Chapter 5

Force Majeure for Sure?
Contractual Coal Supply Obligations in a Changing World

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§ 5.01. Introduction.

Fires. Floods. Hurricanes. Tornados. These are events most people
would describe as “acts of God”; events over which humans have little or
no control. Apart from their practical implications, these events can have
substantial legal implications for buyers and sellers of goods. Under what
is commonly known as a force majeure (fors ma-zher) clause (meaning “a
superior force”), a buyer or seller can be legally excused from meeting certain
contractual obligations when the inability to do so is caused by events over
which the party has little or no control. Buyers and sellers can, and often

1 Also commonly known as a “vis major” clause.
do, negotiate the contractual language that governs what events qualify as force majeure events and the parties’ respective obligations when such an event occurs. Consequently, what constitutes a force majeure event is an inherently individualized question that can only be answered on a case-by-case basis in light of the language of a particular contract and the specific circumstances.

This chapter is designed to provide a brief overview of current issues facing the coal-related industries and how those issues may, or may not, trigger force majeure provisions in coal supply agreements. Section 5.02 addresses the general definition and function of force majeure provisions. Section 5.03 provides examples of language used in force majeure clauses, and section 5.04 covers specific occurrences that may qualify as force majeure events. Current and future regulatory issues raising force majeure concerns are discussed in §§ 5.05 and 5.06. The potentially severe financial implications of an improper force majeure declaration are discussed by way of example in § 5.07. Finally, § 5.08 provides some recommendations for preventative measures to deal with force majeure issues.

§ 5.02. Definition and Function of Force Majeure Clause.

The term force majeure means “[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars).” A contractual force majeure clause is defined as a “provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.”

The purpose of a force majeure clause is to allocate the respective rights and responsibilities of parties to a contract when certain events beyond the parties’ control may impede performance of the contract. For example, a force majeure provision would address the relative obligations of a buyer and

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4 Id.
seller when the seller is unable to fulfill a contract for the supply of goods due to an act of nature (i.e., hurricane, flood, earthquake, etc.) or other event reasonably beyond the party’s control. As discussed more fully below, the occurrence of a force majeure event generally suspends a seller’s contractual obligations to the extent those obligations are impacted by the event until the event is abated. What constitutes a force majeure event and the relative effects on contractual obligations is highly fact specific. They are driven by the language of the contract at issue and the relevant circumstances involved.

§ 5.03. Examples of Force Majeure Provisions.

Some contracts use very general language to describe what constitutes a force majeure event. For example, the 2006 version of the Coal Trading Association’s Master Coal Purchase and Sale Agreement provides as follows:

If a Party is prevented from performing, in whole or in part, any of its obligations to deliver or receive Coal at the Delivery Point under a Transaction due to causes that are beyond the reasonable control and without the fault or negligence of the Party affected thereby . . . .

(emphasis added).\(^5\)

This provision does not give any specific examples of force majeure events. Instead, what qualifies as “beyond the reasonable control and without the fault or negligence of the Party affected thereby” is left to the parties, and ultimately the courts, to determine.

Others contracts provide very specific examples of what constitutes a force majeure event:

Seller shall not be liable for failure or delay in performance under this Order due in whole or in part to causes such as an act of God, strike, lockout or other labor dispute, civil commotion, sabotage, fire, flood, explosion, acts of any government, unforeseen shortages or unavailability of fuel, power, transportation, raw materials or supplies, inability to obtain or delay in obtaining necessary equipment

\(^5\) http://www.coaltrade.org/index.html.
or governmental approvals, permits, licenses or allocations, and any other causes which are not within the reasonable control of Seller, whether or not of the kind specifically enumerated above.\footnote{Sherwin Alumina L.P. v. Aluchem, Inc., 512 F. Supp. 2d 957, 966 (S.D. Tex. 2007).}

As discussed more fully below, a party invoking its \textit{force majeure} rights under a contract is more likely to prevail in the event of a dispute if the event claimed to constitute \textit{force majeure} is expressly mentioned in the contract.

If a contract for the sale of goods does not address \textit{force majeure} events, § 2-615 of the Uniform Commercial Code (UCC), which has been adopted by most states, serves to supplement the contract by operation of law (known as a “gap-filler”) with the following language:

\begin{quote}
Delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impractical by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.\footnote{U.C.C. § 2-615 (2001).}
\end{quote}

This provision addresses two types of circumstances — although not necessarily mutually exclusive. The first part deals with unexpected events that affect performance of the contract (“the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made”). The second part applies to legal requirements that may impact the contract (“compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”).

Not unlike many other statutory provisions, the UCC language is not exactly a model of clarity. Its requirements, however, are relatively simple. In short, to qualify for excused performance under § 2-615, three elements must be satisfied: “(1) the seller must not have assumed the risk of some unknown contingency; (2) the nonoccurrence of the contingency must have
been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable.”

These are essentially the same requirements of most contractual force majeure provisions.

In addition to language describing what constitutes a force majeure event, contracts usually also address how the occurrence of a force majeure event affects the parties’ relative obligations. Normally, a force majeure event only excuses performance to the extent the event interferes with performance. The remainder of the contractual obligations remain in place.

The case of Idaho Power Co. v. Cogeneration, Inc.9 illustrates the extent to which performance may still be required notwithstanding a force majeure event. Cogeneration, Inc. entered into a contract to construct a hydroelectric generation facility and sell the power generated to a state electric utility (Idaho Power). To build the facility, Cogeneration needed to obtain and maintain a regulatory authorization under the Clean Water Act known as a “§ 401 certification”10 from the Idaho Department of Environmental Quality. For various reasons, Cogeneration was unable to comply with the terms of its certification. The Idaho Department of Environmental Quality first suspended, and ultimately revoked, the certification, which essentially halted construction of the facility.

The contract required Cogeneration to tender two security deposits for the project: the first deposit of $250,000 being due in June 1992 and the second deposit of $1,874,800 being due in January 1994. Cogeneration submitted the June 1992 deposit, but declared that the subsequent revocation of the § 401 certification constituted a force majeure event that excused future performance. Cogeneration refused to tender the second security deposit unless Idaho Power acknowledged that the revocation of the § 401 certification was a force majeure event. Idaho Power refused and litigation ensued.

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10 A section 401 certification sets forth the conditions for a project that should ensure compliance with water quality standards and other aquatic environment protection standards.
The trial court concluded, and the Idaho Supreme Court agreed, that revocation of the § 401 certification constituted a force majeure event with respect to the construction and operational requirements of the contract. This revocation did not, however, affect the ability of Cogeneration and its financial partner, Calpine, to deliver the security deposit in a timely manner. “Cogeneration and Calpine may not have wanted to tender the security deposit without assurance that Idaho Power would recognize the occurrence of events as force majeure, but nothing prevented them from doing so.”11 The court also concluded that Idaho Power did not breach the contract by refusing to acknowledge the force majeure nature of the permit revocation.

Another common aspect of a force majeure provision is the requirement to give notice to the other party of a force majeure event. The Uniform Commercial Code § 2-615 requires that “seasonable” notice be given. The Coal Trading Association’s form requires notice “as soon as reasonably practicable” after the event. Some contracts set specific timelines — e.g., 10 days. Compliance with the notice provisions is critical not only to advise the other party of an event that will disrupt performance, but to convey the message that the event qualifies as force majeure. “[C]lassifying an event as a force majeure has powerful ramifications — at the very least, receiving notice that an event is considered a force majeure allows a party to evaluate the validity of a claimed force majeure event and permits it to make other arrangements to mitigate its damages if it suspects the event is serious and will persist.”12 Actual notice of an event may not be sufficient — a party must convey the message that the party considers the event to constitute force majeure. Failure to do so could result in waiver of a force majeure defense to a breach of contract action.

In *Aquila, Inc. v. C.W. Mining*, a coal supplier (C.W.) experienced adverse geological conditions and a labor dispute that substantially hampered coal production.13 C.W. notified the buyer, Aquila, of both the geologic problems

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11 *Idaho Power*, 9 P.3d at 1214.
12 *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1266 (10th Cir. 2008).
13 *Aquila*, 545 F.3d at 1258.
and the labor dispute. C.W. only characterized the labor dispute as a *force majeure* event, and downplayed the impact of the geological conditions. Aquila accepted partial deliveries of coal from C.W. and obtained the balance from other suppliers at higher prices until C.W gave notice that it was cancelling the contract. Aquila then signed a new supply agreement with another company and sued C.W. for the difference in price. C.W. argued that both the geologic conditions and the labor dispute constituted *force majeure* events that excused performance. The court agreed that both events were *force majeure*, and that Aquila had actual notice of both events. The court concluded, however, that C.W. never characterized the geologic conditions as *force majeure* and therefore waived the defense. The court went on to find that C.W. failed to demonstrate that the labor dispute was the cause of the reduced production, and therefore C.W. was liable for Aquila’s increased costs incurred in the new supply agreement.

§ 5.04. What Is a *Force Majeure* Event?

Setting aside the peculiarities of specific contractual language, the key to determining whether an event qualifies as *force majeure* is usually whether the event is beyond the reasonable control of the invoking party. The easiest examples are “acts of God” — forces of nature such as hurricanes, floods, earthquakes, and the like. However, not everything attributable to natural conditions qualifies as *force majeure*. In *R&B Falcon Drilling Co. v. American Exploration Co.*, the court rejected an argument by a drilling company that adverse geologic conditions which caused delays in undersea drilling were “acts of God” under a *force majeure* provision. “An act of God requires an act” noted the court. “There is no allegation or evidence of an act, such as a storm or an earthquake . . . .” The court also rejected the argument that the conditions were generally beyond the driller’s reasonable control because the contract required the driller to survey the sea floor prior to drilling, which the driller failed to do.

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What type of event is properly characterized as beyond a party’s reasonable control will, of course, depend on the circumstances at issue. Below is a discussion of some common circumstances that courts have concluded are not beyond a party’s reasonable control.


As a general rule, adverse economic conditions are not considered to be *force majeure* events — at least with regard to fixed-price contracts.\(^{15}\) Although market conditions can easily be considered beyond the reasonable control of contracting parties, by entering into a fixed-price contract, the parties are assuming the risk of future price fluctuations. In *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,\(^{16}\) a utility attempted to avoid its obligation to purchase coal under a long-term contract when the price of purchasing electricity fell below the cost of buying coal to generate it. The *force majeure* provision of the coal supply contract allowed the utility to stop taking coal deliveries “for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal.”\(^{17}\) The court concluded that Indiana law did not prohibit the use of purchased coal, but only prohibited the utility from increasing rates to cover the cost of using the coal. The court further found that the parties allocated the risk of a changing economic landscape by entering into a fixed-price contract, and that this risk allocation was a material term of the contract that could not be modified through a *force majeure* clause:

A *force majeure* clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract

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\(^{15}\) *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986); see also *Wheeling Valley Coal Corp. v. Mead*, 186 F.2d 219 (4th Cir. 1950) (‘‘Shortage of cash or inability to buy at a remunerative price’ cannot be regarded ‘as a contingency beyond the seller’s control.’’).

\(^{16}\) *Northern Indiana*, 799 F.2d 269.

\(^{17}\) *Id.* at 274.
FORCE MAJEURE

is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed-price contract is to allocate risk in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.\textsuperscript{18}

One case that may be viewed as an exception to the general rule that economic hardship does not qualify as a force majeure event is Kentucky Utilities Co. v. South East Coal Co.\textsuperscript{19} The holdings of this case, however, rest on rather unique contractual language and do not rely entirely on a force majeure provision. In Kentucky Utilities, the Kentucky Supreme Court largely approved a trial court’s finding that under the price modification clause of a coal supply contract, a decrease in the contract price was warranted based on “unforeseen” adverse economic conditions that led to a precipitous drop in the market price for coal. The price modification clause allowed for adjustment of the coal price upon the occurrence of “‘material unforeseen events or changed conditions’ which caused the price of the coal to be inequitable to one of the parties to the agreement.”\textsuperscript{20} Notably, the standard for price modification “was not based on whether the events or conditions could or should have been foreseen, but requires only a factual determination that the events or conditions were not foreseen.” In other words, if the parties did not, as a factual matter foresee an event that caused the contract price to become “inequitable” to one party, a price modification was proper regardless of whether the event could or should have been foreseen. The court identified the convergence of the following unforeseen events that made the contract price inequitable for the utility and therefore merited a price adjustment:

- 10 percent inflation in the years 1978 to 1981;
- nearly 50 percent drop in oil prices;
- surplus of natural gas;
- decrease in demand for electricity;

\textsuperscript{18} Id. at 275.
\textsuperscript{20} Id. at 394.
- various industries and utilities not converting to coal-fired boilers;
- increase in coal imports;
- decrease in coal prices;
- United States economic recession in 1981 and 1982.21

In addition to approving the price modification, the court addressed the separate question of whether the utility properly refused to accept a number of coal deliveries based on alleged force majeure events. Described by the court as “much broader than that commonly seen in case law,”22 the contract’s force majeure provision included events such as “equipment breakdowns” and “scheduled outages for maintenance.”23 Even though “scheduled outages for maintenance” are hardly beyond a party’s control, occurrence of such events excused the utility’s obligation to accept deliveries of coal because they were expressly noted in the force majeure clause. The court went on to uphold the validity of most of the 36 separate force majeure declarations made by the utility.

Again, the conclusions reached in Kentucky Utilities should not be considered widely applicable to more common force majeure provisions because of the rather unique language set forth in that contract.


Since passage of a plethora of environmental laws in the late 20th century, all facets of industry have been faced with ever-increasing costs to achieve compliance with environmental standards. If the increased cost of environmental compliance makes performance of a contract a money-losing venture, does this constitute a force majeure event? In Sherwin Alumina L.P. v. Aluchem, Inc.,24 a federal district court in Texas answered this question with a resounding “no.”

21 Id. at 395-96.
22 Id. at 400.
23 Id. at 399.
Sherwin Alumina ("Sherwin") had a contract to supply calcined alumina products\(^{25}\) to AluChem. The contract contained a *force majeure* provision excusing performance for a number of specific events, including events “not within the reasonable control of” Sherwin.\(^{26}\) During “trial runs” of the manufacturing process prior to execution of the contract, Sherwin experienced several events when dust emissions exceeded the limits in its air emissions permit. After execution of the contract, Sherwin continued to experience excess emission events during the manufacturing process. Sherwin later determined that it could not prevent these excess emissions without “a significant capital investment,” and declared *force majeure* on the basis that “there is no feasible way for [Sherwin] to manufacture these products for AluChem without being in continual violation of the requirements set forth in our air permit.”\(^{27}\)

In concluding that Sherwin’s inability to comply with dust emission limits was not a *force majeure* event, the court noted that “[t]he undisputed facts show that it is within Sherwin Alumina’s reasonable control to continue performance under the Supply Agreement, the issue is the cost to Sherwin Alumina to upgrade its equipment.”\(^{28}\) “Under the terms of the Supply Agreement, Sherwin Alumina is not entitled to declare force majeure because the costs of compliance were higher than Sherwin Alumina would have liked or anticipated.”\(^{29}\) The court also rejected the potential for enforcement action as a *force majeure* event. “This eventuality of a possible forced repair or shutdown is not a force majeure event today, rather it is a possibility that Sherwin Alumina may have to declare force majeure in the future.”


Needless to say, government authorities can exercise a great deal of control over both contracting parties and the subject matter of performance.

\(^{25}\) Calcined alumina is a ceramic material used to manufacture a wide variety of products including spark plugs, pump seals, electronic substrates, grinding media, abrasion resistant tiles, cutting tools, bioceramics, (artificial joints), body armor, and artificial gems.

\(^{26}\) *Sherwin Alumina* at 966.

\(^{27}\) *Sherwin Alumina* at 967.

\(^{28}\) *Id.*

\(^{29}\) *Id.*
At the extreme, government has the power to halt a party’s performance by ordering a shut down of operations or even making performance of a contract illegal. More commonly, however, government’s effect on contracts is a bit more mild. For example, environmental compliance standards discussed above are a form of governmental influence on contracts.

The UCC recognizes that government action can qualify as “the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.” “However, governmental interference cannot excuse performance unless it truly ‘supervenes’ in such a manner as to be beyond the seller’s assumption of risk.” The UCC comments further provide that a party may not declare force majeure based on government action if the party “causes or colludes in inducing the governmental action preventing his performance.”

Examples of governmental interference that courts have found to qualify as a force majeure event include government priorities for equipment orders during wartime and a trade embargo barring international shipment of goods. A change in monetary policy or other action that make market conditions less favorable, or even intolerable, are not likely to pass muster as force majeure events. In Seaboard Lumber Co. v. United States, the Federal Circuit Court of Appeals held that federal government monetary policies that raised interest rates and caused a downturn in the timber market are not “government acts” that constitute force majeure events. Seaboard and other companies had entered into contracts with the federal government in 1980 to harvest timber from federal land. Between 1981 and 1983, federal

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31 Id.
35 Seaboard Lumber, 308 F.3d at 1293.
monetary policy led to a rise in interest rates that caused a downturn in the housing market and the demand for lumber. Seaboard declined to harvest the timber because of the low prices. The federal government re-sold the timber rights in 1987 for less than Seaboard had agreed to pay and sued Seaboard to recover the difference.

Included in the litany of events described in the *force majeure* provision of Seaboard’s contract was “acts of Government.” Seaboard claimed that new monetary policies and deregulation of savings institutions were “acts of Government” that led to market conditions that made harvesting the timber unprofitable, and market conditions were beyond Seaboard’s reasonable control. The court did not find this argument persuasive.

We find no case . . . holding that the phrase “acts of Government” in a force majeure clause is so broad as to include government fiscal policy or monetary policy decisions. Such acts have only an attenuated effect on the contracts at issue, at most making performance by the timber companies unprofitable. . . . [G]overnment policies that affect the profitability of a contract but do not preclude performance should not be considered “acts of government” for force majeure clause purposes.36

Since Seaboard was not precluded from harvesting the timber — albeit at a loss — its *force majeure* defense failed. “At most, the government’s acts indirectly made performance of the . . . contract unprofitable. The timber was of sufficient quality, and Seaboard simply made a business decision not to harvest.”37

One type of government inaction that can have an acute impact on the energy industry is delay in obtaining necessary permits. Unless expressly provided for in a contract, delay or even denial of government approvals are unlikely to qualify as *force majeure* events. “Under the common law, ‘if governmental approval is required for a party’s performance, the party may

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36 *Id.*
37 *Id.* at 1294.
be taken to assume the risk that approval will be denied if there is no provision excusing the party in that event.” 38 For example, in *URI Cogeneration Partners L.P. v. Board of Governors for Higher Education*, denial of a zoning change to allow for construction of a small power station did not constitute a *force majeure* event. 39 Similarly, in *Rand-Whitney Containerboard L.P. v. Town of Montville*, the court ruled as a matter of law that denial of water discharge permit for a municipality to operate a portion of its wastewater treatment plant was not a *force majeure* event. 40 In so finding, the court noted that the contract at issue specifically required the municipality to obtain all necessary permits to construct and operate the treatment system. In *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, (discussed above), a public service commission’s denial of a rate increase for a utility did not rise to the level of a *force majeure* event. 41

An extreme example of government action that one may assume qualifies as *force majeure* is a government ordered shut-down of a facility. At least one court has concluded, however, that such government action does not excuse performance if the shut-down was foreseeable. In *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* 42 Rhone-Poulenc agreed to supply Watson with a drug known as Dilacor. At the time, Rhone-Poulenc was the only source of Dilacor in the world. When the parties executed the supply agreement in June of 1997, Watson was aware that the Rhone-Poulenc manufacturing facility was under an existing enforcement order with the Federal Drug Administration (FDA) based on certain violations of manufacturing standards identified in


41 *Northern Indiana* 799 F.2d 265.

prior FDA inspections. The enforcement order provided that the FDA could shut down the facility if further violations occurred. In August of 1998, almost a year after the contract was signed, the FDA identified additional violations at Rhone-Poulenc’s facility and ordered production to cease.

The supply agreement contained a provision setting forth several *force majeure* events that the court described as “standard, boilerplate *force majeure* occurrences.” These included “regulatory, governmental, or military action or inaction” and “any other cause beyond the reasonable control of either party” among the list of events that would excuse performance. Rhone-Poulenc declared *force majeure* based on the FDA ordered shut-down being “governmental action” under the *force majeure* provision. The court concluded that the action was not specifically identified as a qualifying *force majeure* event even though the contractual language mentioned governmental action as a *force majeure* event. The court found this reference too vague to include the FDA ordered shut-down because both parties were aware of this possibility under the enforcement order when the contract was executed:

[W]hen parties expressly contemplate a known risk of a regulatory prohibition, they should be expected to allocate that risk expressly, rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different. In the absence of such allocation, only governmental action not previously contemplated could qualify as *force majeure*.\(^{43}\)

Rhone Poulenc also argued that the shut-down was beyond its reasonable control. The court first recognized that courts are split over whether unforeseeability is required even where a contract does not expressly contain any such requirement.\(^{44}\) The court went on to agree with the courts that require a *force majeure* event to be unforeseeable, and concluded that Rhone-Poulenc’s *force majeure* defense was invalid because the FDA

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\(^{43}\) *Id.* at 1113-14.

ordered shut-down was “entirely foreseeable.” The court also noted that the contract expressly required Rhone-Poulenc to maintain the manufacturing capacity and capability to supply the drug, and allowing it to be excused from performance based on a foreseeable shut-down would be inconsistent with this obligation.\(^\text{45}\)

§ 5.05. **Current Regulatory Issues Raising Force Majeure Concerns.**

Today’s coal-related industries face a number of regulatory issues that have substantial impacts on the ability to mine and burn coal. What follows is a brief discussion of a few major regulatory developments and whether those developments may qualify as *force majeure* events.

[1] — Permit Delays and Suspensions.

In March of 2007 the District Court for the Southern District of West Virginia (Judge Chambers) rescinded four individual § 404 Clean Water Act permits granted by the Army Corps of Engineers for the construction of in-stream valley fills associated with surface coal mining operations.\(^\text{46}\) The court concluded, among other things, that the Corps failed to assess functions of streams and consequently could not determine how to mitigate for the impact of the fills. Almost two years later, in February of 2009, the Fourth Circuit Court of Appeals found the permits were properly issued and vacated Chambers’ decision.\(^\text{47}\) A month later, in March of 2009, the Environmental Protection Agency (EPA) expressed concerns about the environmental impacts of valley fills. EPA took steps to further delay the issuance of many § 404 permits that had been in limbo while the Fourth Circuit considered the appeal of Judge Chambers’ decision to allow the agency to further scrutinize the permit applications. In June of 2009, EPA, the Corps, and the Department of Interior published a “memorandum of

\(^{45}\) *Watson Labs* 178 F. Supp. 2d. at 1113.


\(^{47}\) *Ohio Valley Env'tl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).
understanding” to implement an increased level of scrutiny on applications to construct in-stream valley fills associated with coal mining operations. Many coal producers are thus unable to obtain § 404 permits in a timely fashion, if at all, for new or expanded operations. *Force majeure?*

Unless a supply contract provides otherwise, the delay or inability to obtain government approval for an operation may not be considered a *force majeure* event — especially if the contract provides that the supplier has the obligation to obtain all necessary permits and authorizations.\(^{48}\) If a contract does not contain a *force majeure* clause, the provisions of U.C.C. § 2-615 would be applied. The question then becomes whether delay or denial of a § 404 permit constitutes “the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.” This, of course, depends on the circumstances at issue.


The coal-related industries are facing ever more stringent environmental and safety compliance standards. In the environmental arena, both air and water emissions standards have become more rigorous. The process for obtaining the necessary permits to conduct surface mining has been under constant attack, which has led government agencies to impose tighter and tighter requirements to obtain permits. Those who burn coal are also subjected to more exacting environmental standards. In terms of safety, both federal and state regulators have been prompted by some high profile mining accidents in the past few years to impose significant new safety standards and substantially increase the monetary penalties associated with safety violations. If the cost of compliance simply becomes too high, does this justify a *force majeure* declaration? As discussed above, at least one court has concluded that the increased cost of compliance is not considered “beyond the reasonable control of any party” or a supervening government action.\(^{49}\)

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contract does not contain a *force majeure* clause, the “gap-filler” provisions of U.C.C. § 2-615 require a determination on whether the increased cost of compliance is “the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.” Again, this will depend on the circumstances.

§ 5.06. Future Issues of Concern.

There is a whole host of issues facing coal-related industries in the very near future that both buyers and sellers should consider when negotiating *force majeure* provisions in coal supply agreements. A detailed discussion of any of the issues mentioned below would merit a journal article in its own right. What follows is merely a “drive-by” look at what is on the horizon.

In terms of environmental compliance, probably the most publicized issue is concern about climate change and the impact of burning fossil fuels. EPA has published a proposed finding that “greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations.”50 Limits on carbon dioxide emissions from coal-fired boilers and a forced reduction in fossil fuel use seem almost inevitable. As mentioned above, EPA has recently announced a new initiative to more heavily scrutinize the process for obtaining § 404 permits for coal mining operations in the Appalachian region.51 On the legislative front, a bill has been introduced to amend the Clean Water Act to expressly prohibit the construction of in-stream valley fills.52 Those who burn coal will almost certainly face more stringent standards for air emissions and the disposal of coal ash.

Through the court system, non-governmental organizations (NGOs) such as the Ohio Valley Environmental Coalition, Earth Justice, and Sierra Club continue to actively pursue “citizen suits” to oppose mining operations as well as both construction and operation of fossil fuel facilities. For example, in addition to the § 404 permit litigation discussed above, NGOs have filed

51 Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009). 
suit to invalidate the recent clarification\textsuperscript{53} of the so-called “buffer zone rule” that allows creation of valley fills.\textsuperscript{54} Multiple lawsuits have been filed to oppose construction of various new coal-fired power plants as well. How these actions, and future challenges, are decided in the courts could have a substantial impact on how, and even if, coal is produced and used.

In addition to environmental concerns, coal producers in particular are facing a labor crisis in the near future. Older, experienced miners are leaving the workforce faster than new miners are joining the industry. The lack of an experienced work force can severely hamper a mining operation. Many coal producers are also troubled by the potential impact of the proposed “Employee Free Choice Act” that, among other things, would allow unions to conduct organizing drives without allowing employees to vote by secret ballot.\textsuperscript{55} If environmental and labor issues were not enough, the current economic downturn has led to an across-the-board reduction in the demand for fossil fuels. Consequently, coal prices have decreased at the same time when the costs of production are on the increase.

The above is just a sampling of the serious and complex issues likely in store for the energy industries. Both buyers and sellers should be cognizant of such issues when negotiating supply agreements.

\textbf{§ 5.07. Implications of Force Majeure Declaration.}

As mentioned above, declaration of a \textit{force majeure} event has a substantial impact on contractual obligations. It excuses performance by the declaring party and puts the other on notice of the need to potentially identify an alternative source. A \textit{force majeure} declaration can have severe financial implications. For example, in 2008 alone, one Kentucky utility lost approximately 850,000 tons of coal deliveries due to \textit{force majeure} declarations based on delays in obtaining § 404 permits. If the contract price were $40.00 per ton and the coal was purchased elsewhere for $50.00 per ton, the utility would realize a net cost increase of $8,500,000. The greater

\textsuperscript{53} 73 Fed. Reg. 75814 (Dec. 12, 2008).
\textsuperscript{55} S.B. 560, H.B. 1409 (2009).
the disparity between the contract price and market price for replacing the coal, the greater the increased cost. For 2009, that same utility has over 2,000,000 tons at risk of potential force majeure declarations. If the per-ton price for replacing all that coal were a mere $0.50 higher, that equates to a $1,000,000 cost increase.

Given the potential financial impact, a coal buyer may not be willing to accept a supplier’s claim of a force majeure event and litigation ensues. A recent case in West Virginia illustrates the risks of declaring a force majeure event. In Wheeling Pittsburgh Steel Corp. v. Central West Virginia Energy Co.,\textsuperscript{56} steel producer Wheeling Pittsburgh had long term supply agreement with Massey Energy subsidiary Central West Virginia Energy (“Central”) starting in 1993 for a specific blend of coking coal. In 2004, Central experienced unexpected problems in production and delivery of the coal that it attributed to railcar shortages, labor shortages, and adverse mining conditions such as roof falls, flooding, breakdowns in equipment and other events at the mines producing the coal. Central declared certain of these events constituted force majeure under the contract and continued to deliver coal in reduced quantities.

Wheeling Pittsburgh filed suit against Central and Massey Energy alleging breach of contract and fraud concerning Central’s declarations of force majeure. In essence, Wheeling Pittsburgh claimed Central was able to produce sufficient coking coal, but was selling the coal to other buyers at higher prices instead of supplying Wheeling Pittsburgh. Following almost five weeks of trial in the summer of 2007, the jury returned a verdict awarding $119,850,000 in compensatory damages and $100,000,000 in punitive damages to Wheeling Pittsburgh. Under West Virginia law, there is no right to appellate review of a jury verdict, and the West Virginia Supreme Court of Appeals declined Central and Massey’s petition for appeal. The United States Supreme Court also subsequently declined to review the decision. Consequently, the jury verdict stood without any appellate review.

\textsuperscript{56} Wheeling Pittsburgh Steel Corp. v. Central W. Va. Energy Co., No. 05-C-85 (Cir. Ct. of Brooke County, W. Va., filed 2005).
In addition to the sheer amount, the verdict is particularly remarkable in that Wheeling Pittsburgh was permitted to seek, and the jury awarded, punitive damages for what was essentially a breach of contract action. In West Virginia and most other states, the general rule is that punitive damages are not recoverable in a breach of contract action, even if breach was willful, unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.\(^{57}\) “Punitive damages, without exception, are not recoverable in breach of contract actions, and this is true even if the breach is willful.”\(^{58}\) A party suing for breach of contract is generally only entitled to recover damages sufficient to put the party in the same position it would have enjoyed if the contract had not been breached. “[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.”\(^{59}\) “Virtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance . . . .”\(^{60}\) Wheeling Pittsburgh maintained, and the jury apparently agreed, that Central and Massey Energy committed a tort, separate and apart from breaching the contract, by shipping coal to other buyers while providing reduced deliveries to Wheeling Pittsburgh based on \textit{force majeure} declarations. Whether right or wrong, the verdict returned in favor of Wheeling Pittsburgh illustrates the substantial financial implications of a \textit{force majeure} declaration. Not only was the supplier found responsible for $119,850,000 in compensatory damages caused by the reduced coal deliveries, but was assessed an additional $100,000,000 in punitive damages.

\section*{§ 5.08. Recommendations.}

Buyers and sellers alike can help reduce the risk of litigation and its potentially costly implications by taking a few relatively easy measures. First

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\begin{itemize}
\item \(^{59}\) Oliver Wendell Holmes, “The Path of the Law,” 10 \textit{Harv. L. Rev.} 457, 462 (1897).
\end{itemize}
and foremost, scrutinize the *force majeure* language of any supply agreement. Do not simply rely on boilerplate language in standard contract forms.\(^6\) Sellers in particular should make sure the contract language expressly covers the types of events that can cause potential delays — beyond the standard boilerplate language — and addresses the extent to which performance is excused by certain events. For example, given the current regulatory climate, a seller would be wise to provide that the delay or inability to obtain necessary mining-related permits, or suspension or revocation of such permits, constitutes a *force majeure* event — especially since at common law this does generally not qualify as *force majeure*. The most suitable type of *force majeure* provision will vary depending on preference and circumstances. Whether one chooses a rather general provision or a litany of specific events, the choice of language should be an informed one.

Second, include a choice of law provision and forum selection clause to govern resolution of disputes. Even if performance of a contract is going to take place largely, if not completely, in one state, contracting parties can agree that the law of another state will govern resolution of any disputes. Parties can also agree on the forum where disputes will be resolved — whether that is a court in a particular jurisdiction or by an alternative dispute resolution method such as arbitration. Selection of the applicable law and forum should only be made after careful consideration of the potential implications of each.

Third, consider whether to limit the scope of potential remedies if a *force majeure* declaration is found invalid. The UCC expressly provides that parties may agree upon a limited or exclusive remedy for a breach of contract.\(^6\) One potential limitation is to foreclose the possibility that punitive damages may be awarded against either party under any circumstance, or even a limitation on recovery of consequential damages.

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\(^6\) See U.C.C. § 2-719 (“[T]he agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article . . . .”).
Fourth, if a *force majeure* event occurs, be sure to comply with the applicable notice requirements. Notice of the event itself is insufficient. A party must clearly convey that it considers the event to constitute *force majeure*. Failure to do so could result in waiver of the *force majeure* defense in the event a dispute arises.\(^6\)

Fifth, continue performing under all aspects of the contract not affected by the *force majeure* event unless the contract provides otherwise. Generally speaking, performance is only excused to the extent a *force majeure* event actually interferes with performance. For example, if a seller supplies coal from several different mines, a *force majeure* event at one mine would not likely affect the seller’s obligation to supply coal from the other mines.

Finally, parties should involve legal counsel in drafting and negotiating supply agreements. As discussed above, the language of a *force majeure* provision can have substantial legal ramifications. Attorneys can also assist in evaluating the interplay of all other contractual provisions and the implications under the laws of a particular jurisdiction. This will allow a party to choose the appropriate language and understand the respective contractual obligations. Involving lawyers in the drafting and negotiating phase of an agreement can help avoid the need to involve them later after a dispute arises.

\(^6\) *Aquila*, 545 F.3d 1258.