

**Black Swans in Contract
Review** - Navigating the
Unthinkable



Great to meet everyone!



superlegal

Chris Lewis

VP Legal Operations

Utah-based attorney with 25 years of experience in real estate and business law, including construction litigation and construction contracts negotiations, representing subcontractors, architects, engineers, and other industry professionals. Engaged in litigation to enforce surety bonds, liens, security interests, and construction contracts.

Purpose and Learning Objectives

- ➔ **Recognize** a Black Swan event in contract review and its potential impact
- ➔ Identify **common vulnerabilities** in contracts exposed by unforeseeable disruptions
- ➔ Evaluate the effectiveness of key contract clauses in **managing unexpected risks**
- ➔ Apply **proactive strategies** to strengthen contract resilience and mitigate exposure

Contract Review - Pain Points

Time-Consuming

Complex Legal Jargon

Billable Hours

Risk Exposure

Lack of Expertise

Slow Turnaround

Uncertainty

Guesswork

High Cost

Missed Red Flags

Inefficiency

Contract Fatigue

Stress

Overwhelming Detail

Hidden Liabilities

Back-and-Forth

Distraction from Projects

What Is a Black Swan in the Legal World?

Definition: *A Black Swan is a rare, unpredictable event with major consequences. The ancient Roman term "black swan event" was popularized by Nassim Nicholas Taleb in his 2007 book, *The Black Swan*. It refers to highly improbable, unpredictable, and impactful events that are often rationalized after the fact, making them seem more predictable in hindsight.*

- Originated in **finance**, but highly relevant to **contracts**—especially in construction.
- These events aren't in your **risk matrix**, but they **redefine obligations** overnight.

Examples:

- The **early days of COVID-19**
- Sudden **tariffs on imported steel**

These events caught teams off guard-and created **massive legal and financial exposure**.

What Is a Black Swan in the Legal World?

Black swans shatter the illusion of certainty baked into our standard clauses.

Why This Matters Today:

Construction contracts must move from being **reactive** to **proactive**.

This session will show you **how to build resilience** into your business through your contracts.



Force Majeure—More Than Just Legal Boilerplate

What It Does:

Excuses **nonperformance** or **delays** caused by rare, uncontrollable events that prevent a party from fulfilling contractual duties.

- **Acts of God:** earthquakes, floods, wildfires, tornadoes, hurricanes, tsunamis
- **Acts of War or Terrorism:** riots, civil unrest, armed conflict
- **Government Actions:** embargoes, tariffs, laws
- **Labor Disputes:** strikes, lockouts
- **Disease:** pandemics, epidemics, outbreaks
- **Other unforeseen events:** fires, explosions, supply chain disruptions

May result in **termination** of the contract

Key Realities of Force Majeure Clauses

Narrowly Interpreted: Courts strictly limit application to specific events listed in the clause.

Example: COVID-19 didn't qualify unless disease, pandemics, or government action were explicitly mentioned.

Catch-alls Aren't Catch-alls: General terms like "other events beyond control" are read in the context of listed examples.

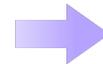
Wording Matters:

Does the clause require performance to be:

Impossible?

Impracticable?

Hindered?



These terms
change outcomes

Force Majeure in Practice

Causation Is Crucial:

- The event must **directly cause** the inability to perform-not just create inconvenience.
- *COVID-19 was not a blanket excuse.*

Foreseeability:

- Courts differ on whether the event must be **unforeseeable**.
- Safer bet: draft clauses to focus on events **outside party control** and **specifically listed**.

Lesson Learned from COVID-19:

- FM clauses went from **formality** to **essential tool**.
- They now demand **careful drafting and negotiation**.

Tariffs & Trade Policy Shifts - A Contractual Blind Spot

Context:

Earlier this year, sweeping **protective tariffs** raised import duties from an average **2.5% to 27%** - impacting nearly all goods entering the U.S. Whether supported or not, these shifts **hit the construction industry hard.**



Tariffs & Trade Policy Shifts - A Contractual Blind Spot

Impact on Construction

- **Material Costs Soared**
 - Steel & aluminum prices surged
 - **Iron cost spike** (Feb) → **~9% rise** in residential construction costs
- **Supply Chain Disruptions**
 - Delays in materials → project slowdowns
 - **Increased labor costs** due to inefficiencies
- **Fixed-Price Contracts Strained**
 - Providers often **absorbed unanticipated costs**
- **Planning & Bidding Uncertainty**
 - Few contracts addressed trade policy risk directly
 - Rarely included in **risk matrices** or **force majeure clauses**

Tariffs & Trade Policy Shifts - A Contractual Blind Spot

Contractual Considerations

- Price Adjustment Clauses?**
 - Allow **modification**, not termination, for tariff-related cost shifts
- Material-Specific Triggers?**
 - Cover key inputs like iron, aluminum, or imported steel
- Covered Events?**
 - **Are tariffs captured under:**
 - “Government action”?
 - “Supply chain disruption”?
 - If not-revise going forward

Bottom Line: *These aren't just economic or political issues—they are contract risks that need to be addressed proactively.*

Pandemics & Global Health Crises - A Legal Wake-Up Call

Before COVID-19:

- In a **10-year span**, <500 federal cases invoked **force majeure** to excuse contract performance.
- **None** dealt with **pandemics** or **national health crises**.

COVID-19 Changed That Overnight

Hundreds of new cases emerged post-COVID

Majority view:

- Clauses **must specifically mention** “pandemic,” “epidemic,” or “health crisis” to apply
- **General language** wasn’t enough

Pandemics & Global Health Crises - A Legal Wake-Up Call

Contract Drafting Post-COVID

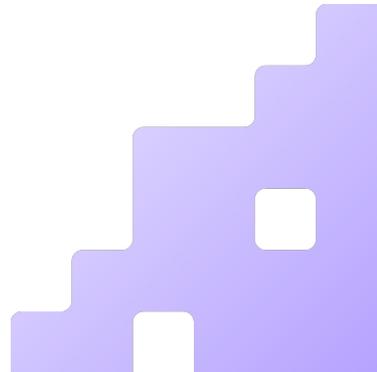
New standard inclusions now often read:

"Epidemic, pandemic (including the COVID-19 pandemic), quarantine, or public health emergency"

Terminology Matters

- **Epidemic** = widespread illness in a **region**
Pandemic = illness spread **globally**
- Clauses must **clearly reflect both** to avoid gaps in coverage

*COVID-19 exposed how unprepared most contracts were. Today, **clear, specific language** is essential to address future health crises.*



Cyberattacks & Data Breaches - The Hidden Force Majeure Risk

Traditional FM clauses: Acts of God & unforeseen events outside a party's control

Technology has changed that

1834 - First cyber attack I can find was in 1834 in France! Involved stealing market information exchanged by French telegraph system.

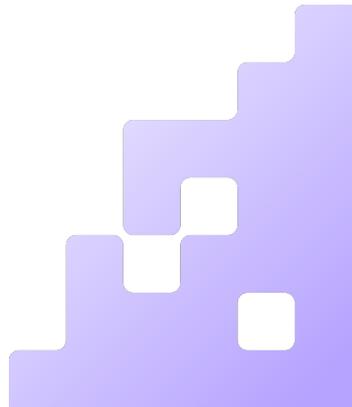
1962 - Allan Scherr extracted passwords from the MIT computer networks and shared them with friends

1971 - first computer virus (research experiment)

1981 - first person convicted for cybercrime (hacking AT&T's internal computers and changing the computer clocks, wreaking havoc)

1988 - first major internet attack-first worm

Exploded in the **'90s** as internet usage became commonplace, and **2000s**



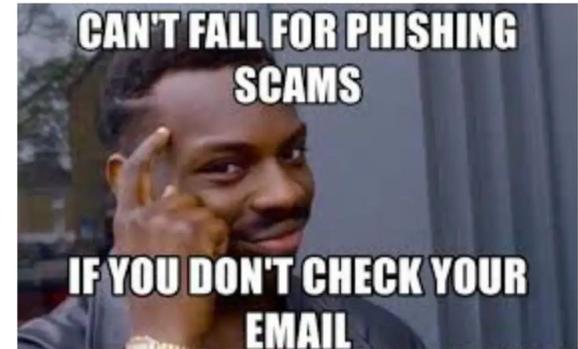
Cyberattacks & Data Breaches - The Hidden Force

Majeure Risk

Obviously the right way to avoid cyber security risks is not to avoid technology.

Now:

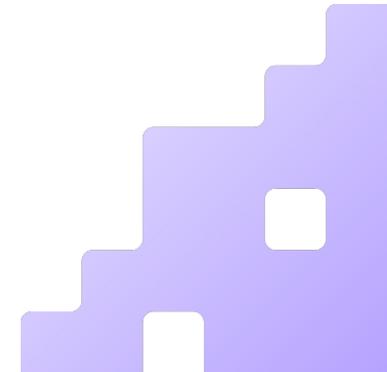
- Cybercrime is now a \$1.5 trillion industry
- Cybercrime is the number one global business risk
- The average cost of a data breach is now \$4.45 million USD
- 82% of breaches involve the cloud
- Cybercriminals are frequently targeting healthcare, which is now the top attacked industry
- Phishing and compromised credentials are the top two attack vectors
- Ransomware made up 24% of attacks in 2023



Cyberattacks & Data Breaches - The Hidden Force Majeure Risk

Cyberattacks Are on the Rise - But Are You Covered?

- Some contracts **specifically name cyberattacks** ("cyberattacks on critical systems" or "internet infrastructure failures,") as force majeure events → greater chance of enforceability
- Traditional contracts reference only "**Acts of God,**" "**theft,**" or "**malicious damage**" - coverage is **uncertain or limited**



Cyberattacks & Data Breaches - The Hidden Force Majeure Risk

Key Contractual Challenges

- **Performance vs Delay**
 - Is FM triggered only when performance is **impossible**?
 - Or does it apply if performance is merely **delayed** due to system outages?
- **Exclusions for War & Terrorism**
 - Many clauses exclude these - a problem when **state-linked** cyberattacks are suspected
 - **Attribution is difficult:** Hacker groups may have loose or unclear ties to governments or ideological movements

Cyberattacks & Data Breaches - The Hidden Force Majeure Risk

Burden of Proof Lies with the Impacted Party

To claim FM due to a cyberattack, you may need to show:

1. **Who** carried out the attack
2. That the attacker is **sufficiently linked** to a state or ideology (via threat intelligence, tools, aliases, etc.)

*Force majeure clauses must evolve to **explicitly address cyber risk** - vague language might not hold under modern threat scenarios.*

Climate-Related Disruptions - Rethinking Acts of God"

Traditional Force Majeure Language:

Acts of God (AOG):

*Acts of God (AOG): "An overwhelming, unpreventable event caused exclusively by forces of nature" Includes: earthquakes, floods, tornadoes - now often **broadened** to include **all exceptional natural events***

Climate-Related Disruptions - Rethinking "Acts of God"

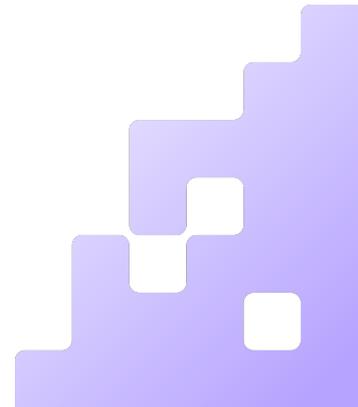
Evolving Risk Landscape

Extreme Weather Events

- Increasing in **frequency** and **severity**
- Disrupt supply chains, job sites, energy and water usage

Governmental & Regulatory Actions

- **Water restrictions, energy caps, and construction halts** in response to climate events
- Regulations tied to:
 - **Clean Air Act (1963)**
 - **Clean Water Act (1972)**
 - **Kyoto Protocol, Paris Agreement, etc.**



Climate-Related Disruptions - Rethinking "Acts of God"

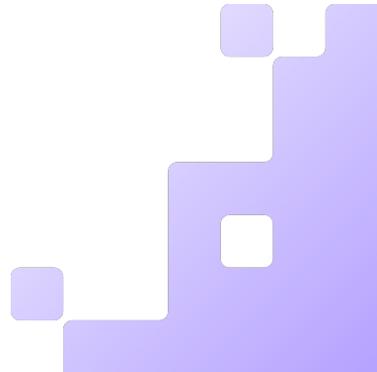
Implications for Contracts

Expect **more government interventions** tied to climate policy

FM clauses should clearly address:

- **Environmental regulation** changes
- **Climate-related natural disasters**
- **Compliance impacts** (e.g., site shutdowns, materials bans)

"Acts of God" is no longer enough. Contracts must evolve to reflect modern climate risk and policy realities.



Sudden Insolvency or M&A - When Your Counterparty Disappears

What Can Go Wrong?

Triggering Event:

- Insolvency or acquisition often gives rise to a **termination right**

Legal Complexities:

- **Insolvency laws** may override contract rights
 - Administrators/liquidators can **disclaim contracts**, leading to sudden **loss of rights**
- M&A activity may result in a **third party assuming** the obligations

Operational Impact:

- Delays or disruptions if contract doesn't allow **suspension of obligations**
- Uncertainty over continuity of services or deliveries



Sudden Insolvency or M&A - When Your Counterparty Disappears

Risk Mitigation Strategies

Pre-Contract Due Diligence

- Assess financial and ownership stability of the counterparty

Strong Contract Language

- **Include rights to:**
 - **Suspend** or **terminate** obligations
 - Define clear **effects of termination**

Ongoing Monitoring

- Regularly evaluate the financial health of key vendors or partners

*Contract stability is only as strong as the party on the other side - plan for sudden changes **before** they happen.*

War as a Black Swan - Legal & Operational Shockwaves

Case in Point:

Russian Invasion of Ukraine

- Disrupted global trade: **oil, gas, agriculture**
- Triggered **sanctions**, foreign company exits, billions in economic loss



War as a Black Swan - Legal & Operational Shockwaves

Consequences for Construction Contracts

- **Supply Chain Disruptions**
- **Contract Interruptions** (due to sanctions or counterparties affected)
- **Government Actions:** Sanctions, trade bans, export controls
- **Operational Disruptions:** Site closures, halted projects
- **Labor Shortages:** Military mobilization → employees unavailable

War as a Black Swan - Legal & Operational Shockwaves

Legal Considerations

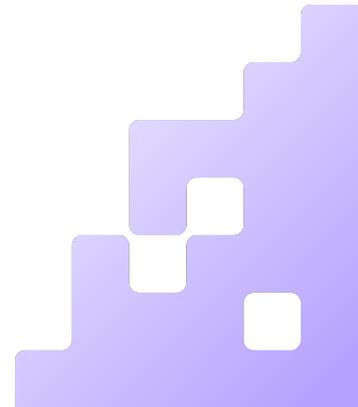
Force Majeure May Apply

- But often only allows for **temporary suspension**, not full **termination**
- Definition of “war” has **broadened**:
 - Once limited to **formally declared war**
 - Now includes broader **armed conflicts**

Alternative Clauses to Review

- Price Adjustment Clauses
- Material Adverse Change (MAC) or Material Adverse Effect (MAE) provisions

Modern conflict impacts contracts far beyond the battlefield - make sure your agreements reflect the real scope of wartime disruption.



Conclusion - Preparing Contracts for Black Swans

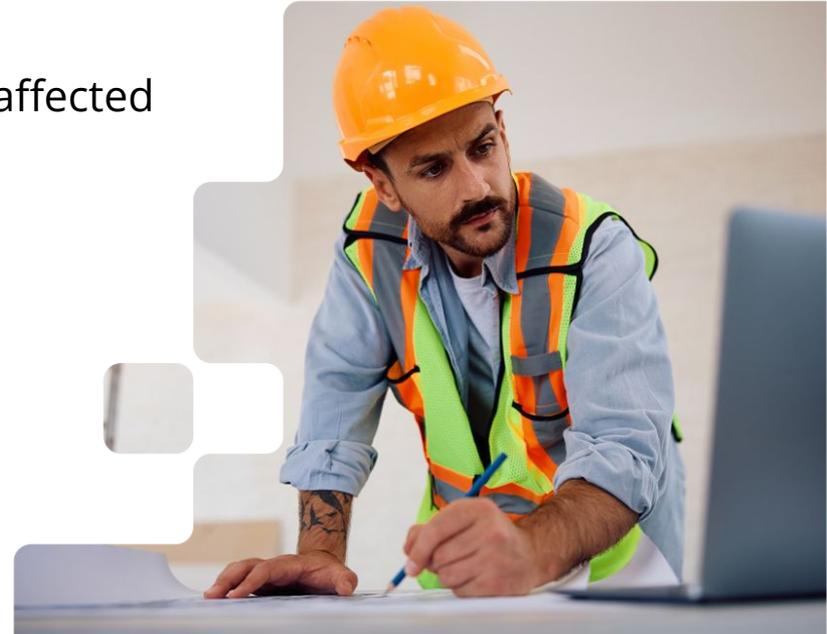
1. Define & Limit Triggering Events

- Be specific about what constitutes a **force majeure** event—if it's not included, best to assume it's not covered (an exception to enforcing contracts)
- Include modern risks: **pandemics, cyberattacks, trade shifts, war**
- Maintain a **catch-all** for events **outside party control**
- Remember: Courts now expect pandemics to be **explicitly listed**

Conclusion - Preparing Contracts for Black Swans

2. Clarify Scope of Non-Performance

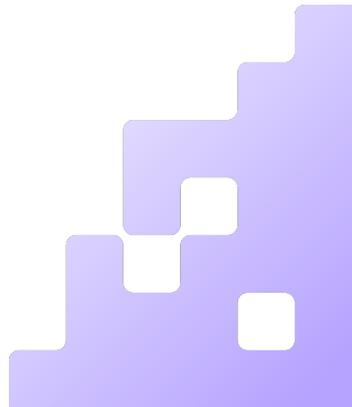
- State whether non-performance is **temporary** or allows for **termination**
- Specify if **both parties** are excused—or only the affected party



Conclusion - Preparing Contracts for Black Swans

3. Require a Causal Link

- Performance must be impacted **because of** the event—not just during it
- Carefully select wording:
 - **“Impossible,” “impracticable,” “hindered”** each carry different legal weight



Conclusion - Preparing Contracts for Black Swans

4. Address In-Progress Work & Next Steps

- Acknowledge work done **prior to disruption**
- Define obligations going forward:
 - Effective dates
 - Notice requirements
 - Mitigation duties

*Black swan events are unpredictable—but how your contract responds to them **shouldn't be.***

Conclusion - Essential Contract Language for Shock Events

Well-drafted contracts are your first line of defense against global disruptions, operational delays, and legal uncertainty. Prioritize the following provisions:

1. Force Majeure

- Excuses performance due to **unforeseen events** (e.g., war, pandemics, natural disasters)
- Clearly define triggering events
- Specify **consequences**: suspension, termination rights
- Include **notification and mitigation** requirements

Conclusion - Essential Contract Language for Shock Events

2. Supply Chain Disruption

- Address vulnerability in **global sourcing and logistics**
- Require:
 - **Business Continuity Plans**
 - **Prompt notification** of failures
 - **Defined liability** for delivery shortfalls
- Consider adding:
 - A formal **Supply Chain Disruption & Contingency Plan**

Conclusion - Essential Contract Language for Shock Events

3. Business Continuity & Resilience

- Ensure both parties commit to **maintaining operations** during crisis
- Require:
 - **Disaster recovery protocols**
 - **Cooperation during incidents**
 - Strategies to **maintain essential services/deliverables**

Shock events are unavoidable. Contract clarity ensures your business doesn't get caught off guard.

Conclusions: Real-world case studies and lessons learned

Past disruptions offer critical lessons for building resilience:

- **Hershey (1999):**
Poorly timed system overhaul during peak season caused integration failure and lost sales.
 - *Lesson:* Avoid major system changes during peak periods; phase and test carefully.
- **KFC UK Supply Chain Collapse:**
Switch to a single distributor caused nationwide closures.
 - *Lesson:* Avoid single points of failure; test changes and choose experienced partners.
- **Global Shock Events:**
From the **1973 oil crisis** to **COVID-19**, supply chain shocks emphasize the need for:
 - *Diversification, proactive risk assessment, and strong contingency plans.*

Conclusions: Proactive risk management techniques

Legal and procurement teams must move from reactive to proactive risk management. Key strategies include:

- **Risk Identification & Assessment**
 - Evaluate supplier, market, and operational risks using data, expert input, and scenario planning.
- **Supplier Evaluation & Diversification**
 - Conduct due diligence and spread risk across regions and industries.
- **Strong Contractual Terms**
 - Use clear, updated contracts with defined obligations, standards, and dispute clauses.
- **Ongoing Monitoring**
 - Track supplier performance, compliance, and financial health in real time.

Conclusions: Proactive risk management techniques

- **Technology Tools**
 - Use e-procurement systems, AI analytics, and automation to improve visibility and control.
- **Compliance & Regulation**
 - Stay current on laws, train teams, and build frameworks to avoid legal risk.
- **Contingency Planning**
 - Create and test backup sourcing, crisis procedures, and financial risk plans.
- **Collaboration & Communication**
 - Promote cross-functional alignment and open dialogue with key stakeholders.



Conclusions: Proactive risk management techniques

By strategically implementing these contract language enhancements, learning from real-world examples, and adopting proactive risk management techniques, businesses can build resilience, minimize the impact of future shock events, and ensure long-term stability and success.

QUESTIONS?



Superlegal is an AI-powered contract review platform built for construction companies.

By combining advanced AI with expert attorney oversight, Superlegal helps businesses cut legal costs by up to 90% while accelerating contract reviews.

The platform spots risky clauses, ensures agreements align with project goals, and simplifies complex legal work - so teams can save time, reduce reliance on costly outside counsel, and focus on building, not paperwork.

The screenshot displays the Superlegal interface for reviewing a "Subcontract Agreement". The main document text includes:

This Subcontract Agreement ("Agreement"), dated as of January 1, 2025 (the "Effective Date"), is entered into between Alpha Beta Company, LLC, a limited liability company, ("Subcontractor") and Contractors, Inc., a corporation ("Contractor"). Each party may be referred to herein individually and collectively as "Parties".

1. Services. Subcontractor shall provide to Contractor the services (the "Services") described in one or more statements of work issued by Contractor and accepted by Subcontractor (each, a "SOW") in the form shown in Exhibit B. A SOW shall be effective only if in writing and signed by both Parties. In the event of any conflict between this Agreement and any SOW, purchase order or any other documents, this Agreement shall govern.

2. Change Orders. Subcontractor shall not make any changes or additions to a SOW except by written order signed by both Parties. Contractor. Upon receipt of a request for a change to an SOW from Contractor, Subcontractor shall, within a reasonable time immediately after each such request, provide a written estimate to Contractor of (i) the likely time required to implement the change; (ii) any necessary variations to the fees.

The interface also features an "AI Markup Summary" sidebar on the left with sections for "Revised Issues" (listing "Pay when paid" and "Liquidated damages and indemnification") and "Added Issues". A chat window on the right shows a confirmation from "Jason Thomas, SUPERLEGAL ATTORNEY": "I have reviewed the AI modifications. This contract is approved and ready to be sent to the counterparty."