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Force Majeure in the Age of the Four Horsemen

Contractual and Extra-Contractual Defenses to Performance

During Times of War, Pestilence, Famine, and Wild Beasts

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If the past two years have taught anything, it is that, whether in business or work, to expect the unexpected. Or, perhaps, "Murphy was an optimist." Whether it is Covid-19, the war in Ukraine, food shortages, supply chain interruptions, interest rates, energy price increases, baby formula shortages, lack of shipping containers, the Nutella® shortage, the lack of truck drivers, or any of the many other disruptions that have become part of life since early 2020, it seems (rightly or not) that existing business structures, relationships, and agreements face far greater headwinds (and changes) than in recent times.

While many have responded by opining that we live in "unprecedented times," C.S. Lewis offered advice that is both calming and disturbing: "We must stop regarding unpleasant and unexpected things as interruptions of real life. The truth is that interruptions are real life." And, those interruptions, in reality, are prospects that both business planners and lawyers can help address.

BACKGROUND

"From Winter, plague and pestilence, good lord deliver us." Thomas Nashe (1592) Perhaps Nashe was attempting to draft a force majeure clause! The origins of the concept of Force Majeure can be traced back to Roman times ("*vis major*" or greater force), with the term "force majeure" deriving from the Napoleonic Code (or French Civil Code) of 1804[1].

The concept of "Force Majeure" was historically intended to address acts of God, "events beyond the parties' control that frustrate the purpose of a contract or make performance impracticable for one or more parties."[2] Force majeure clauses and the doctrine of impossibility go back at least to the sixteenth century, and while other cases and agreements likely antedated it, in 1883, the U.S. Supreme Court placed its seal of approval on the concept within the United States. There, in a dispute in which the good (cargo) ship *The Tornado* had contracted to deliver bales of cotton and other cargo, but sadly caught fire and sunk even before leaving port, the question was presented as to whether this excused performance. While there was no contractual clause expressly addressing this situation, the Court quoted an earlier English decision (*Taylor v. Caldwell*), stating, "'In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.'"[3] Thus, as the damage to the vessel prevented the shipment of goods on the contracted-for ship, performance was impossible, and excused.

In general, a force majeure clause is intended to relieve a party from its contractual obligations when its performance is prevented by a source beyond its control or when the contract's purpose has been frustrated.[4] They enable parties to "specify which events in particular they anticipate and consent to consider as an 'unforeseen' event beyond the reasonable control of the affected party, thereby excusing or postponing performance, or limiting damages flowing from nonperformance."[5] These clauses vary, depending upon the drafter, the needs of the parties, negotiating strength, and even the societal and political concerns during the time period when the clause was drafted. While prior to the recent pandemic, they were often considered

"boilerplate" clauses thrown into agreements based upon prior documents without much further thought, it is clear from case law that the contract language is critical. The cited occurrence must be one of the "force majeure events" enumerated in the contract, and courts closely examine whether the event does, in fact, fall within the listed events that will excuse performance.[6] Once that is shown, it also must be demonstrated that the event could not have been reasonably foreseen, that the party seeking application must show it cannot mitigate its losses, and that the hardship goes beyond "mere" economic hardship or impracticability.[7]

Whether within or outside the United States, as a creature of contract, it has fallen to the Courts to consider the application of force majeure clauses. Even though force majeure clauses have been present in contracts since the early 20th century, in more recent times they were predominantly "boiler-plate" clauses sitting towards the end of a contract. It is fair to say that such clauses were not the central focus for contract drafters. However, these clauses have come into sharp focus over the past couple of years in light of our four horseman and in certain instances may contain ambiguities or provide insufficient remedies for the contracting parties. This highlights the importance of ensuring that a force majeure clause is fit for purpose and drafted having regard to the subject matter and wider terms of the contract.

There are a number of constituent elements/principles to be considered in a force majeure situation[8] including, *inter alia,* the following:

i. The triggering events – its goes without saying that a force majeure event must occur. Force Majeure clauses vary from general concepts of events outside the control of the parties to a specific list of events. It will often include general catch all language at the end such as "any other event beyond the parties' control". The contractual interpretation maxim of *ejusdem generis,* whereby a general word or expression will be interpreted and confined in the context of the previous specific words, may apply to force majeure clauses[9].

ii. The impact of the event – the force majeure clause will typically require the event to have been prevented, hindered, delayed or somehow to have otherwise impacted on performance. A clause that requires performance to be prevented will generally be more difficult to satisfy. In *Tennants (Lancashire) Ltd v CS Wilson & Company Ltd*[10] the Court held that preventing "must refer to physical or legal prevention and not an economical unprofitableness". By contrast the threshold for "hinder" and "delay" will be lower – albeit circumstances which impact on profitability/where something is more expansive/less financially viable will generally not amount to a force majeure event.[11]

iii. Outside the party's control - the events must also be ones which are outside the party's control. If the party acting reasonably could have prevented the event then the force majeure clause cannot apply.[12]

iv. Causation - it has been long establish that the party seeking to rely on a force majeure clause must bring itself within the terms of the clause[13]. It must also establish that it is the force majeure event and not another cause that has impacted the party's ability to perform under the contract[14].

v. Mitigation - the force majeure clause may require the relying party to mitigate the consequence of the force majeure event or a duty to mitigate could even be implied by the Court[15]. Mitigation can could include steps such as sourcing an alternative source or supply of product[16] or alternative methods of performance[17].

vi. Notice – force majeure clauses will generally set out the notice requirement which normally require the party relying upon the force majeure event to provide written notice to the other party within a specified period of time and may also prescribe the form of the notice. The status of the notice and

whether or not the provision of notice will be a condition precedent that must be strictly complied with or whether it can be consider to be an intermediate term, the non-fulfilment of which would be less serious, will generally depend on the terms of the clause and the contract[18]. It is important to ensure not only that the notice is served within the specified time but also that the content of the notice meets any stipulated requirements as well as providing sufficient details.

vii. Effect of the force majeure – again this will depend on the provisions of the clause but generally a force majeure clause will stipulate the consequence of a force majeure event which might include suspension of contractual obligations for a specified time or for the duration of the force majeure event, excusing performance, extensions of time for performance or even the termination of the contract.

In general, the parties' *principal* purpose in making contract must be frustrated. Thus, the parties' principal purposes in making the contract must be frustrated "by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made...."[19] That the contract may be less profitable than anticipated will not excuse performance.[20]

When faced with an allegedly disabling event that is not listed in the contract's force majeure events, but could fall within a catch-all clause, many courts will allow that event to excuse performance only if was unforeseeable when the contract was made. "When parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."[21] While different rules of construction may apply by state, jurisdictions such as New York require that "courts … construe force majeure clauses narrowly."[22] This principal applies to "catch all" clauses as well, which are to be interpreted only to encompass events "of the same kind or nature as the particular matters mentioned."[23]

That the force majeure event *caused* the party seeking to be excused to be unable to perform is a critical part of the analysis. Not only must that party demonstrate the impact of the force majeure event, but whether *what* it caused – that it could not possibly perform; that performance was impracticable; that it delayed beyond a certain amount of time – will also be driven by the terms of the contract. As a general matter, financial hardship in fulfilling the contract – even when arising from a global financial crisis outside of the party's control -- will not suffice. [24]

Force Majeure clauses may have applicability where the "uncontrollable" event does not prevent complete performance, but only partial compliance. Especially where the language of the clause expressly permits it, a party may seek to excuse nonperformance *to the extent* a unforeseeable listed occurrence partially makes performance impossible.[25] In such circumstances, close analysis of the contract language (for instance, does its language expressly allow for partial nonperformance due to force majeure events) and causation is crucial.

Force Majeure in a Non-U.S. Context

The term "force majeure" does not in fact have any specific legal meaning in English law[26] or indeed in Irish law. It was recently codified in 2016 in Article 1218 of French civil law[27]. In France and many other civil jurisdictions, the courts have greater flexibility to tailor a wide range of remedies to enable parties to overcome the force majeure[28]

Force majeure, then, is a construct of contract designed to address the "limited application and narrowness"[29] of the common law doctrine of frustration. The Irish High Court in *Ringsend Property Ltd v Donatex Ltd*[30] reaffirmed that the defence of frustration has a very narrow scope and only arises in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties. The limited doctrine of frustration evolved to address the rigidity of

absolute contractual obligations under common law whereby a party was bound by his bargain. The fact that a contractual obligation had become difficult or even impossible did not excuse performance. Even death was no excuse![31]

Murdoch and Hunt's Encyclopaedia of Irish Law[32] defines force majeure as "an overpowering event which could not be anticipated or controlled e.g. an Act of God. Contracts often contain a force majeure clause. A force majeure may amount to a frustration of the contract." A force majeure clause will operate to alter, excuse or suspend contractual performance obligations or even to terminate a contract on the occurrence of exceptional events or circumstances outside a party's control.

Notably despite the long existence of force majeure clauses, non-U.S. case law in relation to these clauses is limited. Most of the precedent that does exist primarily concerns English law.[33] Force Majeure clauses will very much turn on their own terms, the consequences that will flow from triggering the clause and the procedure to be followed. The well-established rules of contractual interpretation[34] will apply to the interpretation of force majeure clauses. The onus will be on the party relying on the force majeure clause to establish that the requirements of the clause have in fact been met[35]

FORCE MAJEURE AS APPLIED TO CURRENT EVENTS

The preceding discussion is not intended to be a comprehensive review of force majeure, or the common law defenses of impossibility, frustration of purpose, or defenses available under U.C.C. § 2-614. Instead, it is intended to provide a background for a discussion about how these doctrines may apply to "this ever changin' world in which we live in"[36], and the current geopolitical events which may be potential reasons for both the use of force majeure clauses, and for a re-examination and updating of one's "boilerplate."

Plague and Pestilence: Covid-19

During the recent pandemic, courts have been faced with evaluating efforts by parties to excuse nonperformance based upon the COVID-19 pandemic or events related to the pandemic. In many cases, courts have looked to whether the phrase "governmental action" found in many force majeure clauses applies to the facts of the particularized case.

Cases Excusing Nonperformance Due to COVID-19

The COVID-19 pandemic – and the governmental response to the health concerns – is in most cases circumstances beyond the reasonable control of contracting parties.[37] In such circumstances, courts will often allow parties to use a contract's force majeure clause to terminate their contractual obligations, provided they can demonstrate all necessary elements. For instance, in *JN Contemporary Art LLC*, the Southern District of New York found that the "natural disaster" clause in the art sale contract's force majeure clause was beyond the parties' control, and that because the very nature of the pandemic "require[ed] the cessation of normal business activity," it was "the 'type of circumstance' that was envisioned by the Termination Provision."[38]

Government action that hindered, rather than entirely precluded, performance has been held to be sufficient to excuse nonperformance, at least in part. In a landlord's rent collection action, the court found that the Illinois Governor's Executive Order banning "on-premises consumption" of food and beverages sufficed to invoke the force majeure clause in the lease, which provided, in pertinent part, that performance would be excused "in the event, but only so long as the performance of any of its obligations are prevented or delayed . . . or hindered by . . . laws, governmental action or inaction, orders of government . . . ."[39] While the Governor's orders constituted

governmental action hindering the lessee's ability to operate normally, and thus sufficed to constitute proximate cause for the lessee's inability to pay rent, invocation of the force majeure clause was allowed, but only to the extent it was demonstrated that the order precluded business.[40]

Cases Rejecting COVID-Related Arguments

Despite the successes noted above, the majority of courts have concluded that force majeure clauses do not excuse nonperformance in the COVID-19 context, because of the breaching party's failure to show a causal relationship between the pandemic and its nonperformance.[41] In their analyses, courts have looked beyond the force majeure clauses to other terms, and declined to apply force majeure remedies when in doing so, they would render other provisions meaningless.[42] Courts have often held, too, that even were COVID-19 and subsequent governmental actions force majeure events, breaching parties seeking to invoke a force majeure clause had failed to show a causal relationship between the event and their nonperformance.[43]

The question of whether or not the COVID-19 pandemic will trigger a force majeure clause is highly fact dependent and will turn on the facts of each case and the terms of the Contract. This is no more evident than in two recent English cases both concerning media rights for sporting events affected by the pandemic. *European Professional Club Rugby v RDA Television LLP*[44] involved licensing rights for two European rugby competitions which were postponed due to the Covid-19 pandemic. The Court held that the COVID-19 Pandemic was a force majeure event under the force majeure clause and that the reference to "*epidemic*" in the definition of a force majeure event included a pandemic. The Court further found that the COVID-19 was a circumstance "*… beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement".* The force majeure clause provided that, if a force majeure event prevented, hindered or delayed performance for a continuous period of more than 60 days, "the party not affected by" the event could terminate on 14 days' written notice.

This case must be contrasted with the decision in *The Football Association Premier League Ltd v PPLive Sports International Ltd*[45] which concerned broadcast rights of Premier League football matches in China and Macau. The case involved a material adverse change clause as opposed to a force majeure clause. The Court found that the clause was not triggered despite the significant disruption to the 2019/20 season due to the Covid-19 pandemic. The clause in question was only triggered if there was a "fundamental change" to the format of the Premier League competition which the Court held did not include the timing of matches or whether there were fans present or not.

Basic contract principles will dictate the force majeure analysis in the context of COVID-19, and should guide drafters looking to update their boilerplate for the future. Most courts do not dispute that the pandemic constitutes an "Act of God" so that it, or responses by governments, would excuse a party's nonperformance for this ultimately unforeseeable event that was outside the parties' control.[46] Even so, the contractual language must include these kinds of events as ones triggering force majeure, while at the same time not removing the obligations at issue from those excused by such an event. Perhaps more critically, the party hoping to invoke the clause (or alternatively, an impossibility defense) must prove a causal connection between the force majeure event and the nonperformance.[47] Finally, not only will courts not interpret the force majeure remedies so broadly as to render other specific provisions meaningless, but principals of equity may impact the ability to use the clause.

War: The Russian-Ukraine Conflict

When this presentation was in its formative stages, few envisioned that world events would necessitate a consideration of "war" clauses in the force majeure context. While "war" as a force majeure event has long been

included in many standard contracts, the conflict in Ukraine – which as of this writing remains, at least according to Russia, not a "war" but a "special military operation" – has and will necessitate consideration of such clauses in military conflicts where declarations of war are absent. In the case of this particular conflict, moreover, the United States is (at least in theory) not an active participant.

The Concept of War

Force majeure clauses have evolved over time and now can prescribe a long list of war/warlike circumstances[48]. The question of whether or not war or warlike circumstances exist will be determined applying the usual business common sense approach to the interpretation of contracts and established case law. The leading English case on what is meant by war is *Kawaskai Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company Ltd*[49]. The case, which arose during the pre-Second World War period, concerned a charter-party war cancellation clause which provided that "charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." The owners sought to trigger the clause on the grounds that war had broken out between Japan and China. The Court considered the circumstances which included the fact that 50,000 Japanese troops were on the ground in Shanghai supported by fleet and aircraft and were engaged in battle with 1.5 million Chinese forces with heavy casualties on both sides. Three Japanese armies numbering around 100,000 were also advancing in North China in the teeth of opposition of 300,000 Chinese soldiers.

The Defendant in contrast maintained that "war" had not broken out, as there had been no declaration of war by China or Japan and both countries had continued to maintain diplomatic relations. The Court considered the matter to be one where general commercial principles of construction would be applied. In that context, the meaning applied was one of commercial common sense and what a reasonable commercial person would consider. The Court concluded that Japan was involved in a war. The fact that the no declaration of war had been made or that diplomatic relations were not broken off were not conclusive evidence of the non-existence of a war.[50]

The interpretation of war cancellation clauses in marine insurance cases can also provide instructive guidance on the circumstances constituting a war, warlike operations, hostilities[51].

Conflicts in Which the United States is Involved.

As with the COVID-19 pandemic, while U.S. courts acknowledge that war is unforeseeable, even in situations in which the United States is an active participant in the conflict, they still require that the party seeking to be excused show that "war" made performance impossible.[52] Thus, the party invoking "war" as a force majeure event must demonstrate that wartime conditions made its performance of its contractual duties impossible. In *Carvel*, the court considered whether a force majeure clause[53] excused the defendant seller's failure to deliver sage leaves from Greece to the United States. *Id.* As such, the court "examin[ed] . . . the duties of each party" to determine whether "existing war conditions in Greece . . . affect[ed] or controll[ed]" the ability of the seller to perform the contracts. *Id.* While when the first contract was signed (May 1940), the Mediterranean Sea was open, events beginning a month later when Italy declared war on France, and continuing through prohibitions against American ships traveling in the Mediterranean Sea, the bombing of Greek ports, and German occupation of the area, rendered shipping from Greece initially unpredictable and eventually nonexistent. These conditions led the court to find causation, and the seller's force majeure defense was successful.

Courts will generally uphold invocation of a force majeure or impossibility defense when war, or warlike conditions, occur subsequent to the signing of a contract.[54] In *McDonnell Douglas Corp.*, the court excused the plaintiff's breach of contract after it failed to perform its contractual duties when it did not send aircraft parts ordered by the Imperial

Iranian Air Force to the Islamic Republic of Iran after the take-over in 1979. After the United States Air Force prohibited the delivery of military parts to Iran, the court construed a force majeure clause which excused nonperformance for causes out of the party's control (including "acts of the United States Government in either sovereign or contractual capacity") so that the Iranian revolution and subsequent Air Force ban excused McDonnell Douglas's nonperformance.[55]

Still, there must be some correlation between the war or warlike condition and the breach to successfully invoke a force majeure defense. In *OWBR LLC*, the court rejected an attempt to invoke a force majeure clause based on the 9/11 terrorist attacks, finding that "[t]o excuse a party's performance under a force majeure clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age, where terrorism could conceivably threaten our nation for the foreseeable future."[56] *Id.* As the invocation was five months after the 9/11 terrorist attacks, "when there was no specific terrorist threat to air travel," the court rejected use of the force majeure clause. Thus, although it recognized that 9/11 was the kind of unforeseeable event significant enough to trigger a force majeure clause, it rejected the argument that "fear and uncertainty" about travel sufficed to establish causation between 9/11 and cancelling the contracted-for event, in part because had it accepted this claim, "contracting would no longer provide any stability and predictability to commercial transactions."[57]

Foreign Wars or Conflicts Not Involving the United States

In contrast, U.S. courts generally do not excuse nonperformance because of impossibility stemming from a foreign war,[58] unless there is a specific contractual provision excusing nonperformance due to war or warlike conditions,[59] or a particularized showing that any performance contemplated by the contract was impossible due to the war.[60] In *Richards & Co.*, the court denied an impossibility defense to a German co-partnership for its failure to deliver two contractually agreed upon shipments, notwithstanding the German-Belgian War, and subsequent German government orders prohibiting the goods from being shipped. Citing to precedent and the doctrine of *lex loci contractus*, the court reasoned that because the contract was signed in New York and was to be executed in the United States, "effect [would] not be given to foreign laws in derogation of the contracts or prejudicial to the rights of citizens."[61]

A specific contractual provision – such as a force majeure clause or its equivalent – may excuse nonperformance if such a condition is expressly provided for in the contract. In *Roessler & Hasslacher Chemical Co.*,[62] the court excused the seller for its failure to import German goods which had become unavailable due to a British embargo. Although Germany and Britain had been at war for five months when the contract was signed, the court concluded that the appliable clause[63] was intended to cover such possibilities as were presented, and was sufficient to excuse the seller for its nonperformance. In language that may be helpful in arguing for the applicability of such clauses in similar circumstances, the court reasoned that the exception "was not of war, but of losses or damage or delays due to war," and thus it mattered not whether the United States was a party to the war or whether the damages or delays were anticipated.[64]

Sanctions

War or war-like circumstances could likely trigger other force majeure events, such as acts of authority, law or governmental order, embargos, and sanctions. The English High Court earlier this year considered the proper interpretation of a force majeure clause in the context of the sanctions imposed on Russia in 2018[65]. The sanctions prohibited dollar payments which were required under a Contract of Affreightment (COA). The force majeure clause under the COA was triggered and the case turned on the reasonable endeavours obligations in the clause to overcome the force majeure event. The Court found that the requirement under the COA to pay in US

Dollars was a key term under the COA. The reasonable endeavours obligation did not extend as far as requiring the acceptance of non-contractual performance being the payment in a different currency than that specified in the COA.

Analysis

Thus, generally a force majeure clause or impossibility defense can be successfully raised during war or warlike conditions if (1) the force majeure clause specifically lists war or warlike conditions as an example of such an event; (2) the war or conflict occurs subsequent to the signing of the contract; (3) there is a causal relationship between the conflict and nonperformance; and (4) the U.S. is a part to the conflict. One would not need all of these circumstances to be present for a successful defense, but generally, if circumstances 1 and 3 are present, the defense is likely to be successful.

In the context of the Russian-Ukrainian conflict, courts will look to see whether a contract in question (1) had a force majeure clause specifically listing war or warlike conditions as an event, and (2) the conflict actually caused the breach. If, for example, a Russian-based company and a Ukrainian-based company executed a contract in the United States, precedent indicates that a breach by either party due to the conflict between the countries would be insufficient to raise a force majeure defense.[66] Nor would a breaching party that signed a contract anytime subsequent to the first Russian invasion of Ukraine likely be able to raise a force majeure defense, as such a conflict would no longer be unforeseeable;[67] and the parties would have likely contemplated for alternative performance in the event war made the primary performance impossible.[68] An exception would likely arise– and a prudent step from a drafting standpoint – if the contract itself *expressly* provided for an excuse or alternative performance in the event of such a conflict.

In sum, courts will likely consider specific contractual language, foreseeability of the conflict (based on the time the contract was signed), and causation in determining whether a breaching party can successfully raise a force majeure or impossibility defense.

Wild Beasts: Supply Chain Disruptions

In the past several years, manufacturers, wholesalers, retailers, and consumers have faced novel, unexpected, and seemingly growing interruptions in the ability to get parts, components, products, and services which had been taken for granted for decades. Whether it is the availability of semiconductor chips, metals such as aluminum, wheat, groceries, Nutella®, plastics, building materials, baby formula, raw materials, or other items that are part of the modern world, it seems that businesses and consumers throughout the economy are in a constant state of anxiety – or worse – about whether they will have what they need to continue. Explanations and attributions point to multiple causes, including labor shortages, lack of trucking and transportation, overregulation, world conflicts, political issues, and the over-reliance upon Just-in-Time supply chain models, but at the end of the day, contracts are not being met in a timely fashion, with ramifications that can flow far downstream.

While supply chain issues might be characterized as market condition issues which would be unlikely to sustain a force majeure or impossibility defense, supply chain issues beyond the breaching party's control can, in some circumstances, amount to a successful excuse defense.[69] If the supply chain issue results from the market changing, a court is likely to deny an impossibility defense because such issues can be "anticipated by ordinary prudence and foresight."[70] If, however, an "Act of God" were the cause of the supply chain issue, a court is more likely to excuse nonperformance.[71] An alleged "Act of God" affecting a supply chain will generally not excuse nonperformance if the contractual obligation can be fulfilled by other means.[72]

Similar to inflation, then, supply chain issues caused by the unpredictability of the market will likely be insufficient to raise an impossibility or force majeure defense. These commercial issues are ones which, in the views of most courts, prudent businesses should consider in contracting and in logistics.[73] Only where there are specific sets of circumstances, market practices, and terms which preclude a court's holding that disruption was foreseeable or that alternate means are available to perform, is a court likely to excuse the breaching party for its nonperformance. Instead, prudence suggests that the best course is to address supply chain issues in the contract (as in *Bunge Corp.*), so that the parties can proceed agreed in advance. In light of the uncertainties in today's world, it is suggested in any contemplated arrangement where supply chain issues may arise, this ought to be considered in most negotiations.

Famine: Food Supply, Drought, Climate Change

Depending on when and why they were revised, some force majeure clauses specifically list "famine" as an "Act of God" that would excuse nonperformance by a breaching party.[74] Despite this, there is a dearth of caselaw on famine as a specific force majeure event and its effect on contractual obligations.[75] Still, guidance from the Second Restatement of Contracts, and other caselaw, may shed some light on how a court might rule.[76]

As a general principle, if a contract lists famine as a force majeure event, such an occurrence is likely to excuse the breaching party's nonperformance.[77] Because force majeure clauses "are construed narrowly," they "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *Id.* Thus, if famine is listed as a force majeure event, a famine actually occurs, and actually prevents a party's performance, a court is likely to excuse nonperformance on these grounds. Of course, what constitutes a "famine" or other equivalent force majeure event may itself be a fair grounds for litigation. Similarly, the party seeking to be excused must also demonstrate that the "famine" was the cause for its inability to perform.[78]

Given the lack of precedent discussing famines and their relation to contractual obligations, general principles of contract law relating to an inability to meet specific requirements due to unforeseen events may offer some guidance. As New York's highest court stated over one hundred years ago, "it is well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation."[79] Similarly, as noted in § 262 of the Second Restatement of Contracts, "If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made." While most caselaw concerning the application of this principle involves the death of a key person, one could analogize to situations in which a party is unable to deliver product because its workers depart (or worse) due to famine; in such circumstances, one could expect nonperformance to be excused, provided the famine were not within the defaulting entity's control.

Similarly, other Restatement illustrations may shed some light on how a court might address an impossibility defense based upon a famine. There, the authors draw a distinction between a contract for the sale of cloth, and a similar contract for the of cloth to be manufactured in a particular factory. While in the first instance, performance would not be excused were there a fire in the seller's factory (because alternate sources could be secured), an identical fire would likely make performance impossible.[80]

Thus, were a famine (or a drought) to devastate or even significantly reduce a workforce, a court would need to examine whether under the terms of the agreement, that impact would prevent the defaulting party from fulfilling its obligations. Similarly, if the famine or drought were to prevent the growing of contracted-for foodstuffs, whether this would excuse performance would turn on whether, under this particular agreement, performance

required supply from the impacted area, or whether substitution would suffice under the contract.

"Climate Change" is, of course, a matter of significant discussion. Some tie the likelihood of increased drought to warmer temperatures.[81] Others offer that that warmer oceans will increase the amount of water in the air, and thus can increase the intensity and frequency of precipitation.[82] Other suggested impacts of climate change have included rising oceans, species losses, food shortages, poverty, displacement, and more.[83] And, of course, there remains a debate regarding the extent of climate change, as well as its causes.

In the context of our discussion regarding force majeure and impossibility, these issues transcend the political and public policy discussions which they typically occupy. Instead, given the scope of – and, to many, some inconsistency in – the claimed impacts of climate change, and the amount of scientific debate regarding how severe it might be, a party looking to excuse its nonperformance on the basis of "climate change" is likely not only to need to demonstrate that the subject contract includes the particular "climate change impact" in its force majeure events, but even more critically, it will need to marshal significant scientific and other evidence that climate change is the reason for the nonperformance. While in theory, a "climate change clause" in a force majeure provision might be cited to excuse a default, it is far more likely that any court adjudicating such a defense would drill more deeply to see whether the alleged consequence of climate change – be it drought, flood, or geopolitical disruption – caused the breaching party to be unable to comply with its contractual obligations. From a drafting standpoint, therefore, it is suggested that a more efficient approach (and one less subject to politically tinged debate) would be to examine the actual risks to performance – i.e., is the factory subject to flooding; do the crop fields have certain water and temperature requirements; are the fish to be supplied sensitive to temperature variations in their native waters; is a certain amount of snow needed to operate the ski resort – and draft those specific risks into the force majeure clause. Faced with that, a court would not need to address competing claims as to whether climate change – as opposed to some other weather event or natural disaster -- was the cause of the default, and further would be able to rule knowing that the parties already allocated the risks in their agreement.[84]

In sum, then, while there is only limited caselaw concerning famines and droughts, and their effect on contractual obligations, analogous authority would seem to guide to the conclusion that a force majeure clause which expressly lists those events could excuse nonperformance, provided causation can be proven. No authority has been found addressing whether a generalized "climate change" force majeure event could be similarly used, but it would seem a better course to simply list specifically applicable "climate change impacts" in the clause, thereby avoiding several layers of unnecessary debate when seeking relief.

The Horsemen's Compatriots: Inflation, Money, and Financial Hardship

Finally, in these times in which, to quote an AP headline from 2008, "everything [is] spinning out of control,"[85] parties are facing the fact that as a result of inflation, more expensive or less available credit, increased costs of raw materials, and other financial factors, what had been considered profitable contracts when made will no longer contribute to the profit side of the company's ledger. Efforts to plead financial hardship as a 'force majeure" excuse are not new, and case law is clear: they are for the most part unsuccessful.

In general, courts refuse to allow the invocation of a force majeure clause to excuse nonperformance if the event beyond the parties' control is a "mere market shift[] or [a] financial inability."[86] "Even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'".[87]

Thus, economic or market impacts are typically insufficient to successfully invoke force majeure clauses. In *OWBR LLC*, the court rejected the defendant's claim that the 9/11 terrorist attacks made their continued hosting of an

event "undoubtedly inadvisable." *Id.* Despite the defendants' arguments regarding the logical economic rationale for their cancellation, the court held that "a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." This was buttressed by the fact that the force majeure clause in question did not "contain language that excuse[d] performance on the basis of poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants."[88]

Thus, it has long been the rule that force majeure clauses will not buffer a party against the normal risks of a contract.[89] Whether it is because the anticipated profit has been drastically impacted by a collapse in sales prices;[90] because the costs of contract compliance are higher than a party would like;[91] worsening economic conditions,[92] or other adverse market changes,[93] economic hardship or other market fluctuations will typically not trigger a force majeure clause. In *Northern Indiana Public Service Co.*, the breaching party argued that governmental orders outside its control excused its failure to purchase coal it agreed to buy; the court rejected this argument, holding that because the orders simply precluded the coal purchaser from passing along fuel costs to its ratepayers, the purchaser would bear the consequences of an ill-advised gamble.[94]

As such, inflation is unlikely to amount to an event sufficient to successfully invoke a force majeure or impossibility defense. A large body of caselaw holds that mere increases in prices and/or expenses will not render performance impossible, even if performance was economically impractical. Thus, while nationwide inflation could be considered an "extreme and unreasonable difficulty," the breaching party would bear the burden, even with a force majeure clause, to show that inflation was an extreme difficulty such that performance was impossible. Even if government policies caused inflation to some extent, absent such a showing of extreme difficulty or expense, it is highly unlikely that a force majeure or impossibility defense because of inflation would be successful as to excuse nonperformance.

A critical exception may arise depending on the contract's language. If the language of the agreement is unambiguous and reflects that its terms were specifically bargained for by the parties; in such circumstances, concepts such as unforeseeability, control, and market conditions may be negotiated away, as the parties allocate risks of loss.[95] Thus, if the force majeure clause expressly includes the event alleged to have prevented performance, this can excuse a default, even if the event is a "change to economic conditions."[96] Given that these issues often arise in disputes between sophisticated business parties, it is certainly foreseeable that allocations of risks from economic conditions may be included in the force majeure clause. As noted, however, precision in drafting is critical to overcome the judicial presumption that such situations are not force majeure events.

CONCLUSION

Given the many issues ongoing in the world, fundamental contract principles should serve as guidance as to how a court will rule on whether a particular event or issue can excuse nonperformance by a breaching party to a contract. The inquiry will often hinge on the actual contractual language, coupled with close evaluation of issues such as control, causation, and mitigation, to determine whether the party seeking forbearance will succeed. It will also often, relatedly, depend upon the foreseeability of the event itself, as if such an event was contemplated for in the contract itself or reasonably foreseeable by the breaching party, a force majeure or impossibility defense is unlikely to succeed unless it is expressly addressed in the contract itself. But, if an unforeseeable "Act of God" occurs and proximately and actually causes the breaching party's nonperformance, then (especially if the contract contains a force majeure clause) such a defense is likely to excuse the breaching party's nonperformance of his contractual duties.

Still, while he might not be considered a leading legal scholar, Bob Dylan's advice would seem especially

appropriate to these times: "Doesn't expecting the unexpected make the unexpected expected?" Thus, perhaps the biggest change that should come out of the presence of the Four Horsemen is abandonment of the viewpoint that "force majeure" clauses are boilerplate to be inserted into a contract without further thought. Instead, they should be viewed as an important part of risk allocation, to be drafted and negotiated based upon close consideration of the facts applicable to that relationship.

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[1] L.Thibierge "*Force Majeure and its Effects*" (2017) 6 IBLJ.

[2] J. Hunter, J.C. Selman, WE. Steineker, A G. Thrasher, "Use the Force? Understanding Force Majeure Clauses," *American Journal of Trial Advocacy,* Vol 44:1 (Fall 2020), at 3.

[3] *The Tornado,* 108 U.S. 342, 351 (1883).

[4] *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213 (N.D.N.Y 2012).

[5] COM. CONT. STRATEGIES DRAFTING & NEGOTIATING § 9.04[G].

[6] Compare *JN Contemporary Art LLC v. Phillips Auctioneers, LLC.,* 507 F.Supp. 3d 490 (S.D.N.Y. 2020) (relying upon "beyond your reasonable control" clause, pandemic and government-imposed restrictions permitted invocation of termination provision) with *IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District*, 2019 WL 1064264*10 (W.D. La. 2019) (exclusions written into force majeure events in contract precluded excuse defense).

[7] *See OWBR LLC v. Clear Channel Communications, Inc.*, 266 F.Supp.2d 1214 (D. Haw. 2003); *Vici Racing LLC v. T-Mobile USA, Inc.*, 763 F.3d 273 (3rd Cir. 2014).

[8] While this discussion cites non-U.S. law, similar principals apply within the United States. *See, generally,* J. Kelley, "So What's Your Excuse? An Analysis of Force Majeure Cases," 2 *Texas Journal of Oil, Gas, and Energy Law*, L. 91 (2007), Section III.

[9] *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co* (1976) 56 DLR (3d) 409.

[10] [1917] AC 495.

[11] *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm) and *Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others [*2010] EWHC 40 (Comm).

[12] The recent case English case of In *2 Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC)* concerned the destruction of a distribution centre as a result of an arson attack during the London Riots in 2011. The Defendant considered the riots and the fire as a force majeure event outside its control. However while the Court acknowledged that the riots were unforeseen and unprecedented, it Court held that had the Defendant taken adequate security measures it could have prevented the fire. Therefore the fire was not amount to circumstances beyond the reasonable control of the Defendant and the Defendant was not entitled to rely on the force majeure clause.

[13] See *Channel Island Ferries Ltd supra.*

[14] *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905 and *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm).

[15] See *Channel Island Ferries Ltd supra.*

[16] *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102.

[17] See *Seadrill Ghana Operations supra.*

[18] *Mamidoil-Jetoil Greek Petroleum Company SA, Moil-Coal Trading Company Ltd v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), *Great Elephant Corp v Trafigura Beheer BV ('The Crudesky')* [2012] EWHC 1745

[19] *Chicago, M., St. P. & P. R. Co. v. Chicago & N. W. Transp. Co.,* 263 N.W.2d 189, 192 (1978).

[20] *Gap, Inc. v. Ponte Gadea New York, LLC*, 2021 WL 861121 (S.D.N.Y. March 2021)

[21] *TEC Olmos, LLC v. ConocoPhillips Co.,* 555 S.W.3d 176, 183 (Tex. Ct. App. 2018).

[22] *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022).

[23] *Kel Kim Corp. v. Central Markets, Inc.,* 70 N.Y.2d 900, 902-03, 524 N.Y.S.2d 384, 296-97 (N.Y. 1987).

[24] *Great Lakes Transmission, Ltd. Partnership v. Essar Steel Minnesota, LLC,* 871 F.Supp.3\2d 843 (D. Minn. 2012); *see also OWBR LLC v. Clear Channel Communications, Inc.*, 266 F.Supp. 2d 1214 (D. Hi 2003). .

[25] *See Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258 (10th Cir. 2008).

[26] *Hackney Borough Council v Doré* [1922] 1 KB 431.

[27] Article 1218 of the French Civil Code 2016 provides as "There is force majeure in contractual matters when an event beyond

the debtor's control, which could not reasonably have been foreseen at the time of conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents performance of the obligation by the debtor".

[28] B. Symons & J. Dalby *"Force Majeure and Frustration in Commercial Contracts"* Bloomsburg Professional 2022.

[29] *Ringsend Property Ltd v Donatex Ltd* [2009] IEHC 568.

[30] Ibid.

[31] *Gamble v The Accident Insurance Co* (1869) IR 4 CL 204 where the plaintiff was executor of the deceased and sued the defendant life assurance company. The deceased had a life insurance policy which required that details of any accident suffered by the defendant should be provided to the defendant within seven days. The deceased was drowned in an accident and could not meet this requirement. The Court held that notification was not impossible as during his lifetime the deceased could have arranged for someone to notify the defendant on his behalf.

[32] Bloomsbury Professional 2021.

[33] See B. Symons & J. Dalby *"Force Majeure and Frustration in Commercial Contracts"* Bloomsburg Professional 2022

[34] See *Analog Devices B.V v Zurich Insurance Company* [2005] 1 IR 274 for the rules of contractual interpretation under Irish law.

[35] *Channel Island Ferries Ltd v Sealink UK Ltd* [1998] 1 Lloyd's Rep 323.

[36] P. McCartney, "Live and Let Die" (1973).

[37] *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020), *aff'd* 29 F. 4th 118 (2d Cir. 2022); *In re Hitz Restaurant Group*, 616 B.R. 374, 377–78 (Bankr. N.D. Ill. 2020); *In Re Cinemex USA Real Estate Holdings, Inc.*, 627 B.R. 693, 700 (Bankr. S.D. Fla. 2021) (force majeure clause excused lessee movie theater from rent obligations until theaters allowed to reopen).

[38] *JN Contemporary Art LLC,* 507 F. Supp. 3d at 501 (S.D.N.Y. 2020)

[39] *In re Hitz Restaurant Group*, 616 B.R. 374, 376-77. (U.S. B'cy CT, N.D. Ill, 2020).

[40] *Id.*at 379-80 (lessee remained responsible for at least 25% of rent amount, because orders allowed that level of business).

[41] *See, e.g., Rudolph v. United Airlines Holdings, Inc.*, 519 F. Supp. 3d 438, 450–51 (N.D. Ill. 2021); *Palm Springs Mile Associates, Ltd. V. Kirkland's Stores, Inc.*, No. 20-21724, 2020 WL 5411353, at *2 (S.D. Fla. Sept. 9, 2020); *MS Bank S.A. Banco de Cambio v. CBW Bank*, No. 20-04049-JWB, 2020 WL 5653264, at *2–*3 (D. Kan. Sept. 23, 2020) (force majeure defense unlikely to prevail because plaintiff failed to "identify any obligations under the [contract] that it cannot perform due to the pandemic"); . *1163 W. Peachtree St. Apartments Invs., LLC v. Einstein & Noah Corp.*, No. 1:21-CV-0219-TWT-WEJ, 2021 WL 2176928, at *5 (N.D. Ga. Apr. 30, 2021) (even if COVID-19 constituted a force majeure event, contract language provided that payment of rent not affected by such events); *1600 Walnut Corp. v. Cole Haan Company Store*, 530 F. Supp. 3d 555, 558–59 (E.D. Pa. 2021) (while COVID-19 pandemic was a force majeure event "in the same category as other life altering events . . ., such as war, riots, and insurrection," and although it proximately caused nonpayment of rents, contractual language barred such an event as basis to withhold rent payments).

[42]In *Rudolph*, *supra*, the court examined the inconsistent remedies in the airline's force majeure clause vs. its Schedule Change and Irregular Operations provisions, and thus rejected the airline's contention that COVID-19 qualified as a force majeure event because in doing so, it would render the airline's Schedule Change and Irregular Operations provisions meaningless. 519 F. Supp. 3d at 448-49.

[43] In *Palm Springs Mile Associates, Ltd.*, 2020 WL 5411353, at *2, rejected a nonpaying lessee's force majeure defense, holding that the lessee failed to show how governmental regulations restricting its operations "resulted in its inability to pay rent." *See also Lampo Group, LLC v. Marriott Hotel Services, Inc.*, 2021 WL 3490063 (M.D. TN 2021).

[44] [2022] EWHC 50 (Comm)

[45] [2022] EWHC 38 (Comm)

[46] *JN Contemporary Art LLC*, 507 F. Supp at 501.

[47] Compare results in *Palm Springs Mile Associates, Ltd.*, *1163 W. Peachtree St. Apartments Invs., LLC*, and *MS Bank S.A. Banco de Cambio* (where there was no showing of causation) with those in *JN Contemporary Art LLC* and *In Re Cinemex USA Real Estate Holdings* (where courts upheld the use of force majeure clauses because causation was shown).

[48] The International Chamber of Commerce 2020 long form force majeure clauses sets out a detailed list of war/warlike circumstances as follows (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy.

[49] [1939] 2 KB 544
[50] See E. McKendrick Force Majeure and Frustration of Contract, Informa Law, 2nd Ed. 1995.
[51] *Clan Line Steamers Ltd v Liverpool and London War Risks Insurance Association Ltd* [1943] KB 209; *CMA CGM SA v Beteiligungs-Kommandit Gesellschaft MS (The Northern Pioneer)* [2003] 1Lloyd's Rep 212 (CA); *Spinney's v Royal Insurance* [1980] 1 Lloyd's Rep 406; *Britain SS v The King*,[1921] 1 AC 99.
[52] *Carvel v. John Kellys (London), Ltd.*, 52 N.Y.S. 2d 640, 641 (N.Y. Sup. Ct. 1945), *aff'd*, 270 A.D. 999 (N.Y. App. Div. 1946); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 347 (8th Cir. 1985); *OWBR LLC v. Clear Channel Communications, Inc.*, 266 F. Supp. 2d 1214, 1224 (D. Haw. 2003).
[53] The force majeure clause in *Carvel* was as follows: "The Seller is not responsible for nondelivery or delay in delivery resulting from . . . the acts of governments, or caused by . . . perils of the sea, embargoes . . . or . . . any other causes beyond Seller's control." *Carvel*, 53 N.Y.S. 2d at 641.
[54] *McDonnell Douglas Corp*., 758 F.2d at 347.
[55] *Id.* at 347–48.
[56] 266 F. Supp. 2d at 1224.
[57] *Id.*
[58] *Richards & Co. v. Wreschner*, 174 A.D. 484, 488 (N.Y. Sup. Ct. 1915),
[59] *Roessler & Hasslacher Chemical Co. v. Standard Silk Dyeing Co.*, 254 F. 777, 780 (2d Cir. 1918).
[60] *The San Giuseppe*, 122 F. 2d 579, 587 (4th Cir. 1941).
[61] *Id.* at 487–88, 490–91.
[62] 254 F. at 780.
[63] "Sellers not liable for non arrival of any shipment . . . for losses or damage or delays due to causes beyond their control including in such causes strikes, lockouts, floods, fires, accidents to work where the goods are manufactured, war, or insurrection."
[64] *Id.*at 780.
[65] *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm).
[66] *Richards & Co*, 174 A.D at 490–91.
[67] *McDonnell Douglas Corp*., 758 F.2d at 347; *Carvel*, 53 N.Y.S. 2d at 641; *OWBR LLC*, 266 F. Supp. 2d at 1224;
[68] *The San Giuseppe*, 122 F. 2d at 585
[69] *Haley v. Van Lierop*, 64 F. Supp. 114, 117 (W.D. Mi. 1945), *aff'd*, 153 F.2d 212 (6th Cir. 1945); *Bunge Corp. v. Recker*, 519 F. 2d 449, 450–51 (8th Cir. 1975).
[70] *Baker v. St. Louis & S.F.R. Co.*, 129 S.W. 436, 438 (Mo. App. 1910). There, the defendant railroad company tried to excuse its delays claiming that increased demand led to too low of a supply of cars. In rejecting this argument, the court held that the defendant could not "excuse its failure to meet natural and normal traffic conditions by saying that it failed to anticipate or to provide against them." *Id.*
[71] *See Haley*, *supra,* 64 F. Supp. at 117. There, the defendant farmer did not produce the contracted quantity of crops, ostensibly due to extreme weather. The court noted that estimates of the particular crop (gladiolus bulbs) were "highly speculative" because of weather and because those particular bulbs were vulnerable to diseases. For these and other reasons, circumstances like extreme weather beyond the defendant's control shielded him from liability for failing to produce the full amount. *Id.*
[72] *Bunge Corp.*, 519 F. 2d at 451. In that case, although "severe winter weather" had made a farmer's beans impossible to harvest, the court would not excuse the farmer's failure to produce the quantity of beans provided for in the contract because the contract's language allowed for fulfilment "by acquiring the beans from any place or source as long as they were grown within the United States." *Id.* Thus, the supply chain issue did not rise to an impossibility or force majeure defense. *Id.*
[73] Given this approach, query whether the past few years may result in a significant decrease in the use of "just in time" inventory (and components) systems. Indeed, one must wonder whether some of the current warehouse shortages now arising (*see* J. Lawton, "The Warehouse in 2022: Where Do We Go From Here?",www.forbes.com (June 2, 2022) (https://www.forbes.com/sites/forbestechcouncil/2022/06/02/the-warehouse-in-2022-where-do-we-go-from-here/?sh=4a50fb955788) may not be predominantly because of an inability to hire labor, but instead the result of business recognition that they no longer can assume they have the luxury of not stocking critical parts, components, and inventory.
[74] COM. CONT. STRATEGIES DRAFTING & NEGOTIATING § 9.04[G].

[75] *Stein v. Rice*, 51 N.Y.S. 320, 322 (N.Y. App. Term 1898).
[76] *Lorillard v. Clyde*, 37 N.E. 489, 491 (Ct. App. N.Y. 1894; RESTATEMENT (SECOND) OF CONTRACTS § 262; RESTATEMENT (SECOND) OF CONTRACTS § 263, illus. 1–2, 7–8.
[77] *In re Cablevision Consumer Litigation*, 864 F. Supp. 2d 258, 264 (E.D. N.Y. 2012).
[78] For instance, in *Stein v. Rice,* a tenant sought to excuse its nonpayment of rent on the grounds that a "water famine" in the area prevented his family from washing or cooking in the rental cottage. The court rejected this excuse because although water supplies typically decreased in the area during August, there was no evidence that amounted to a water famine that occurred and allegedly caused the breach. *Id.* at 321–22. As such, water famine was insufficient under these facts to excuse the defendant's breach. *Id.*
[79] *Lorillard v. Clyde*, 142 N.Y. 456, 462 (Ct. App. N.Y. 1894),
[80] *See Restatement (Second) Contracts,* § 263, illustrations 1 and 2
[81]*See* T. Means, "Climate change and droughts: What's the connection?", Yale Climate Connections (August 18, 2021), at https://yaleclimateconnections.org/2021/08/climate-change-and-droughts-whats-the-connection
[82] "Climate Change Indicators: Heavy Precipitation," U.S. E.P.A., https://www.epa.gov/climate-indicators/climate-change-indicators-heavy-precipitation
[83] *See* United Nations Climate Action, "Causes and Effects of Climate Change," https://www.un.org/en/climatechange/science/causes-effects-climate-change
[84] A more in-depth discussion in the construction context can be found at J. Knoll and S Bjoklund, "Force Majeure and Climate Change: What Is The New Normal?", 8 *American College of Construction Lawyers Journal,* Issue 1 (Feb. 2014).
[85] https://www.nbcnews.com/id/wbna25311529
[86] *OWBR LLC*, 266 F. Supp. 2d at 1222 (quoting SECOND RESTATEMENT OF CONTRACTS § 261, CMT. B), particularly "[i]n the context of fixed-price contracts." *Shelter Forest Int'l Acquisition, Inc. v. COSCO Shipping (USA) Inc.*, 475 F. Supp. 3d 1171, 1186 (D. Or. 2020) (quoting *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 275–76 (7th Cir. 1986)).
[87] *See Butler v. Nepple*, 354 P.2d 239, 245 (Calif. 1960)
[88] *OWBR LLC*, 266 F. Supp 2d at 1223-24.
[89] *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1293 (Fed. Cir. 2002).
[90] *Langham-Hill Petroleum, Inc. v. S. Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987)
[91] *Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W. 2d 658, 663 (Tex. App. 1987).
[92] *Elavon, Inc. v. Wachovia Bank, Nat Ass'n,* 841 F.Supp.2d 1298, 1307-08 (N.D. Ga 2011).
[93] *See Day v. Tenneco, Inc.*, 696 F.Supp. 233, 235-36 (S.D. Miss., 1988).
[94] *Northern Indiana Public Service Co* , 799 F.2d at 274.
[95] *See Perlman v. pioneer Ltd. Partnership,* , 918 F.2d 1244, 1248 (5th Cir. 1990).
[96] *In re Old Carco LLC*, 452 B.R. 100, 119 (B'cy. Ct, S.D.N.Y. 2011)