

## Defenses to construction contract performance



Owen P. Quinn, John Gambill | Tuesday, July 7, 2020

Industry experts predict that the current pandemic will likely result in a flood of litigation in the construction industry. Project owners, contractors, material suppliers, and equipment rental companies are understandably concerned about either getting dragged into disputes or being forced to bring actions themselves due to COVID-19 impacts and related issues on projects. Most contractors are aware that force majeure clauses may excuse a party's performance or delayed performance of contract terms. However, if you either do not have a contract or your contract does not contain a force majeure provision, you should be aware of the common law doctrines of impossibility, impracticability, and commercial frustration that can excuse contract obligations and when they apply.

### **Doctrine of impossibility (or impracticability) of performance**

Impossibility of performance is a contractual doctrine excusing performance where performance is rendered objectively impossible due to supervening causes beyond the control and not foreseeable by either party, such as weather, acts of government, or (you guessed it) a global pandemic. While some courts require that performance be literally impossible for the doctrine to apply, many courts have held that "impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficult, expense, injury or loss involved." This is referred to as the impracticability defense and applies only where: (1) the circumstances creating the impossibility were not and could not have been anticipated by the parties; and (2) the party asserting the doctrine demonstrates that it did not contribute

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to the circumstances and tried all practical alternatives available to permit performance.

### **Doctrine of commercial frustration**

The doctrine of commercial frustration is similar to the doctrine of impossibility of performance, since both arise from the commercial necessity to excuse performance in cases of extreme hardship. However, under the doctrine of commercial frustration, performance remains possible, but the expected value of the performance of the party seeking to be excused has been destroyed by a fortuitous event that supervenes to cause a complete (or nearly complete) frustration of the purpose underlying the contract. Under this doctrine, a party must demonstrate that “the frustrating event was not reasonably foreseeable and the value of counter performance has been totally or nearly totally destroyed by the frustrating event.”

Parties invoking the doctrines of impossibility or commercial frustration bear the burden of proving their applicability to their case and, if there is a force majeure provision in the contract, it may supersede the common law defenses.

If you are seeking to justify your nonperformance of a construction contract, you should explore all reasonable options to overcome the impediment to performance. For example, if one of your suppliers can't get the material you need; try and locate an alternate source. You should also give notice to the other party as soon as possible. Even without a contractual requirement, the courts may consider notice in determining the equities of the situation.

If someone is demanding that you excuse their performance, you must remember your duty to act in good faith and mitigate damages if possible. You should also keep records of notice, mitigation and good-faith attempts to accommodate.



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