henceforth will be referred to collectively as "termination."

§ 18:2 Determining construction contract "breach" and "material breach"

Construction, even on a normal and seemingly routine project, is an extraordinarily complex process—rarely proceeding as planned[1] in strict conformance with the requirements of the contract documents; subject to a "range of reasonably expected adverse conditions"[2] requiring skillful coordination of numerous tradesmen; subject to changes invoked under agreements of the parties or due to conditions beyond the control of the parties;[3] usually involving substantial expense; and little understood by laypersons. More often than not, stress-free construction is a fairy tale.[4] Enforcement of contract rights and assessment of

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The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract as it was said. The infelicity of the word 'annul' has been averted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. At the time when notice was given, it was merely a ceremony to mark the point of default as a preliminary to employing someone else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get someone else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed, this right was expressly stipulated in the specifications, if, during the progress of the work, a board should recommend that the contract be "annulled" on the ground that it would not be completed in time. (Citations omitted.),

[Section 18:2]

[1]See Constr. Planning & Scheduling 4 (1997) ("Construction rarely proceeds as planned. There are always unexpected events and conditions that occur during construction and impact the contractor's ability to complete the project as planned.").

[2]See Bat Masonry Co., Inc. v. Pike-Paschen Joint Venture III, 842 F. Supp. 174, 182 (D. Md. 1993) ("[T]here is a range of reasonably expected adverse conditions in the performance of a construction contract within which there is no breach."). See also §§ 15:102 to 15:119.

[3]See §§ 4:1, 4:2.

[4]See Erlich v. Menezes, 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 896, 981 P.2d 978 (1999), in which the Supreme Court of California gave vent to this common perception:

> The [owners] may have hoped to build their dream home and live happily ever after, but there is a reason that tagline belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of urban legends—the cause of bankruptcy, marital dissolution, hypertension, and fleeting fantasies ranging from homicide to suicide.

"breach" and "material breach" thus are formidable tasks.[5]

Any inquiry into the alleged breach of a construction contract obligation begins with a review of the parties' contractual promises[6] embodied in the agreed "scope of the undertaking"[7] —the express and implied contractual terms and conditions,[8] inter-

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[5]See 4 Corbin on Contracts § 945 ("A building contractor may fail even to start excavation, or he may erect the building as a whole substantially in accordance with specifications and fail merely to use the brand of sewer pipe that his contract required. In either case the builder has committed a breach of contract, but his two breaches are not of the same size or importance.") See also Williston on Contracts §§ 43:6 to 43:8 (4th ed.).

> Sometimes, when a dispute arises during the course of performance of a contract both parties stop performing, and each claims that it is justified in terminating the contract because of the other's breach. The builder that has not received a progress payment may suspend and later terminate on the ground of nonpayment. The owner that has failed to pay may contend that the nonpayment was not a breach because the builder had already committed a material breach by failing to follow the specifications, and the owner may terminate on that ground. . . .[leading] a court to impose liability on the party that committed the first material breach.

See also Murphy Oil USA, Inc. v. Wood, 438 F.3d 1008, 1015 (10th Cir. 2006) ("[I]t is well settled in Oklahoma that a party to a contract who prevents or hinders performance thereof cannot seek performance by the other contracting party. This is the so-called 'first breach' defense.").

[6]See 1 Corbin on Contracts p 10 § 1.3:

> [A] contract establishes a relationship among the contracting parties that goes well beyond their express promises. The promise, or group of promises, or other bargain, is fleshed out by a social matrix that includes custom, trade usage, prior dealings of the parties, recognition of their social and economic roles, notions of decent behavior, basic assumptions shared, but unspoken by the parties, and other factors, most especially including rules of law, in the context in which they find themselves. The entire law of contracts plays a major role in determining the terms of the contract.

[7]See Day v. U.S., 245 U.S. 159, 161, 38 S. Ct. 57, 62 L. Ed. 219 (1917) ("[W]hen the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."); West v. All State Boiler, Inc., 146 F.3d 1368, 1372, 42 Cont. Cas. Fed. (CCH) ¶ 77323 (Fed. Cir. 1998) ("The bid price of a government contract incorporates any anticipated expenses arising from the performance of the contract."); Bilotto v. Webber, 172 A.D.2d 639, 568 N.Y.S.2d 438, 439 (2d Dep't 1991) (failure to make progress not excused by encountering conditions foreseeable prior to contracting). See also §§ 15:11 to 15:17.

[8]See §§ 9:1, 9:64 to 9:105. See also McClain v. Kimbrough Const. Co., Inc., 806 S.W.2d 194, 197 (Tenn. Ct. App. 1990), in which the Tennessee Court of Appeals was called upon to review the propriety of the termination of a subcontract that neither contained a termination clause nor incorporated the prime contract by reference. The court observed:

> Contracting parties should endeavor to define their respective rights and obligations precisely. As a practical matter, however, contracting parties are not always precise and frequently leave material provisions out of their contracts. In these situations, the courts impose obligations on contracting parties that are reasonably necessary for

preted when unclear in their "context"[9] and in accordance with trade custom and practice,[10] and course of dealing,[11] all as circumscribed by public policy considerations and by time-honored legal excuses for contractual nonperformance.[12] Overarching this objective review[13] of contract "scope"[14] is the paramount

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the orderly performance of the contract. (Citations omitted.).

[9]See and Ch 3.

See Travelers Cas. and Sur. Co. v. Dormitory Authority-State of New York, 735 F. Supp. 2d 42 (S.D. N.Y. 2010) (citing treatise, and opining in the context of enforcement of a "no damage for delay" clause: "[A]ny consideration of what was reasonably within the contemplation of the parties at the time of contracting must take into account the commercial context. [The contractor] was the last of around a dozen prime contractors to join a complex construction project in the heart of a busy commercial neighborhood in this city, and it did so with full knowledge of the number of other participants involved. Having been supplied before bidding with all of the contract documents . . . [the contractor] was also well aware that the project was architecturally 'ambitious'. . . . The fact the design modifications, delays or other difficulties could arise on such a project would not surprise a prudent bidder. . . . As a commercially sophisticated actor with extensive experience in the construction industry, [the contractor] could be expected to review the risk allocation provisions contained in the contracts . . . and to have contemplated those provisions carefully in determining the amounts of each bid. As such, there is no reason not to hold [the contractor] to its bargain.").

[10]See §§ 3:72 to 3:78. See also L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc., 880 F.2d 219, 227, 14 Fed. R. Serv. 3d 348 (9th Cir. 1989), in which the U.S. Court of Appeals for the Ninth Circuit decided the issue of contractual responsibility for "field engineering" by looking to "custom":

> As a matter of law, the responsibility for field engineering lies with the party to whom that responsibility is given under the terms of the construction contract. When the contract does not specifically identify the party whose responsibility it is to perform the field engineering, that responsibility lies with the subcontractor according to the custom within the industry.

See also U.S. ex rel. Greenmoor, Inc. v. Travelers Cas. and Sur. Co. of America, 2009 WL 4730233, *49 (W.D. Pa. 2009) (citing treatise and opining "Whether a breach is so substantial as to justify an injured party regarding the whole transaction is at an end is a question of degree; it must be answered by weighing the consequences in the light of the actual custom of men in the performance of a contract similar to the one that is involved in the specific case.").

[11]See §§ 3:79 to 3:81.

[12]Such legal excuses include impossibility, breach by the other party, waiver and estoppel, acceptance, and the contract vitiation principles of fraud and mistake. See Restatement Second, Contracts §§ 151-158, 174-177, 261-272.

[13]See Corbetta Const. Co. v. U. S., 198 Ct. Cl. 712, 461 F.2d 1330, 1336 (1972) ("[t]he crucial question is what the [contractor] would have understood as a reasonable construction contractor, not what the drafter of the contract terms subjectively intended").

[14]See §§ 4:10 to 4:12.

issue of the parties' expectations at the time of contracting[15] regarding (1) intended scope[16] and expected conditions[17] of the contracted work, (2) implications of express and implied contractual allocation of foreseeable risks,[18] and (3) implications of contractual provisions that convert common law breaches into sanctioned conduct within the scope of the contract to be remedi-

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Issue is addressed in determining whether a change order constitutes a "cardinal change" because it is beyond the scope of the contract. See "Cardinal Change" Doctrine in Federal Contracts Law, 9 A.L.R. Fed. 2d 565.

See also Wayne Knorr, Inc. v. Department of Transp., 973 A.2d 1061 (Pa. Commw. Ct. 2009) (a contractor did not materially breach its contract by failing to prepare a CPM schedule, because that type of schedule is not called for by the contract); Limon v. J.T.B. Services, Inc., 2009 WL 1161043 (Tex. App. Austin 2009) (ruling that a contractor did not breach a subcontract by awarding work to another company, because that work was outside the scope of the subcontract). Compare In re Electric Machinery Enterprises, Inc., 416 B.R. 801 (Bankr. M.D. Fla. 2009), order aff'd in part, 474 B.R. 778 (M.D. Fla. 2012) (rejecting a construction manager's claim that the contract did not require it to co-ordinate subcontractors, and ruling that the construction manager's failure to schedule and co-ordinate the work constituted a material breach of contract).

See also Avery, Alternative Delay-Based Entitlement Theories to the Government Delay of Work Clause, 47 Proc. Law. 17 (Winter 2012) (discussing the "cardinal delay" and the "partial remedy" principles).

[15]See II Farnsworth on Contracts § 8.12 (2d ed. 1998) ("A factor of special importance in assessing the impact of a breach on the injured party's expectations is the extent to which that party can be compensated adequately in damages.").

[16]"Divisibility" of the contract scope on projects subject to future assignments of work is an important issue. See Kuswa & Associates, Inc. v. Thibaut Const. Co., Inc., 463 So. 2d 1264 (La. 1985) (rejecting a subcontractor's lost profits claim for wrongful termination because the subcontract scope only covered work assigned on a building-by-building basis and did not include work on all 64 buildings to be constructed in the subdivision). Compare Carvel Co. v. Spencer Press, Inc., 1998 ME 74, 708 A.2d 1033 (Me. 1998) (holding that contract scope was not intended to be deemed to cover separate divisible contractual undertakings).

[17]See Bat Masonry Co., Inc. v. Pike-Paschen Joint Venture III, 842 F. Supp. 174, 182 (D. Md. 1993) ("[t]here is a range of reasonably expected adverse conditions in the performance of a construction contract within which there is no breach").

[18]See Blake Const. Co., Inc. v. C. J. Coakley Co., Inc., 431 A.2d 569, 576-577 (D.C. 1981):

> It is well-established that there are certain implicit duties between the contracting parties, particularly the duty not to prevent performance by the other party. In the case of construction contracts, courts have construed those mutual duties in light of the prevailing practices of the trade and out of deference to the inherent uncertainties of the timing and conditions of the actual performance. However, there is a point at which a contracting party exceeds the necessary latitude of discretionary action, even in construction contracts.

ated under agreed remedies and measures for adjustment of the contract price and time.[19]

The express construction contract on large projects typically consists of hundreds of pages of general and special terms and conditions, hundreds of drawing sheets and thousands of pages of specifications containing words and symbols of great significance to those in construction familiar with their special meanings but of little meaning to laypersons.[20] Enforcement or nonenforcement remains subject to the tension between the early common law doctrine of "sanctity of contract"[21] and common law excuses for contractual nonperformance and a host of implied conditions that mitigate the harshness of the doctrine.[22] These implied conditions, such as the owner's implied warranty of the adequacy of its detailed design documents,[23] the owner's implied duty of full disclosure,[24] the contractor's implied duty of inquiry regarding

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[19]See §§ 15:82, 15:83, 19:52.

[20]See §§ 1:2, 3:1.

[21]See Dermott v. Jones, 69 U.S. 1, 8, 17 L. Ed. 762, 1864 WL 6582 (1864) ("The principle [of sanctity of contract] . . . does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves did not stipulate."). The vestiges of *Dermott* remain. See Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575, 577 (Mo. Ct. App. E.D. 2000) ("If a party desires to be excused from performance in the event of contingencies arising after the formation of a contract, it is that party's duty to provide therefore in the contract."). See also §§ 13:1, 14:24, 15:11, 15:22.

[22]See Bruner, Force Majeure and Unforeseen Ground Conditions in the New Millennium: Unifying Principles and "Tales of Iron Wars," 17 Int'l Constr. L. Rev. 47 (2000):

> For more than two thousand years, judges under national legal systems rooted in Roman law have walked the narrow path between the Roman doctrines of *pacta sunt servanda* ("contracts must be honored") and *rebus sic stantibus* ("provided the circumstances remain unchanged"). The path has been ever-shifting, forever being redefined by each succeeding generation in response to circumstances that in its mind warrants enforcement of or relief from contractual obligations made burdensome by circumstances unforeseen at the time of contracting and fundamentally different than contemplated by the parties when the contract was formed.

[23]See §§ 9:78 to 9:91. See also U.S. v. Spearin, 54 Ct. Cl. 187, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166, 42 Cont. Cas. Fed. (CCH) ¶ 77225 (1918). See also Construction contractor's liability to contractee for defects or insufficiency of work attributable to the latter's plans and specifications, 6 A.L.R.3d 1394 (citing authorities from numerous jurisdictions which have adopted the implied warranty of design specifications).

[24]See § 9:92. See also City of Indianapolis v. Twin Lakes Enterprises, Inc., 568 N.E.2d 1073 (Ind. Ct. App. 1991) ("The [City's] failure to inform [the Contractor] of the nature and extent of the obstructions . . . went to the very heart of the agreement to dredge this site."). See also Bannum, Inc. v. U.S., 80

patent design deficiencies,[25] the contractor's implied warranties applicable to construction materials[26] and workmanship,[27] the joint implied duty of cooperation and nonhindrance,[28] and the joint implied duty of good faith and fair dealing,[29] are read into

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Fed. Cl. 239 (2008) ("The government is only liable for breach of this duty [to disclose superior knowledge] when the following four prerequisites are met: (1) [the contractor] undertook to perform without vital knowledge of a fact that affects performance, costs, or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specifications supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information."); See also Metro Wastewater Reclamation Dist. v. Alfa Laval, Inc., 2008 WL 1924896 (D. Colo. 2008) ("The superior knowledge doctrine, most commonly applied in construction and United States government contract cases, is based on the premise that a contracting party that has superior knowledge about conditions that may impact the other party's use of a product or performance of a contract will have a duty to inform that overrides any duty to inquire on the part of the contractor.").

[25]See §§ 9:64 to 9:66. See also H.B. Zachry Co. v. U.S., 28 Fed. Cl. 77, 38 Cont. Cas. Fed. (CCH) ¶ 76502 (1993), aff'd, 17 F.3d 1443 (Fed. Cir. 1994) (holding ambiguity regarding painting of a steel roof deck was sufficiently obvious to have required the contractor to have made inquiry prior to bidding).

[26]See U.C.C. § 2-314 (implied warranty of merchantability) and U.C.C. § 2-315 (implied warranty of fitness for a particular purpose). See also §§ 9:29 to 9:32.

[27]See §§ 9:67 to 9:70. See also Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 3 S. Ct. 537, 28 L. Ed. 86 (1884) (upholding implied warranty would be constructed in a workmanlike manner free of defects).

[28]See §§ 9:99, 15:22 to 15:28, 15:29. See also Gulf, M. & O. R. Co. v. Illinois Cent. R. Co., 128 F. Supp. 311, 324 (N.D. Ala. 1954), judgment aff'd, 225 F.2d 816 (5th Cir. 1955) ("A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.").

See also In re Electric Machinery Enterprises, Inc., 416 B.R. 801 (Bankr. M.D. Fla. 2009), order aff'd in part, 474 B.R. 778 (M.D. Fla. 2012) ("Florida law also recognizes, in the construction context, an implied obligation not to hinder or obstruct performance and an implied obligation not to knowingly delay unreasonably the performance of duties under the contract. . . . While there is a paucity of cases on this topic in Florida, other states have refined the application of the implied obligation not to hinder or obstruct performance. Under Illinois common law principles, the right to direct the general progress of the work implies an obligation on the part of the contractee to keep the work in such a state of forwardness as to enable the contractor to perform within the required time, and responsibility for delay solely rests with the contractee. Likewise, under Arkansas law, directing a contractor to proceed in accordance with a schedule known to be unworkable constitutes active interference with the contractor's work.").

[29]See § 9:103. See also Restatement Second, Contracts § 205 ("Every

the contract as a matter of law. These express and implied duties are subject to legal excuses for nonperformance, such as impracti-

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contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). See also A.C. Shaw Const., Inc. v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989) (holding that an owner's termination of a contract was subject to the implied duty of good faith and fair dealing, because to hold "otherwise would suggest that a government entity has the right to refrain from cooperation in a contract, or that a environmental entity could act in bad faith calculated to destroy the benefit of the contract to the other contracting party"). See also Tecom, Inc. v. U.S., 66 Fed. Cl. 736, 757-773 (2005), in which the United States Court of Federal Claims discussed extensively the implied covenant of good faith and fair dealing in federal contracts and concluded:

> The court concludes that claims of a breach of the implied covenant of good faith and fair dealing—including claims that the duties to cooperate and not hinder performance of a contract have been breached—are to be treated like any other claim for breach of contract. The presumption of good faith conduct of Government officials has no relevance. Where it otherwise, and where the presumption considered particular to Government officials, it would no longer be the case that the duty applies to the Government just as it does to private parties. This would be a rejection of the long-held notion that the principles which govern inquiries as to the conduct of individuals, with respect to their contracts, are equally applicable where the United States is a party.
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> Moreover, if the presumption of good faith conduct applied to breaches of the implied duties, it would also be invoked in all breach of contract actions, were the Government merely to add a standard contract clause promising good faith not to breach the contract. But since fraud or quasi-criminal wrongdoing are not at issue when a breach of the implied covenant of good faith and fair dealings raised, and the actions complained of are typically not official public duties but instead the actions of a party in the performance of a contract, the presumption of good faith conduct poses no special obstacle to parties alleging such a breach. . . . It is not the type of action, like a civil charge of fraud, that requires the safeguard of clear and convincing evidence.

Compare Southern Comfort Builders, Inc. v. U.S., 67 Fed. Cl. 124, 154-155 (2005) (holding that the claimant "failed to present clear and convincing evidence to overcome the presumption of good faith afforded to the actions of Government personnel," even though the contractor's allegations against the Government did not include fraud). Because of the inconsistency between the Tecom and Southern Comfort cases, it appears that the United States Court of Appeals for the Federal Circuit may be obliged to address the burden of proof standard applicable to the presumption of the Government's good faith.

See generally Rakoff, good Faith in Contract Performance: Market Street Associates Ltd Partnership v. Frey, 120 Harv. L. Rev. 1187 (March 2007); Dubroff, the Implied Covenant of Good Faith in Contract interpretation and Gap-filling" Reviling a Revered Relic, 80 St. John's L. Rev. 559 (Spring 2006); Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369 (December 1980).

See generally Rakoff, good Faith in Contract Performance: Market Street Associates Ltd Partnership v. Frey, 120 Harv. L. Rev. 1187 (March 2007); Dubroff, the Implied Covenant of Good Faith in Contract interpretation and Gap-filling" Reviling a Revered Relic, 80 St. John's L. Rev. 559 (Spring 2006); Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369 (December 1980).

cability, force majeure, fraud, mistake, misrepresentation, waiver, and estoppel.

The key to implied allocation of construction risk is foreseeability at the time of contracting. A contractor is expected to include in its contract price all costs foreseeable to the performance of its contract, taking into consideration the normal "hurly-burly" of the construction process[30] and sufficient profit to cover assumed risks.[31] The contractor is presumed to have protected itself against foreseeable risks by charging a fair price for the risks assumed and the work to be performed under the construction contract.[32]

Complicating the analysis of unexcused breach and its materi-

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[30]See Bat Masonry Co., Inc. v. Pike-Paschen Joint Venture III, 842 F. Supp. 174, 182 (D. Md. 1993) ("[t]here is a range of reasonably expected adverse conditions in the performance of a construction contract within which there is no breach").

See also Travelers Cas. and Sur. Co. v. Dormitory Authority-State of New York, 735 F. Supp. 2d 42 (S.D. N.Y. 2010) (citing treatise, and opining in the context of enforcement of a "no damage for delay" clause: "[A]ny consideration of what was reasonably within the contemplation of the parties at the time of contracting must take into account the commercial context. [The contractor] was the last of around a dozen prime contractors to join a complex construction project in the heart of a busy commercial neighborhood in this city, and it did so with full knowledge of the number of other participants involved. Having been supplied before bidding with all of the contract documents . . . [the contractor] was also well aware that the project was architecturally 'ambitious'. . . . The fact the design modifications, delays or other difficulties could arise on such a project would not surprise a prudent bidder. . . . As a commercially sophisticated actor with extensive experience in the construction industry, [the contractor] could be expected to review the risk allocation provisions contained in the contracts . . . and to have contemplated those provisions carefully in determining the amounts of each bid. As such, there is no reason not to hold [the contractor] to its bargain.").

[31]See West v. All State Boiler, Inc., 146 F.3d 1368, 1372, 42 Cont. Cas. Fed. (CCH) ¶ 77323 (Fed. Cir. 1998) ("The bid price of a government contract incorporates any anticipated expenses arising from the performance of the contract."); Hoffman Const. Co. of Oregon v. U.S., 40 Fed. Cl. 184, 192-93, 42 Cont. Cas. Fed. (CCH) P 77247 (1998), aff'd in part, rev'd in part on other grounds, 178 F.3d 1313 (Fed. Cir. 1999) ("[Contractor] is not entitled to an equitable adjustment [for work] that was plainly within the scope of its work under the terms of the contract."); Global Const., Inc. v. Missouri Highway and Transp. Com'n, 963 S.W.2d 340, 344 (Mo. Ct. App. W.D. 1997) ("[a] contractor working on a public improvement may not recover additional compensation for the expenditure of extra labor and materials when they are within the terms of the contract, even though the extra expenditures were caused by unforeseen difficulties"); Broadway Maintenance Corp. v. Rutgers, State University, 90 N.J. 253, 447 A.2d 906, 914 (1982) ("The contractor that chooses to accept [contract] risks [should] reflect the accompanying responsibility in [its] price.").

[32]See Wells Bros. Co. of New York v. U.S., 254 U.S. 83, 86, 41 S. Ct. 34, 65

ality is the common industry practice of including in construction contracts various provisions expressly authorizing their breach and providing administrative redress,[33] a practice that has the effect of converting breaches—even material breaches[34] —into mere claims compensable under the contract[35] and sometimes in amounts less than that recoverable under the common law.[36] Such "breach conversion" clauses ordinarily are enforceable under

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L. Ed. 148 (1920), in which the United States Supreme Court, in an opinion enforcing a "no damage for delay" clause, noted:

> Men who take $1 million contracts for governmental buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract . . . protected themselves against such delays [and other assumed or foreseeable risks] as are complained of by the higher price extracted for the work.

See also Meyer Scale & Hardware Co. v. U.S., 57 Ct. Cl. 26, 58, 1922 WL 1839 (1922):

> It is well known that contractors for the Government are not unsophisticated and take the necessary precautions and make provision in the sum bid to meet the exactions in the contract which the nature of the Government's work requires. The unusual and broad powers reserved in these contracts in order to allow [the Government] to retain control of the work are well known, and contractors make their profits sufficiently large to protect themselves against such contingencies. It is also well known that these stringent provisions in government contracts are usually taken into consideration by contractors making bids for Government work.

[33]See Mega Const. Co., Inc. v. U.S., 29 Fed. Cl. 396, 415, 39 Cont. Cas. Fed. (CCH) P 76564 (1993) ("[T]he contract converted what would have been deemed a breach of contract into a claim for an equitable adjustment"). See also §§ 15:82, 15:83.

[34]See McGee Const. Co. v. Neshobe Development, Inc., 156 Vt. 550, 594 A.2d 415, 417 (1991) (opining that "contracting parties can define what will constitute a material breach of their contract").

For a discussion of materiality of breach in the context of the federal contract doctrine of "cardinal change," see Hess, "Cardinal Change" Doctrine in Federal Contracts Law, 9 A.L.R. Fed. 2d 565 (2006).

[35]See St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyo., 93 F. Supp. 2d 1170, 1175 (D. Wyo. 2000), aff'd, 6 Fed. Appx. 828 (10th Cir. 2001) ("The performance bond's express contemplation of a tardy completion by the surety due to contractor delays, manifested by its provision of liquidated damages for contractor delays, runs contrary to the notion that the [owner] could terminate [the surety] if it exceeded the completion deadline."). See also Metro Wastewater Reclamation Dist. v. Alfa Laval, Inc., 2008 WL 1924896 (D. Colo. 2008) ("Plaintiff could not terminate the contract, as the parties clearly intended for the contract to be completed notwithstanding the failure [of a product to meet performance] standards, and where [the remedy of] liquidated damages was prescribed as the remedy to address that performance issue.").

[36]See § 15:81.

the doctrine of "freedom to contract."[37] The ultimate legal effect is that any contractually authorized breach by either party for which the contract provides administrative redress cannot constitute a common-law breach of contract.[38] The most common breach conversion clauses[39] are those addressing changes,[40] suspension of the work,[41] misrepresentation of site conditions,[42] and termination for convenience.[43] Because unilateral changes in the work and time of performance are endemic to construction, and because

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[37]See McGee Const. Co. v. Neshobe Development, Inc., 156 Vt. 550, 594 A.2d 415, 417-418 (1991) ("It is axiomatic that parties can define their contractual relationship by the provisions employed in their contract. Contracting parties can define what will constitute a material breach of their contract. . . . They can determine the damages that are recoverable in the event of a breach. . . . Contracting parties can also provide for the dispute resolution procedure to be followed in case of breach.").

[38]See U.S. v. Utah Const. & Min. Co., 384 U.S. 394, 405, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966) ("[w]hen the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract"); Vermont Marble Co. v. Baltimore Contractors, Inc., 520 F. Supp. 922, 29 Cont. Cas. Fed. (CCH) ¶ 81786 (D.D.C. 1981) (contract payment provisions for extra work constituted an acknowledgment that the possibilities of delay and increased costs were contemplated at the outset of the contract and barred the contractor from treating the added work as a breach of contract justifying repudiation of the contract); St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyo., 93 F. Supp. 2d 1170, 1175 (D. Wyo. 2000), aff'd, 6 Fed. Appx. 828 (10th Cir. 2001) (Bond provision contemplating tardy completion precluded termination for delay in completion.).

[39]"Breach conversion" clauses in modern construction contracts address owner misrepresentation of soils conditions (the differing site conditions clause), owner suspension of the work (the suspension clause), owner delay (the time extension and no damages for delay clause), owner withholding of payment (the payment clause), and continuation of work pending resolution of claims (the dispute clause).

Another breach conversion clause in federal contracting is the "Government Delay of Work" clause prescribed by Federal Acquisition Regulation 52. 242-17, which provides "equitable adjustment" relief for government-caused delay but excludes profit from any recovery. To get around such "breach conversion" clauses, parties sometimes pursue cardinal change or cardinal delay theories comparable to "material breach" so as to justify claims recoverable outside of the contract under common law damage remedies. See §§ 4:10 to 4:12. See also Avery, Alternative Delay-Based Entitlement Theories to the Government Delay of Work Clause, 47 Proc. Law. 17 (Winter 2012) (discussing the "cardinal delay" and the "partial remedy" principles).

[40]See §§ 4:1, 4:2, 4:9 to 4:12.

[41]See §§ 15:83 to 15:88.

[42]See §§ 14:29, 14:46 to 14:52.

[43]See §§ 18:45 to 18:48. See also John B. Conomos, Inc. v. Sun Co., Inc. (R&M), 2003 PA Super 310, 831 A.2d 696 (2003) (upholding the recovery limita-

few construction projects are constructed exactly as planned, public and private construction contracts routinely contain clauses that authorize the owner unilaterally to change the work and time of performance, thereby (1) precluding changes within the scope of the clause and resulting delays from being classed as material breaches of contract,[44] and (2) converting what otherwise would constitute traditional common-law breaches into a contractual right.[45] Contracts also contain termination clauses that (1) seek to define breaches material enough to warrant termination of the contract for cause, (2) prescribe remedies available to the nonbreaching party,[46] and (3) even authorize the owner to terminate the contract without cause[47] and without obligation to pay for the contractor's lost profits on unperformed work.[48] Thus, any determination of just what constitutes a "breach"—let

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tion provision of a termination for convenience clause that limited the contractor's recovery to costs incurred prior to termination plus profit on those costs, and ruling that "the contract may prescribe the remedies available for breach. To the extent that the cause of action and remedies remain within the province of contract law, the contract may be binding in the determination of consequences of the breach").

[44]See Vermont Marble Co. v. Baltimore Contractors, Inc., 520 F. Supp. 922, 928, 29 Cont. Cas. Fed. (CCH) ¶ 81786 (D.D.C. 1981) ("In light of rider paragraph 32 [authorizing delays and suspensions for which claims could be presented], we conclude that even 'unreasonable' delays are not material breaches of this subcontract. Rather, a material breach might arise only if [the contractor] failed to pay a properly presented claim.").

[45]Examples are the American Institute of Architects Standard Articles addressing "changes in the work" and "suspension of the work." See AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 7, Changes in the Work, and ¶ 14.3, Suspension By the Owner for Convenience.

[46]See §§ 18:33 to 18:47. See also AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 14 (addresses termination and suspension of the contract); F.A.R. § 52.249-10, 48 C.F.R. § 52.249-10 (Federal Default Clause). See also Spotsylvania County School Bd. v. Seaboard Sur. Co., 243 Va. 202, 415 S.E.2d 120, 125, 73 Ed. Law Rep. 561 (1992).

[47]See §§ 18:45 to 18:47. See also AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 14.4 (termination by the owner for convenience); F.A.R. § 52.249-1, 48 C.F.R. § 52.249-1 (federal termination for convenience clause). See also Krygoski Const. Co., Inc. v. U.S., 94 F.3d 1537, 41 Cont. Cas. Fed. (CCH) ¶ 76985 (Fed. Cir. 1996) (discusses restraints on enforcement of the federal termination for convenience clause); Linan-Faye Const. Co., Inc. v. Housing Authority of City of Camden, 847 F. Supp. 1191 (D.N.J. 1994), judgment rev'd on other grounds, 49 F.3d 915 (3d Cir. 1995) (termination for convenience clause enforced); Desco Vitro Glaze of Schenectady, Inc. v. Mechanical Const. Corp., 159 A.D.2d 760, 552 N.Y.S.2d 185 (3d Dep't 1990).

[48]See G. L. Christian and Associates v. U. S., 160 Ct. Cl. 1, 312 F.2d 418 (1963) (holding termination for convenience clause mandated by federal regulation barred a contractor's common law right to recover lost profits for a termina-

alone a "material breach"—of a modern construction contract begins with extensive analysis to define the contractual rights and obligations in order within the legal parameters of the "scope of the undertaking".

Complicating further the analysis of unexcused breach and its materiality is the factual complexity of technical construction issues. Two critical considerations in judging the materiality of any construction contract breach are the extent of (1) conformance of work to the contract documents, and (2) job progress.[49] The farther satisfactory job performance and payment have progressed, the less endangered is the owner's interest in the remaining future performance and the risk of contractor forfeiture. Breaches by either side near the end of contract performance are less likely to have a material impact on remaining future performance than those occurring near the beginning of the performance. If a material breach is claimed to have impacted timely performance, the construction schedule and all causes of delay to its critical path must be reviewed.[50] If the material breach is claimed to be the contractor's defective work, the design intent of the contract plans and specifications must be evaluated against the quality of the work actually furnished, its suitability under applicable building codes, and its adequacy for the owner's intended use.[51]

Into this "tar pit" of extraordinarily complex legal and factual

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tion without cause and solely for the convenience of the government).

[49]The materiality of contract time is critical to an evaluation of a contractor's failure to make progress. See §§ 15:17 to 15:20. See R.R. Gregory Corp. v. Labar Enterprises of Rochester, Inc., 2007 WL 3376642 (E.D. Va. 2007) (finding a subcontractor to have materially breached its subcontract by failing to complete its work in accordance with the progress schedule).

[50]See §§ 15:5, 15:17 to 15:19, 15:29.

See also Bast Hatfield, Inc. v. Joseph R. Wunderlich, Inc., 78 A.D.3d 1270, 910 N.Y.S.2d 256 (3d Dep't 2010) (a subcontract was wrongfully terminated for unexcused delay, where the delay was attributable to the contractor's schedule mismanagement and the subcontract contained only the overall "project" completion date without any earlier date by which the subcontractor's work allegedly was to have been completed).

[51]See §§ 13:1, 13:2.

U.S. ex rel. Greenmoor, Inc. v. Travelers Cas. and Sur. Co. of America, 2009 WL 4730233, *50 (W.D. Pa. 2009) (citing treatise and finding that a subcontractor materially breached its subcontract agreement by failing to perform its work in conformance with the contract, namely, "to the satisfaction of [the contractor and the owner], and to the highest generally accepted level of care and skill ordinarily exercised by persons or entities performing services of the nature similar to that subcontractor is performing. . . . Not only did [the subcontractor] promise to perform to [the contractor's] satisfaction and do the highest level of care and skill, it also agreed to abide by the direction of the

issues surrounding construction contract scope are thrown judges and jurors who, with little technical background, are called upon to decide momentous issues of contract obligation and breach.[52] Because modern construction industry contract disputes commonly are burdened by factual and legal complexities[53] and contentious adversarial crossfire[54] involving competing claims as to which none of the parties have "acquitted themselves with pure grace,"[55] the fundamental issues of contract scope, breach,

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[owner's agent], which the subcontractor was found to have not done.").

[52]Judges and juries historically have been obliged to decide countless construction disputes invariably involving some issue of payment. Because of the complexities of modern construction contract disputes, the most widely used private construction contract forms call for disputes to be decided by mediation and arbitration rather than by court or jury. See AIA Document A201-1997, General Conditions ¶ 4.5 (mediation) and ¶ 4.6 (arbitration). Construction disputes with the federal government are decided without a jury, either by board of contract appeal or by the United States Court of Federal Claims.

[53]See U.S. for Use and Benefit of Cortolano & Barone, Inc. v. Morano Const. Corp., 724 F. Supp. 88 (S.D. N.Y. 1989), in which the trial judge was called upon to decide a fairly typical modern construction suit commenced by an unpaid Miller Act subcontractor whose $620,000 subcontract had been terminated and whose suit was answered by the contractor with a barrage of counterclaims. During the eight-day trial, "several hundred exhibits" and the testimony of five witnesses were received into evidence. The trial judge commenced his opinion as follows:

> By the skilled and experienced hands of able counsel for both sides, the court was led through the formation, performance and termination of a substantial subcontract . . . in connection with a government construction project for Stewart International Airport. Notwithstanding the assistance given the court, to account for the issues presented is almost as difficult as to track the progress of this construction job.

U.S. for Use and Benefit of Cortolano & Barone, Inc. v. Morano Const. Corp., 724 F. Supp. 88, 89 (S.D. N.Y. 1989).

[54]Any major construction dispute typically generates an extraordinary amount of contentious legal crossfire in the form of countervailing claims. See Cates Construction, Inc. v. Talbot Partners, 21 Cal. 4th 28, 86 Cal. Rptr. 2d 855, 876, 980 P.2d 407 (1999) ("Most often a [construction] dispute will involve claims, counterclaims, charges and countercharges. Seldom will any one party be altogether in the right."); Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1228 (10th Cir. 1999) (contentious disputes over subcontractor delays and contractor's interference in trial of a wrongful termination claim); District of Columbia v. Kora & Williams Corp., 743 A.2d 682, 693-696 (D.C. 1999) (upholding wrongful termination amid contentious claims); Paul Hardeman, Inc. v. Arkansas Power & Light Co., 380 F. Supp. 298, 310 (E.D. Ark. 1974) ("[n]either party was totally without blame, and both had committed a substantial number of 'breaches' of their expressed and implied contractual undertaking").

[55]See Decker & Co. v. West, 76 F.3d 1573, 1577, 40 Cont. Cas. Fed. (CCH) P 76887 (Fed. Cir. 1996), in which Circuit Judge Plager commenced the court's opinion thusly:

material breach, and their excusability frequently are viewed as downright difficult for even the most industrious jurist or conscientious juror to analyze. Few judges or jurors who have been called upon to decide the issue of unexcused breach in a complex construction case could fail to empathize with this lament:

> [E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this $100 million hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick, and *ad hoc* sort, analogous to ever-changing commands on the battlefield. Further, it is a difficult task for a court to be able to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on the job site [or by any other party for that matter], became so extreme, so debilitating and so unreasonable as to constitute a breach of contract between the contractor and a subcontractor. This was the formidable undertaking faced by the trial judge in the instant case . . .[56]

The difficulty of judges and lay jurors, even in the quiet of the

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> This is one of those messy government [construction] contract dispute cases in which, during the performance of the contract, neither of the parties acquitted themselves with pure grace. Working through the detailed record of such a case causes one to understand better the ancient curse of "a plague o' both their houses." See William Shakespeare, Romeo and Juliet, Act 3, Scene 1. Nevertheless, since the parties could not resolve their dispute, we must.

[56]Blake Const. Co., Inc. v. C. J. Coakley Co., Inc., 431 A.2d 569, 575 (D.C. 1981). See also Vermont Marble Co. v. Baltimore Contractors, Inc., 520 F. Supp. 922, 927, 29 Cont. Cas. Fed. (CCH) ¶ 81786 (D.D.C. 1981) (citing *Blake* and noting "we believe the subcontract was negotiated with special attention to the great uncertainties which face major participants in a monumental undertaking such as was the Dirksen [senate office building] project").

See also Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Authority, 2002 WL 31187691, *12 (Mass. Super. Ct. 2002), in which the court expressed its frustration with the complexity of the dispute before it as follows:

> The contract language . . . is sprawled over hundreds of pages and contained in several documents, not all speaking consistently with one another; and the 'record' is massive, covering literally thousands of pages. The burden placed on this court is immense, and, it fears, after all of its attempts to give fair attention and correct rulings to the various issues, whichever side does not prevail will first seek reconsideration and thereafter will ultimately appeal, and may well argue that the material facts remain in dispute. In short, this memorandum and the orders it produces may turn out to be an exercise in futility driven by a hugely over-litigated case. One need only look at the fact that the contract in issue contains provisions for a Disputes Review Board made up of three experts in the kind of construction at issue themselves have taken months to resolve some of these very same issues, only to be asked to reconsider

courtroom, in fairly deciding "precisely when the disorder and constant readjustment, which is to be expected . . . became so extreme, so debilitating and so unreasonable as to constitute a breach of contract," underscores the extraordinary burden of construction field personnel on the firing line in the heat of the construction process in making correct determinations of contract breach and its materiality under pressures imposed by obscured availability of facts, limited time to decide, frequent conflicting perspectives, and the risk of being second guessed in future litigation.

§ 18:3 Consequences of wrong assessment of materiality of breach upon termination for cause

The most highly leveraged decision in construction, bar none, is the decision to declare the contract terminated due to a material breach by the other party.[1] An owner's wrong decision to terminate the contract discharges both the contractor and its performance bond surety from all performance obligations,[2] and exposes the owner to liability to the contractor for lost profits and

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their initial conclusions and then, because their determinations are not binding, to have the issues raised again in this litigation. Here, a single judge—not a panel of experts in the subject of tunnel construction—is asked to resolve the issues because the parties themselves refuse to accept the decisions of their contractually assembled team of experts.

[Section 18:3]

[1]See Walker & Co. v. Harrison, 347 Mich. 630, 81 N.W.2d 352, 355 (1957) (the decision to terminate a contract "is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim").

[2]See St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyo., 93 F. Supp. 2d 1170 (D. Wyo. 2000), aff'd, 6 Fed. Appx. 828 (10th Cir. 2001) (obligee's wrongful termination of surety discharged performance bond obligations); U.S. ex rel. Virginia Beach Mechanical Services, Inc. v. SAMCO Const. Co., 39 F. Supp. 2d 661 (E.D. Va. 1999) (obligee's material breach of subcontract by wrongfully withholding payment discharged both the subcontractor and surety of their obligations under the bonded subcontract). Depending upon the language of the subcontract termination clauses, the termination of the prime contract also may result in termination of subcontracts. See Carolina Cas. Ins. Co. v. Ragan Mechanical Contractors, Inc., 262 Ga. App. 6, 584 S.E.2d 646 (2003) (holding that a subcontract was terminated by virtue of an owner's termination of a prime contract for default, and that the subcontractor had no obligation to continue performance of the subcontract under the prime contractor's take over of surety). When termination of the prime contract results in termination of subcontracts, subcontractors who are authorized to continue working after termination may recover under implied contract theory. See Encore Const. Corp. v. SC Bodner Const., Inc., 765 N.E.2d 223 (Ind. Ct. App. 2002).