitment to the school boards, which was not conditional, creating the risk that the dealer would be unable to deliver if GM did not accept the orders and deliver the chassis to the dealer on time. As GM had not previously failed to deliver to the dealer, the dealer did not consider itself at risk when it submitted the bid. GM initially extended the dates for accepting the dealer's orders and, in turn, the school boards extended the dealer's delivery dates, but eventually GM notified the dealer that the orders would not be accepted, putting the dealer in breach.[14]
- *Evra Corp. v. Swiss Bank Corp.*[15]: A vessel charterer in Chicago agreed that if a rent payment was late, then the vessel owner in Switzerland, where payments were to be made, could terminate the charter. The day before payment was due the charterer instructed its bank (bank A) to wire transfer funds in the amount of the rent payment to the owner's bank (bank C). Bank A transferred the funds to bank B with instructions to transfer the funds to bank C, but bank B failed to transfer the funds for reasons never explained.[16] The next day, the owner canceled the charter. The charterer initiated arbitration proceedings and the arbitrators concluded the owner was entitled to terminate the charter. The charterer then sued bank B for its damages (arbitration proceeding costs and profits lost because of cancelation of the charter). Bank B, the charterer, and the owner were P1, P2, and P3, respectively; the P1-P2 obligation was the transfer of funds to P3 and the P2-P3 contract was the charterparty. If P2's obligation to P3's was matched by a corresponding obligation by P1 to P2, then P1 would have had to deliver the funds to P3 when they were due from P2 and P1's liability for breach would have covered P2's losses under the P2-P3 contract. Such a match did not exist in this case.[17]

No Willing Supplier. Supply risk exists in transactions where the supplier has not been identified and no contract for the first transaction has been formed. P2 may need the supply of an item of value from a third party to perform its obligation to P3 and expect or hope to find a supplier after contract formation and before its performance to P3 is due. One reason for its failure may be that no supplier is willing to supply it with the value it needs, though such suppliers are willing to supply others. An example is a property buyer who must borrow moneys to pay all or a portion of the purchase price but cannot find a lender willing to extend credit to it; the failure to raise the loan is due to the buyer's lack of qualifications to borrow such amount. Whether the buyer had the ability at contract formation and lost it later does not matter. Another reason may be that no potential supplier is willing to supply the item P2 requires for its performance of its obligation to P3. As a result, performance of P2's obligation is infeasible. Such infeasibility is attributable to the absence of willing suppliers in the market. The absence of suppliers may have existed at contract formation or occur later. In either case, the absence of supply lies in the market. That risk is described in chapter 12.[18]

Mouhelis v. Thomas[19] illustrates inability of an obligor in the second transaction to find a supplier in the first. A condition in a contract for the sale of property allowed the buyer to terminate within 21 days from its execution if the buyer "submitted a true loan application and otherwise made every reasonable effort to secure a loan commitment from any source made available to him and has been unable to do so." The buyer had to notify the seller of termination within that period. The buyer applied for a loan, but because his employment had been terminated while the application was pending, the loan was denied. This, however, was after the 21-day period expired. The lender, buyer, and seller were P1, P2, and P3, respectively. The buyer either chose the wrong lender to ask for a loan, because another lender would have made the loan notwithstanding his unemployment, or he was unable to borrow from any lender because he was unemployed. In the former the buyer's problem lay with his chosen supplier, but since the lender did not commit to loan any funds, it did not breach any commitment. In the latter his problem was his inability to borrow the amount he needed. In either case, he had no supplier of the funds needed to pay the purchase price. When the 21-day period lapsed without termination, he assumed responsibility for the risk of liability to his seller for his failure to obtain those funds.[20] He had no commitment from a lender to match his commitment to his seller.

Offtake Hazards

Offtake is the acquisition or purchase of items of value that have been acquired or produced by their seller for sale. The focus on offtake shifts from the furnishing to the acquiring of a want. Offtake enables a seller to realize some or all of the value it expects or hopes from a transaction. Just as P2 can depend upon P1 to supply items it needs to perform its commitment to P3, P2 can depend upon P3 to purchase those items to enable P2 to realize the anticipated benefit of the transaction with P1. An offtake transaction is a mirror image of a supply transaction: P1's performance as supplier in the first transaction has no value to P2 without P3's performance as offtaker in the second transaction.

An offtake failure occurs when an offtaker (P3) in a second transaction indicates it will not acquire or pay for or fails to acquire or pay for goods or services supplied by P2 that were in part or whole supplied or produced using items supplied by P1 in a first transaction, the purpose of which was to supply P3. P3's failure may or may not be excused. In all instances P3's failure to perform in the P2-P3 transaction may impair the value P2 expects to realize, unless P2 can find another offtaker at the same or better price.

Supply and offtake risk differ: a supply failure may impair or deprive the obligee in the first transaction of its ability as obligor in the second transaction to complete its commitments to its obligee in that transaction. P2 may be able to locate alternative supplies in time to perform, or it might not. The market may be such that it cannot locate any alternative supplies. An offtake failure does not affect P2's ability to perform its obligation to P1 (or P1 its obligation to P2). P3's breach or repudiation may impair or destroy the benefit P2 expects from P1's performance in the first transaction. P2 may be able to locate an alternative offtaker at the same or better price. The market may be such that it cannot locate any alternative offtakers. Whether it can or cannot locate alternative offtakers, it can pay P1 for its performance. In principle, its ability to perform is unaffected by P3's breach or repudiation.

Offtake Mismatch and Breach. The relationships P2 has to P1 and P3 also face two different sets of hazards, but they are the reverse of those described for supply transactions. The first set is acts and incidents that indicate P3 will fail to perform, excused or otherwise. This set also includes acts and incidents that indicate a loss of or potential to lose willingness and ability to perform, as described in chapter 8. The other set are chances that P2 will be liable to P1 for breach when by choice it fails to perform its obligation to P1 in the first transaction because P3 failed to perform or repudiated the second transaction. This set includes the assumption in the P1–P2 transaction of the risk that P2 will not perform in that transaction because P3 repudiated the second transaction (and P2's anticipated benefit of the P1–P2 transaction was lost). These hazards are mismatches between P3's commitment to P2 and P2's commitment to P1 and assumption of the risk of liability to P1 in the first transaction notwithstanding that P3 repudiates in the second transaction.

Following are two cases that illustrate mismatch of offtake and other commitments:

- *Peoplesoft U.S.A., Inc. v. Softeck, Inc.*[21]: A Puerto Rican software developer contracted to provide software and related services to Policia de Puerto Rico (Policia). It licensed software from a US software developer to provide those services. Policia decided not to use the Puerto Rican developer's software. The Puerto Rican developer, in turn, decided not to use the US developer's license. The US developer, the Puerto Rican developer, and Policia were P1, P2, and P3, respectively. P3, the offtaker in the P2-P3 transaction, either permissibly terminated or impermissibly defaulted on its commitment to P2. If the former, P3's commitment to P2 was weaker than P2's commitment to P1. If the latter, P3's commitment to P2 matched P2's commitment to P1, but P2 assumed responsibility for the risk P3 would breach or repudiate (though P3 was responsible for P2's losses caused by its breach). Even though P2 had a claim against P3 for breach, it was still liable to P1 for breach of the license. Note: P3's breach did not impair P2's performance under the license with P1, only its incentive to perform.[22]
- *Moore Brothers Co. v. Brown & Root, Inc.*[23]: A subcontract between a contractor and the subcontractor for a toll road project included a "pay when paid" clause.[24] A payment bond was issued by a surety in favor of the subcontractor that did not include this limitation. The subcontractor requested payment for work ordered by change orders. The project owner, which depended upon receiving loans from its lenders to pay the contractor, was unable to pay the contractor for such additional work because it and the contractor had assured the lenders no such additional work was required; the contractor lacked the funds to pay the subcontractor. The subcontractor and lender were P1s (P1A and P1B, respectively), the contractor and surety were P2s (P2A and P2B, respectively), and the project owner P3. There were four contracts: (1) the P1A-P2A contract (subcontract between contractor and subcontractor), (2) the P1A-P2B contract (surety bond in favor of P1A and P2A), (3) the P2A-P3 contract (construction contract), and (4) the P1B-P3contract (loan agreement). First, the lender's contract (4) commitment did not match the owner's contract (3) commitment: the project owner had payment obligations to the contractor that the lender did not have to finance. This is an example of a supplier having a lesser commitment to perform than the supplied party has to its offtaker. Second, the contractor's contract (1) commitment to the subcontractor would not have matched the owner's contract (3) commitment to the contractor if the "pay when paid" clause was effective: the contractor had to pay only when paid by the project owner, whereas the owner had to pay the contractor all amounts due under contract (3).[25] The contractor's contract (1) commitment to the subcontractor matched the owner's contract (3) commitment to the contractor if the "pay when paid" clause was ineffective: the contractor had to pay the subcontractor, whether or not it was paid by the owner. Third, responsibility for both risks was allocated to the surety under contract (2): the surety had a commitment to pay the subcontractor whenever payment was due without regard to the "pay when paid clause."[26]

No Willing Offtaker. Comparable to supply failure, offtake failure occurs when no offtaker has been identified and the contract for the second transaction has not been formed by the time an offtaker is expected to have been identified and agreed to buy. P2 may need offtake from a third party to realize the value anticipated in the first transaction and expect or hope to find an offtaker after contract formation and before its anticipated time for disposing of its items. One reason for its failure may be that no offtaker is willing to buy from P2, though such offtakers are willing to buy from others. Another reason may be that no potential offtaker is willing to buy the item P2 desires to sell. *Columbian National Title Insurance Co. v. Township Title Services, Inc.*[27] may be an example: because a few title insurers in an area had recently failed, lenders in that area were reluctant to have an insurer new to the area, seeking to develop a market, issue title policies for their loans. There was no demand for the insurer's product. Selling title insurance was feasible, though selling this particular insurer's policies was not. The absence of offtakers may have existed at contract formation or occurred later. Had lenders stopped making loans or were willing to make loans without title insurance and thus did not need title policies, the lack of demand would have been attributable to the market. Market risk—the absence of buyers for certain goods, services, and other items of value—is described in chapter 12.[28]

Additional Costs and Delays. The previous description of supply and offtake risks focuses on complete failures by a supplier to supply and an offtaker to offtake. A supplier may fall short of expectations by supplying later or at a cost higher than expected. This is a risk to the supplied party who may be unable to pass along the extra costs or time to its offtaker. An offtaker may fall short of expectations by buying later or at a lower price. This is a risk to the offtaker's counterparty who may be unable to lower the price it pays its supplier. With appropriate modifications, the previous description of supply and offtake hazards can be repeated for suppliers' late completion and completion at costs more than expected and offtakers' late completion and completion at prices less than expected.

McNamara Construction of Manitoba, Ltd. v. U.S.[29] illustrates a common mismatch between the prices a party commits to pay its suppliers and its offtaker commits to pay it. A Canadian contractor agreed to complete works on canal locks and related structures at Sault St. Marie, Michigan, for a fixed price, having estimated labor costs of $6,162,066 (out of a total estimate of $21,471,690). Laborers in the area proved far more difficult to work with than anticipated. Strikes, delays, and harassment plagued the contractor throughout the performance of the contract. The total labor costs were $14,222,624 (out of a total cost of $29,660,455). The contractor claimed compensation for the additional labor costs, contending its estimate was based on a mutually mistaken assumption about labor in the area. The laborers were P1, the contractor P2, and the government agency for which the work was performed P3. The contractor's claim was effectively that P3's commitment to P2 should be reformed to match P2's ultimate commitments to P1; P3 would thus be responsible for P2's extra costs. Had P1's commitment to P2 matched P2's commitment to P3, the laborers would not have been entitled to payments above the amount P2 estimated. No one made this claim. P2, by giving and accepting different commitments to P1 and from P3, as the government claimed, assumed responsibility for its additional costs.[30]

THIRD-PARTY CONSENT HAZARDS

Consent is synonymous with authorization, approval, and permission.[31] An essential feature of all of them for purposes of the present analysis is that consent or a like act can be given or refused; the outcome of a decision whether to consent is not a foregone conclusion. A consenting person may be a private individual or entity or a government or international agency and may choose to give or deny its consent. A consent will be necessary when one or both parties are required by the contract between them or a contract with a third party or other legal obligation to obtain a consent from a third party before completing a task or realizing a benefit.

- *Specialty Tires of America, Inc. v. CIT Group/Equipment Financing, Inc.*[32] illustrates a consent required for an obligor to perform: to dispose of equipment leased to an equipment lessee who defaulted under the lease, the equipment lessor required access to the lessee's premises to deliver the equipment still located there. The equipment lessor could not deliver the equipment to a buyer without that consent.
- *Witchita Properties v. Lanterman*[33] illustrates a consent required to realize the benefits of transaction: a tenant who leased premises for the sole purpose of operating a liquor store needed and failed to obtain a liquor license and repudiated the lease. The tenant could pay rent and other obligations under the lease but could not reap the benefits without the liquor license.
- *Gerard v. Almouli*[34] illustrates a consent required because the parties agreed that it must be obtained for a party to complete a task or realize a benefit, even though such consent was not required by a contract with a third party or by any other legal obligation. A distributor agreed to be the exclusive distributor of small-sized halogenated aerosol fire extinguishers for North America, South America, Central America, Germany, and Japan and was obligated to begin placing orders once the manufacturer had obtained approval of the extinguisher from the Underwriters Laboratories. Six years later the approval had still not been obtained. The consent requirement could have been, but was not, waived by the party for whose benefit the consent was to be obtained, the distributor. The consent required in the former two cases could not have been waived by the parties to the contract.

A requirement that a consent be obtained to complete a task or enjoy a benefit is a hazard to the party that must complete the task or realize the benefit because it will be unable to do so without the consent. The risk that the consent will not be obtained is also the risk that the activity will not be completed or the benefit realized. The hazard can be avoided when a consent can be obtained prior to contract formation. If the consent must be obtained before contract formation, the absence of the consent goes to the formation of the contract; the contract may be void or voidable. The consent is one of the legal formalities that must be satisfied for the contract to be effective. Otherwise, the risk—the chance that the consent will be denied—exists from contract formation until the consent is obtained or the transaction terminated.

A third-party consent is analogous to supply in a supply transaction when the consent is required for an obligor to complete its performance. Like a supplier input that must be procured in a first transaction to complete a task in a second transaction, a third-party consent must be obtained in a process distinct from the transaction to enable the obligor to perform its obligation to the obligee. For example, in *Specialty Tires of America, Inc. v. CIT Group/Equipment Financing, Inc.*,[35] where the lessee denied the lessor access to the equipment when it sought to take possession, the seller was thus unable to deliver and failed to deliver the equipment to the buyer. The lessee, seller, and buyer were P1, P2, and P3, respectively; P2 required P1's consent to perform under the P2-P3 contract. If the lessee had been obligated under the P1-P2 contract to consent, its denial of access would have been a breach, just as a failure to supply can be a breach of a supply contract. In most instances, a consenting party will not be so obligated. In such a case, a third-party consent is analogous to a supply transaction when the supplier has no commitment to deliver under the P1-P2 contract.

A third-party consent is analogous to offtake in an offtake transaction when the consent is required for an obligee to realize the benefits of a transaction. Like offtake in a second transaction that yields the benefit of the first transaction to a party, a third-party consent must be obtained in a process distinct from the transaction to enable the party to realize that benefit. For example, in *Witchita Properties v. Lanterman*,[36] the tenant received possession of the premises but could not use them without a liquor license; it could not sell liquor and realize the benefit of the lease. P1, P2, and P3 were the landlord, tenant, and licensing authority, respectively; the license, while not offtake, was essential for offtake to be permissible.

A consent mismatch exists when a party that needs a consent to complete a task has responsibility for obtaining that consent but does not have a commitment from the consenting party to consent. A mismatch would have existed in *Specialty Tires of America, Inc.*[37] had the equipment lessee no commitment to allow access to the equipment still on its premises and the lessor had a commitment to sell and deliver to the buyer. The finding that the lessee's denial of access in that case made the lessor's performance to its buyer impossible eliminated that mismatch.[38] A mismatch existed in *Witchita Properties*[39] because the tenant had a commitment to lease the premises while having no commitment from the liquor licensing authority to issue a liquor license. In both cases, the mismatches could have been avoided by obtaining the consent and license before contract formation or by conditioning the obligation upon the receipt of the consent.

Oversight, etc., of Supply, Offtake, and Consents

The supply, offtake, and third-party consent risks previously described may be compounded by the occurrence of one or more of the planning hazards described in chapters 3, 4, and 5: overlooking, recognizing but rejecting as unnecessary, or misunderstanding the importance of the process of obtaining a supply or offtake arrangement or a required consent. For example, in *McNamara Construction of Manitoba, Ltd.*,[40] the contractor contended the parties were "mutually ignorant of a material existing fact, namely the unavailability of responsible labor in the area of the project, as well as the exorbitant cost of such labor as was available."[41] The implication was that the contractor lacked sufficient information and made incorrect assumptions about its prospective labor costs and the match between its potential commitment to its labor and its commitment to the government. The process and the likelihood of obtaining a consent may be highly uncertain: the actions the parties are required to take and the criteria the consenting party must consider may be highly discretionary. For example, the manufacturer, in *Gerard*, claimed both parties misunderstood how long approval of the Underwriters Laboratories would take. It may have had incorrect information, incorrectly processed good information, or made an incorrect assumption, not based on information, about how long the process would take. The process was also highly uncertain: whether approval would eventually be forthcoming and how long the process would take could not be predicted.

SUPPLY, OFFTAKE, AND THIRD-PARTY CONSENT RISK MANAGEMENT

Supply, Offtake, and Consent Diligence

Diligence on suppliers and offtakers is similar to that on counterparties. The objective is to determine if at contract formation (1) they are willing and will thereafter remain willing to complete their tasks, and they will complete their tasks in the manner expected; (2) to the extent they must then be able, they are able and will otherwise obtain and retain that ability to complete their tasks, and they will complete their tasks in the manner expected; (3) their performance will be competent; (4) they have given the necessary commitments to supply and offtake; and (5) if they inexcusably fail to perform, they have the financial resources to pay compensation for such failures. Investigations of suppliers and offtakers that have minor but critical roles in supply or offtake chains can and, in some instances, should be conducted. *Evra Corp.*,[42] previously discussed in this chapter,[43] is illustrative: each bank that had to transfer the lessee's funds played a small, but indispensable part in helping the lessee perform and was thus part of its supply chain. It seems likely that the lessee assumed, without investigation, each bank in the payment chain would transfer the funds immediately following their receipt, an assumption that proved in this instance to be incorrect. Had the lessee asked its bank how long each bank might take to effect its transfer and the bank's liability for transferring late, the lessee could have arranged for an earlier transfer of funds to ensure timely payment.

Diligence on third-party consents varies widely, depending on the third party, the scope of its discretion to refuse its consent, and its procedure for deciding whether or not to give it. The third party may be a private person or a governmental agency. The process may be highly predictable or uncertain. Such discretion may be absolute or circumscribed.

Supply and Offtake Risk Allocation

Contract law principles of interpretation, unilateral and mutual mistake, impossibility, impracticability, frustration, unconscionability, and good faith and fair dealing allocate supply and offtake mismatch and supplier or offtaker performance failure. For example, in *McNamara Construction of Manitoba, Ltd.*,[44] interpretation of the contract as one where the parties knew of the labor difficulties in the area would have resulted in the allocation of responsibility for the risk to the contractor, whereas interpretation of it as one where the parties were unaware of such difficulties would have resulted in allocation of responsibility for the risk to the government. The mismatch of responsibility for risk can be avoided altogether by matching a supply with an offtake commitment, and vice versa. Responsibility for each supplier and offtaker breach hazard can be allocated to the offtaker and supplier, respectively.

Supply Commitment Match. A commitment by a party to its offtaker in a second transaction to perform in circumstances when its supplier does not have a commitment to it to perform in a first transaction is a hazard in one or the other of the transactions. Elimination of that hazard entails either obligating the supplier to perform in the first transaction in all circumstances in which the party is committed to perform in the second or allowing the party to be excused from failing to perform in the second transaction when the supplier in the first transaction is not obligated to perform.

Following are cases that illustrate such commitment matches:

- *State Fuel Co.*[45]: The background to this case is previously summarized.[46] One month after the program was established, a seller and distributor, knowing of the regulations establishing the subsidy, agreed to the sale and purchase of kerosene shipped in boxcars. The seller's telegram, while not mentioning the new regulations, contemplated them when it stipulated, "Unloading and handling charges to be accumulated by you and to bill us and supported by proper evidence but not to exceed 2 cents per gallon." The distributor's subcontractor that unloaded the boxcars for the distributor charged the maximum. The distributor charged that amount to the seller; the seller invoiced the government-owned corporation for reimbursement; the government-owned corporation requested an audit of the subcontractor's books and records; and the subcontractor refused. The subcontractor had been incorporated by the distributor's treasurer and used the distributor's equipment and employees. The government-owned corporation paid only one-half cent per gallon for the excess unloading costs. Had the quoted language not obligated P1 to allow the audit, as the distributor claimed, there would have been a mismatch: the supplier would not have had the commitment from P1 it needed to satisfy the conditions required by the regulations to obligate P3 to pay. P2 would have assumed responsibility for the risk that P1 would not allow the audit and P3 would not pay. As P2 successfully claimed, however, the quoted language obligated P1 to allow an audit; P1's obligation to P2 under in the first transaction matched the conditions P2 had to satisfy to receive reimbursement from P3.[47] The case illustrates the first solution to mismatch risk: including terms in the P1-P2 contract that ensure P1 must perform in all circumstances in which P2 must perform under the P2-P3 contract.

- *Chic Organization, Ltd*.[48]: This case is summarized in chapter 1.[49] Diana Ross, Motown, and Chic were P1, P2, and P3, respectively. P1 had no commitment to record with P2 once her contract expired. Had P2 a commitment to provide P1's collaboration, notwithstanding the expiration of her contract with Motown, as Chic claimed, P2 would have committed to perform in circumstances in which P1 had no corresponding obligation to perform. As Motown successfully claimed, P2 had no commitment to P3 if P1 had no commitment to P2. The case illustrates the second solution to mismatch risk: P2 impliedly limited its commitment to P2 to the circumstances under which P2 is entitled to a corresponding performance from P1 under a P1-P2 contract.
- *Cabriolet Porsche Audi, Inc*.[50]: This case is summarized in chapter 7.[51] The manufacturer, importer, and dealer were P1, P2, and P3, respectively. Had the importer committed to deliver to the dealer all the cars it ordered, notwithstanding the shortage to meet all dealers' orders, as the dealer claimed, P2's commitment to P3 would have been greater than P1's commitment to P2. As the importer successfully claimed, it reserved the right to allocate deliveries to dealers and to supply P3 with fewer than all the cars it ordered.[52] The case illustrates the second solution to supply mismatch risk when there are multiple offtakers or P3s. The case also illustrates how a party can, by reserving the discretion to adjust its commitment to its offtaker, whenever and for whatever reason its supplier fails to supply all its wants, avoid supply commitment mismatch.

Offtake Commitment Match. The mismatch hazard in an offtake transaction is an offtaker's commitment in a second transaction that does not require its performance in all circumstances in which the offtaker's counterparty (P2) must perform under its contract with its supplier in a first transaction. Elimination of that hazard entails increasing the offtaker's commitment in the second transaction so that its performance is required under all circumstances in which P2 must perform in the first transaction. Alternatively, P2's commitment to its supplier in the first transaction can be decreased to match P3's commitment in the second transaction.

U.S. v. Southwestern Elec. Coop., Inc.[53] illustrates the first solution to offtake mismatch. Southwestern and 14 other utilities acquired an interest in a nuclear electric generating plant to be built, borrowed the moneys to finance such acquisition, and agreed, as a condition to such loans, to purchase all their electricity requirements from the plant at a tariff that would repay the construction, construction financing, operating, and maintenance costs. The initial estimate of the construction cost of the plant of $361,195,000 in February 1976 rose to $666,654,000 in August 1976 and then to $3,250,000,000 in November 1985. The final cost exceeded $5,000,000,000. Southwestern filed an action to rescind the requirements contract. The contractor was P1, the plant owner and its lenders P2, and the utilities P3. Had the commitments of the utilities to pay the construction costs been limited to an amount below the actual costs, as the utilities claimed, P3's commitment to P2 would have been less than P2's commitment to P1. P2 would have assumed some or all of responsibility for the risk of cost overruns. As the plant's owner successfully claimed, the commitments of the utilities to pay the tariff matched the plant's commitment to pay the contractor; P3's commitment to P2 matched P2's commitment to P1. The utilities thus assumed the entire risk of cost overruns.[54]

Supplier Performance Risk Pass Through. Performance risk in supply transactions is the chance that a supplier in a supply transaction will fail to perform as committed. When a party has a commitment to its offtaker in a second transaction that matches its supplier's commitment to it in the first transaction, the supplier's breach can result in a party's liability to its offtaker for breach when the supplier's breach in the first transaction causes its breach in the second. It may be able to avoid such breach by finding an alternative supplier. It may be prudent to assume it cannot find a ready, alternative supply source. It has recourse to the supplier, but it may still incur liability to the offtaker. The hazard is incurring the risk of that liability. That risk is eliminated by conditioning the party's obligation to perform in the second transaction upon performance by its supplier in the first transaction—what is referred to as "passing through" to the offtaker the risk the supplier will fail to perform. The party thereby avoids responsibility for its own breach that is the result of its supplier's failure to supply it with items it needs to perform.

Lewis v. Penthouse International, Ltd.[55] illustrates a successful pass through of supply risk. Lewis entered and won Penthouse magazine's Penthouse Pet of the Year contest, which, under the terms of the contract she signed, entitled her to an annual salary of $25,000 and the Pet of the Year prizes described in the magazine. The prizes were to be delivered directly by third-party suppliers. Penthouse agreed to use its best efforts to have the suppliers deliver and did, in fact, use such efforts, but a number of suppliers failed to deliver, including that of the primary prize, a new Heritage Legacy automobile. The prize suppliers, Penthouse, and the contestant were P1, P2, and P3, respectively. If the prize suppliers were legally bound to deliver the promised prizes, and the report of the case does not clearly indicate whether they were, they breached when they failed to deliver. Had Penthouse committed to Lewis to deliver or cause delivery of the prizes, notwithstanding the suppliers' failures to do so, as she claimed, it would have assumed as far as she was concerned responsibility for the risk of their breaches, though it would have had recourse to them. Had Penthouse committed only to pass along to the contestant those prizes delivered by the suppliers, it would have entirely passed through to her responsibility for the risk of their defaults. Their defaults would not have put Penthouse in breach of its commitment to the contestant. As Penthouse successfully claimed, Penthouse committed to do something to cause without guaranteeing delivery of the prizes; Penthouse assumed responsibility for the risk that it would fail to do what it committed to do, but nothing more. By agreeing to a standard of performance less than a commitment to deliver or cause the suppliers to deliver the prizes, it partially passed through to the contestant responsibility for the risk of breach by the suppliers.[56]

Offtaker Performance Risk Pass Through. Performance risk in an offtake transaction is the chance that an offtaker will fail to offtake as committed. When a party has a commitment to its supplier in a first transaction that matches its offtaker's commitment to it in the second transaction, the offtaker's breach can result in a party's having to choose to repudiate its supply contract or perform the supply contract without realizing the expected benefit. It has recourse to the offtaker but will still incur liability to the supplier. The hazard is incurring the risk of that choice. That risk is eliminated either by conditioning the party's obligation to perform in the first transaction upon performance by its offtaker in the second transaction or by the party "passing through" to the supplier responsibility for the risk the offtaker will fail to perform.

The following cases illustrate such risk allocations:

- *Howard v. Nicholson*[57]: A landlord hired a contractor to build a beauty salon that would be leased for 20 years to a beauty salon operator. The operator became bankrupt before construction started. The lessor terminated the construction contract (and the contractor sued). The construction contract nowhere expressly stated the landlord would be allowed to terminate in such circumstances. The contractor, landlord, and tenant were P1, P2, and P3, respectively. Had the landlord's obligation to the contractor been independent of the tenant's performance under the lease, as the contractor unsuccessfully implicitly claimed, the landlord would have had to choose between continuing to build a beauty salon for which it had no tenant and repudiating the construction contract. As the landlord successfully claimed, its obligation to the contractor depended or was conditioned upon the tenant's not repudiating the lease. The landlord successfully passed through to the contractor responsibility for the risk of the tenant's repudiation.[58] This risk allocation would have become increasingly tenuous had the contractor started or finished construction.
- *Gilbane Building Co. v. Brisk Waterproofing Co.*[59] illustrates a "pay when paid" clause. Carly Capital Group hired Gilbane as the general contractor on a project to convert warehouses into condominium complexes. Gilbane hired Brisk as a subcontractor. The subcontract included a clear pay when paid clause.[60] Gilbane paid Brisk as the work progressed, except for the final payment. Carly had filed for liquidation in bankruptcy proceedings and had not paid Gilbane for the work by Brisk covered by the final payment. The appeal court found the pay when paid clause unambiguous and applicable. Since the owner was in bankruptcy and could not pay the general contractor, satisfaction of the condition was impossible. The subcontractor, contractor, and owner were P1, P2, and P3, respectively. Because the pay when paid clause conditioned the contractor's obligation to pay its subcontractor upon receipt of payment from the owner, as the contractor successfully claimed, the risk of nonpayment by the owner, as between the contractor and subcontractor, was allocated to the latter.[61] Had the pay when paid clause been a statement of when payment should be made and not a condition to payment, as the subcontractor unsuccessfully claimed, responsibility for the risk of the owner's nonpayment would, as between the contractor and subcontractor, remain with the contractor.

Force Majeure. Force majeure is defined as an event or effect that "can neither be anticipated nor controlled; esp. an unexpected event that prevents someone from doing something that he or she had agreed or officially planned to do."[62] Such events are associated with both natural events and human acts.[63] A clause that excuses a failure to perform when caused by such an event can be expanded to include a supply failure that renders P2 unable to perform its obligation to P3. The effect of a force majeure clause in such a case is to pass through to the offtaker in the second transaction the risk that P2 will fail to perform due to P1's failure in the first transaction. Whether such a clause can be logically expanded to include an offtake failure seems doubtful: the offtaker's failure in the second transaction defeats the purpose of the first transaction but not P2's ability to perform its obligation to P1.

Following are two cases that illustrate the application of force majeure clauses to supply and offtake failures:

- *Facto v. Pantagis*[64]: A restaurant agreed to host a wedding reception. Shortly after the reception began, a power failure in the area of the restaurant occurred and continued for the duration of the reception. The customer claimed reimbursement of its costs from the restaurant. The contract between the restaurant and its customer included a force majeure clause that "excused . . . performance [by the restaurant] . . . if it is prevented from doing so by an act of God (e.g., flood, power failure, etc.), or other unforeseen events or circumstances." The utility, the restaurant, and the customer were P1, P2, and P3, respectively. P2's failure was directly attributable to the power failure caused by P1, whether or not that failure was excused. Had the clause not applied to power failures, as the customer claimed, because the restaurant might have used backup generators, the restaurant might, as between it and customer, have assumed responsibility for the risk of the utility failing to supply power during the reception. The restaurant might still have been excused by the impossibility doctrine. Because the clause specifically mentioned power failures, it did apply, as the restaurant claimed, and responsibility for the risk that the utility would fail to supply power during the reception had been passed through to the customer.[65] The case illustrates how the application of a force majeure clause to a supply failure passes through responsibility for the risk of such failure to the offtaker.
- *Specialty Foods of Indiana, Inc. v. City of South Bend*[66]: When, in 1993, the National Football League decided to locate the College Hall of Fame in South Bend, Indiana, it leased a facility from the city for 40 years. In 2000, the city agreed Specialty Foods would be the exclusive supplier of food for the facility for five years, with two options to renew for two further five-year terms. Specialty exercised both options. In 2012, with the city's agreement, the College Hall of Fame moved to Atlanta, Georgia. The city canceled its contract with Specialty Foods, which had three years remaining. The city invoked the force majeure clause, the relevant portion of which excused performances delayed, hindered or prevented by events, such as acts of God, or "any other reason not within the reasonable control" of the affected party.[67] Specialty Foods, the city, and the Hall of Fame were P1, P2, and P3, respectively. The relocation of the Hall of Fame defeated the purpose of the contract between P1 and P2, but the city could still perform. It would not realize the intended principal benefits from that performance. Had the application of the force majeure clause been limited to instances where the party claiming the benefit of the clause was unable or hindered in its performance, as Specialty Foods claimed, responsibility for the risk of P3's termination and relocation of the Hall of Fame would have, as between P1 and P2, been assumed by P2. The city successfully claimed that the force majeure clause extended to its situation, where the city was no longer able to realize the benefits of its performance. Such extension of the clause passed through to Specialty Foods responsibility for the risk of the offtaker's termination of its agreement with the city. Notwithstanding the previous comment, that force majeure clauses do not logically apply to offtake failures, the case illustrates the application of a force majeure clause to an offtake failure, where P3 terminates the P2-P3 contract, and not one in which P3 breached the P2-P3 contract at that.[68]

Direct Performance. Having a supplier supply directly to an offtaker or having the offtaker directly offtake from the supplier eliminates the middle party and reduces the scope of the performance required in both transactions. Two transactions and three parties still exist, but the first is no longer a supply transaction in the sense that the supplier supplies obligor P2 with an item of value it uses to perform its obligation to the offtaker in the second transaction. The offtaker has two contracts: one with the obligor P2 and the other with the supplier. By avoiding a contract with the supplier and a contract with the offtaker to supply such item of value to the offtaker, the obligor P2 avoids responsibility for the risk of the supplier's failing to supply. Similarly, by having an offtaker offtake directly from the supplier, the obligor P2 avoids any obligation to P1 concerning that performance and the risk of P3's failing to perform. Supply and offtake risk are avoided by structuring the transactions to redirect supply and offtake chains.

Windows, Inc. v. Jordan Panel Systems Corp.[69] illustrates such a supply structure. A window supplier delivered windows to a carrier, who improperly loaded the trucks for shipment from South Dakota to New York. The windows were extensively damaged en route. The buyer claimed compensation from the seller for such damages. If the carrier had contracted with the seller, the carrier, seller, and buyer were P1, P2, and P3, respectively, and P1 carried the goods under a P1-P2 contract, as the buyer claimed. P1 would have been liable to P2 and P2 liable to P3 for the damage caused by defective loading. As between P2 and P3, P2 would have assumed responsibility for the risk of P1's breach. As the carrier contracted with the buyer, because the seller delivered to the buyer when it delivered the windows to the carrier, as the seller successfully claimed, P3 had separate contracts with P1 and P2, and as between it and P2, P3 had assumed responsibility for the risk of P1's defective loading.[70]

Third-Party Consent Risk Allocation

The two solutions to supply risks—commitment match and pass through of the risk of the supplier's failure to perform—can be combined in a condition precedent that a required consent be given before an obligor must perform. The absence of a commitment by the consenting party to consent can be matched by a commitment by the obligor that becomes effective when the consent is given (P1 has no commitment to consent and P2 has no commitment to P3 to perform until the consent is given). The obligor bears no responsibility for the obligee's losses that result from the failure to obtain the consent. That commitment match can be qualified by terms that impose commitments to make efforts to obtain the consent or to pay compensation if the consent is not obtained.

Following are three illustrations of commitment matches and mismatches:

- *First National Bank of Chicago v. Atlantic Tele-Network Co.*[71]: A bank committed to make loans to a borrower to purchase a telephone network, subject to satisfaction of certain conditions precedent, one of which was obtaining a government approval of the pledge of the stock of the company that would own the telephone network. The condition matched the bank's commitment to loan with the agency's commitment to consent: it had no obligation to loan moneys until the consent was given and the government had no commitment to consent. But the borrower's commitment to pay the bank fees for the commitments was not matched with the agency's discretion to refuse the consent. The borrower had to pay the bank the agreed commitment fees even if the consent was not received. This mismatch resulted in the borrower alone assuming responsibility for the risk the consent would not be given.[72]
- *Brenner v. Little Red School House*[73]: A father agreed to pay a full year's tuition to a private school for his child, but his former wife refused to allow the child to attend the school. The contract stipulated that tuition was "payable in advance of the first day of school, no portion refundable." The ex-wife's lack of commitment to consent was matched by the school's conditional commitment to accept the child when the consent had been given. The school had no obligation to accept the child until the ex-wife consented. But the father's commitment was not similarly matched: he had to pay the tuition even if the ex-wife refused her consent. Because the father had to pay the full year's tuition without any right to a refund, he alone assumed responsibility for the consent risk.[74]
- *T.S.I. Holdings, Inc. v. Jenkins*[75]: A shareholder in a company agreed to convert his common shares into preferred shares, which he would retain, and new common shares, which he would sell to an investor. The bank to which he had pledged the shares as security for a personal loan and of which he was a director had to consent to the reorganization and to release the shares from the pledge. The contract between the investor and shareholder obligated the latter to use his best efforts to obtain the bank's consent. The bank's regulator assumed control of the bank before a decision was made. The company terminated the contract. The shareholder assumed responsibility for obtaining the consent to the extent of the best efforts obligation. So long as it used its best efforts, it discharged its obligation. Beyond that effort the shareholder's commitment to the investor matched the bank's commitment to consent: the shareholder had no commitment to consummate the reorganization or compensate the investor. Both parties shared responsibility for the bank's failure to consent, as the contract could be terminated without either party having to compensate the other for loss of the anticipated benefits.[76]

The risk that the consenting party will not consent when it is obligated to do so or to follow certain procedures when deciding whether to give a consent is also passed through to the obligee by the condition since the consent must have been given before the obligor has a commitment to perform (P1 has a commitment to consent or to follow procedures, but P2 has no commitment to P3 to perform until the consent is given).

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1 BLACK'S LAW DICTIONARY 1439 (10th ed. 2014).
2 *Id.*
3 121 N.C. App. 222, 465 S.E.2d 306 (N.C. App. 1996).
4 See text accompanying notes 12–14.
5 179 F.2d 390 (1st Cir. 1950).
6 See text accompanying notes 45–47.
7 24 Misc.3d 843, 878 N.Y.S.2d 602, 2009 N.Y. Slip Op. 29198 (N.Y. S. Ct. 2009).
8 See text accompanying ch. 8, notes 21–23.
9 The buyer asked for a refund of the deposit, claiming impossibility excused his performance. The court, holding for the seller, muddled through the impossibility defense, finding the buyer "has utterly failed to provide any details as to the amounts lost, the nature of his lost investments, or the actual state of his current finances and assets." *Id.* at 848.
10 56 F. Supp.3d 507 (S.D.N.Y. 2014), sum. jdgmt. on damages, 107 F. Supp.3d 265 (S.D.N.Y. 2015), *rev'd* on other grounds, Nos. 5-554-cv(L), 15-725-cv (XAP) (2d Cir. 2015).

11 WB sued K for breach, for failing to cause J's participation as agreed. K claimed as defenses he had no control over J and supervening impossibility. The court held that because J had a history of illicit doping before fights, his testing positive was not unanticipated; impossibility was unavailable. "As the party who promised to secure [J's] Jones's participation, King [K] 'assumed the risk' of foreseeable events that might frustrate his ability to make good on that promise." *Id.* at 515.

12 121 N.C. App. 222, 465 S.E.2d 306 (N.C. App. 1996).

13 See text accompanying notes 3 and 4.

14 The dealer claimed that the parties contemplated GM as the sole source of the chassis and, that being the case, "an implied condition of its contract with plaintiffs was the ability of GM to manufacture and supply the ordered bus chassis;" that condition had failed. The court disagreed, holding the dealer "assumed the risk of its failure to supply the vehicles, as it was foreseeable that GM might not supply the bus chassis. Failure to make express provision for a foreseeable contingency in a sales contract implicitly places the burden of loss on the seller when the contingency comes to fruition." 465 S.E.2d at 311.

15 673 F.2d 951 (7th Cir. 1982).

16 "No one knows exactly what went wrong. One possibility is that the receiving telex machine had simply run out of paper, in which event it would not print the message although it had received it. Another is that whoever took the message out of the machine after it was printed failed to deliver it to the banking department. Unlike the machine in the cable department that the [Bank A] Continental telex operator had originally tried to reach, the machines in the foreign exchange department were operated by junior foreign exchange dealers rather than by professional telex operators, although Swiss Bank [Bank B] knew that messages intended for other departments were sometimes diverted to the telex machines in the foreign exchange department." *Id.* at 953.

17 The federal district court found bank C was liable to the charterer. The appeal court reversed, holding that if Illinois law applied to the claim the damages—the profits lost from the cancelation of the contract—were not reasonably foreseeable. Judge Richard Posner came close to saying the charterer had assumed the risk: "But Hyman-Michaels [the charterer] is a sophisticated business enterprise. It knew or should have known that even the Swiss are not infallible; that messages sometimes get lost or delayed in transit among three banks, two of them located 5000 miles apart, even when all the banks are using reasonable care; and that therefore it should take its own precautions against the consequences—best known to itself—of a mishap that might not be due to anyone's negligence." *Id.* at 957.

18 See text accompanying ch. 12, notes 20–30.

19 95 Ill. App.3d 181, 419 N.E.2d 956 (Ill. App. 1981).

20 The seller sued for the earnest money deposit and moved for summary judgment, the buyer claimed termination of his employment frustrated the contract, and the court granted the motion. The appeal court affirmed, finding that the doctrine of frustration was inapplicable where the contract addressed the contingency. "Under the contract's terms defendant buyers were to have 21 days to secure financing, and the buyers agreed unqualifiedly that if they did not serve notice of failure to procure a loan commitment upon sellers within 21 days, the contract would continue in full force and effect without any loan contingencies." *Id.* at 184.

21 227 F. Supp.2d 1116 (N.D. Cal. 2002).

22 The US developer sued for breach of contract, and the Puerto Rican developer asserted defenses of frustration of purpose, mistake, impossibility and impracticability of performance, mitigation of damages, failure of consideration, unconscionability, and an implied condition that Policia accept the software. The US developer moved for summary judgment, and the court granted the motion, finding that the Puerto Rican developer had assumed responsibility for the risk that Policia might fail to perform.

23 207 F.3d 717 (4th Cir. 2000).

24 "Notwithstanding any other provision hereof, payment by Owner to General Contractor is a condition precedent to any obligation of General Contractor to make payment hereunder; General Contractor shall have no obligation to make payment to Subcontractor for any portion of the Sublet Work for which General Contractor has not received payment from the Owner." *Id.* at 720.

25 The district court also held that the "pay when paid" clause, while normally effective, was not effective in this case when the contractor, by its collaboration with the owner, prevented its receiving the funds with which to pay the subcontractor. This decision was upheld on appeal.

26 The district court held that the surety was liable for the payments because the "pay when paid" clause had not been incorporated into the bond. This finding was also upheld on appeal. *See* BMD Contractors, Inc. v. Fidelity and Deposit Co. of Maryland, 679 F.3d 643, 656 (7th Cir.), declining to follow Moore Brothers Co. v. Brown & Root, Inc., 207 F.3d 717 (4th Cir. 2000).

27 659 F. Supp. 796 (D. Kan. 1987).

28 See text accompanying ch. 12, notes 6–9.

29 509 F.2d 1166 (Ct. Cl. 1975).

30 The contractor claimed additional costs due to what it characterized were "severe labor difficulties," asserting the parties labored under a mutual mistake of fact that problems would be "normal." The court dismissed the claim, stating, "What we have in the instant case, therefore, is a risk which is known to both parties and results from human inability to predict the future. The authorities are unanimous in distinguishing such risks from bona fide mutual mistakes of fact." *Id.* at 1168. In this case labor was the input that increased costs. The laborers (P1) were not as cooperative as the contractor (P2) believed they would be and unsuccessfully asked the obligee (P3) to bear that risk.

31 Consent broadly includes "[a] voluntarily yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person." BLACK'S LAW DICTIONARY, *supra* note 1, 368. Approve is defined as "[t]o five formal sanction to; to confirm authoritatively." Id. at 123. Permission is defined as "[t]he act of permitting; the official act of allowing someone to do something." Id. at 1321.

32 82 F. Supp.2d 434 (W.D. Pa. 2000).

33 6 Kan. App. 2d 656, 633 P.2d 1154 (Kan. App. 1981).

34 746 F.2d 936 (2d Cir. 1984).

35 82 F. Supp.2d 434 (W.D. Pa. 2000).

36 6 Kan. App. 2d 656, 633 P.2d 1154 (Kan. App. 1981).

37 82 F. Supp.2d 434 (W.D. Pa. 2000).

38 The buyer sued the lessor for breach of contract, and the lessor claimed the defense of impracticability. The court, after reviewing the lessee's earlier cooperation with the lessor's efforts to dispose of the equipment, concluded the lessee's cooperation was a basic assumption of the contract between the lessor and the buyer and the lessee's actions were sufficient grounds for the impracticability defense.

39 6 Kan. App. 2d 656, 633 P.2d 1154 (Kan. App. 1981).

40 509 F.2d 1166 (Ct. Cl. 1975).

41 *Id.* at 1179.

42 673 F.2d 951 (7th Cir. 1982).

43 See text accompanying notes 15–17.

44 509 F.2d 1166 (Ct. Cl. 1975).

45 179 F.2d 390 (1st Cir. 1950).

46 See text accompanying note 5.

47 The court advanced three theories on which the jury could find in favor of the seller: the seller was processing the distributor's claim for the subsidy; the seller was financing the distributor while the claim was being processed; and the seller did not assume the risk the government-owned corporation would deny or reduce the subsidy because the distributor failed to provide all necessary documentation and cooperation. 179 F.2d 390, 396–97 (1st Cir. 1950).

48 582 F. Supp. 812 (S.D.N.Y. 1984).

49 See text accompanying ch. 1, notes 25–34.

50 773 F.2d 1193 (11th Cir. 1985).

51 See text accompanying ch. 7, notes 16 and 17.

52 The district court found in the dealer's favor. The appeal court reversed, holding that as a matter of law the continued use of the allocation system had been reasonable.

53 869 F.2d 310 (7th Cir. 1989).

54 The suit by the utilities claimed mutual mistake and frustration of purpose. The federal district court ruled against Southwestern and the appeal court affirmed. The court pointed out the construction contract acknowledged the uncertainty of costs: "The Participants are aware that the estimated costs of the Clinton Station (including cost of fuel) are subject to change by reason, among other matters, of inflation, compliance with additional governmental requirements, design and equipment changes, and delays in construction and commencement of operation." *Id.* at 314–5. The court also held mutual mistake was inapplicable to cost overruns: "[W]hile the parties to that contract may have been mistaken about the future costs of construction of the Clinton power plant, the doctrine of mutual mistake does not cover an erroneous 'prediction or judgment as to events to occur in the future.'" Citations omitted. *Id.* at 314.

55 825 F. Supp. 131 (S.D. Tex. 1992).

56 Lewis sued Penthouse for breach of contract. The court ruled for Penthouse, which delivered what it promised: its best efforts to get the donors to deliver the advertised gifts.

57 556 S.W.2d 477 (Mo. App. 1977).

58 The trial court found for the defense, and the contractor appealed. The appellate court upheld the trial court's ruling.

59 86 Md. App. 21, 585 A.2d 248 (Md. App. 1991).

60 86 Md. App. 21, 24, 585 A.2d 248, 250.

61 Brisk sued for the unpaid final payment, and Gilbane claimed that because the condition precedent in the pay when paid clause had not been satisfied, it was not obligated to pay Brisk. The trial court granted summary judgment in favor of the subcontractor; the contractor appealed; and the appeal court reversed.

62 BLACK'S LAW DICTIONARY, *supra* note 1, 761.

63 *Id.*

64 390 N.J. Super. 227, 915 A.2d 59 (N.J. Sup. Ct. 2007).

65 The customer sued for the amounts prepaid to the restaurant, the band, the photographer, and the videographer. The full force majeure clause read: "Snuffy's [the restaurant] will be excused from performance under this contract if it is prevented from doing so by an act of God (e.g., flood, power failure, etc.), or other unforeseen events or circumstances." The trial court dismissed the claim, holding the force majeure clause barred the claim. The appeals court affirmed, in part, holding the restaurant was not liable for damages incurred by the customer as the power outage, though not unforeseeable, "These are precisely the kind of circumstances under which the parties agreed, by inclusion of the force majeure clause, that the Pantagis Renaissance would be excused from performance." *Id.* at 62–63.

66 997 N.E.2d 23 (Ind. App. 2013).

67 The full clause stated, "In the event Century Center or [Specialty Foods] shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes[,] lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war or any other reason not within the reasonable control of Century Center or [Specialty Foods], as the case may be, then the performance of such obligation shall be excused for the period of such delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay." *Id.* at 27.

68 Specialty Foods argued the clause did not apply to the cancelation of the city's contract with the NFF since the city could still perform its contract with Specialty Foods. The court disagreed, holding, "[W]e conclude that the terms of the force majeure provision excusing performance for 'any other reason not within the reasonable control of Century Center' includes the closure and relocation of the Hall of Fame." *Id.* at 29. The court's rationale, however, speaks to frustration of purpose and does not explain how the city was prevented from performance: "The purpose was to use the services of Specialty Foods, the ancillary vendor, to enhance the products and services of the Hall of Fame, the primary business, in order to make the Hall of Fame a facility of the highest quality as stated in the UMO Agreement. Thus, when the Hall of Fame ceased to exist in South Bend, so too did the need for the services provided by Specialty Foods." *Id.*

[69] 177 F.3d 114 (2d Cir. 1999).

[70] In an action by the buyer against the seller for breach of contract, the seller's motion for summary judgment was granted by the federal district court and affirmed by the appeal court. Because the contract was a shipment contract, the seller's obligation was to "put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case." Uniform Commercial Code § 2-504(a). The seller had no further obligation upon so doing, and the risk of loss passed to the buyer. Responsibility for the risk of the carrier's failure to perform was thus allocated to the buyer.

[71] 946 F.2d 516 (7th Cir. 1991).

[72] The federal district court granted the bank's motion for summary judgment and the appeals court affirmed in part. Of the fees, the court held they were not conditional upon the bank making a loan. *Id*. at 520. Of the consent from the government agency, the court said, "The refusal of the Virgin Islands commission to allow the purchase of Vitelco did not prevent ATN from paying fees to the bank; it just prevented the loan from going through (at once anyway); the fees were (in part) to compensate the bank for setting money aside for a loan that might never close." *Id*. at 521.

[73] 302 N.C. 207, 274 S.E.2d 206 (N.C. 1981).

[74] The father sued for rescission of the contract with the school, claiming that his performance was excused by impossibility and frustration of purpose. The trial court granted him summary judgment. The appeal court reversed, remanding for summary judgment in favor of the school. The North Carolina Supreme Court affirmed the grant of summary judgment on the nonavailability of these defenses. The court cited a clause in the contract that states that tuition is "payable in advance of the first day of school, no portion refundable" and held, "This provision allocates to plaintiff the risk that the child will not attend, and prevents the application of the doctrine of frustration of purpose." *Id*. at 210.

[75] 260 Kan. 703, 924 P.2d 1239 (Kan. 1996).

[76] The company sued for a declaration that the agreement with the investor had been terminated automatically on the scheduled closing date. The company argued, inter alia, its failure to consummate the conversion of the shares had been excused by the doctrine of impracticability. The district court ruled in favor of the company, and the Kansas Supreme Court affirmed. First, the contract included as a condition to the closing that the shareholder obtain and convert the common shares as agreed. Second, the sellers had a duty to use their best efforts to obtain the shares from the bank. "The sellers neither assumed the risk nor guaranteed the Bank's release of [the shareholder's] Paul's TSI stock. This is not an impracticability of performance case because under Section 4.1(a), sellers were required only to exert their best efforts to secure release of the stock." *Id*. at 719.