



## **May the Force Majeure Be with You: Understanding Impossibility, Impracticability, and Frustration of Purpose**

**Litigation and Dispute Resolution**



With the COVID-19 pandemic, [companies face disruptions](#) to their supply chains, vendors that stop providing services, and customers who seemingly vanish. Who is responsible when business fails due to a pandemic? What should a company do when its vendors cannot fulfill orders when all

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their [employees stay home](#)? And how can a company avoid payment when its revenue stream has dried up?

With the [COVID-19 pandemic](#), an oft-forgotten body of contract law — impossibility, impracticability, and frustration of purpose — has taken a front seat. Similarly, an oft-forgotten contract clause, the “force majeure” clause, is suddenly at the forefront of everyone’s mind.

In the first part of this two-part series, we’ll explore the common law and the Uniform Commercial Code (UCC) guidance on impossibility, impracticability, and frustration of purpose. In the second part of this two-part series, we’ll explore the anatomy and effect of force majeure clauses.

## **Understanding impossibility, impracticability, and frustration of purpose**

As a general rule, contract liability is strict liability. Each party to a contract is required to perform as that party promised under a contract. While this is a harsh rule, it is a bedrock principle of contract law.

However, when there are “[extraordinary circumstances](#),” courts provide some leniency for the parties. This leniency for extraordinary circumstances generally occurs where the contract is either impossible or impracticable to perform, or the purpose of the contract is frustrated. Each of these three issues will be discussed in turn.

### **Impossibility**

Occasionally, contractual performance becomes truly impossible. For example, if the contract is for the consulting services of a specific individual, and that individual dies, the consulting contract becomes impossible to perform. Likewise, if a contract is for the sale of a commodity from one specific site (e.g., grapes from one specific vineyard) and a fire destroys the specific site, the contract is impossible to perform.

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If a contract is impossible to perform, courts generally will not enforce the contract. That means that neither side will be held to their promises. The providing party does not have to deliver, and the paying party does not have to pay. It is as if the contract never existed.

However, the more frequent situation is that a contract becomes impracticable to perform. It is not atypical for courts to refer to both impracticability and impossibility synonymously, though of course they are not truly synonymous.

### **Impracticability**

Extraordinary circumstances may make a contract impracticable for one or both parties to perform. The question naturally arises as to what circumstances warrant such a finding and what circumstances do not warrant such a finding.

A contract is impracticable based upon, for example:

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- A severe shortage of raw materials, making a sale of goods impracticable;
  - Severe personal danger for a party to perform; or
  - Performance of the contract would violate a law, regulation, or order.

On the other hand, a contract is not impracticable based upon, for example:

- The financial condition of the parties;
- A change in circumstances that makes the contract less profitable; or
- If there's an alternate way to perform the contract.

Several of these examples are critical in light of the COVID-19 pandemic, but perhaps foremost is the financial condition of the parties. Companies should remember that in general, financial distress caused by economic repercussions of the pandemic and the government's response to it, is not sufficient to make a contract unenforceable. (Restatement (Second) of Contracts § 261 cmt. a (1981) ("[mere market shifts or financial inability do not usually effect discharge](#)").)

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On the other hand, with the myriad of stay-at-home and [close-business orders](#), performing many contracts literally violates the law. Scores of service contracts will likely become impracticable due to these novel governmental orders in response to COVID-19. By way of one of a countless number of examples, a convention center can no longer legally hold a convention given stay-at-home, social distancing, and closure orders, so the contract is impracticable.

It's important to note that a contract is legally impracticable for violation of a government rule, regardless of whether the rule is a law, regulation, or order; and it's impracticable regardless of whether the rule comes from the federal, state, or local level. And, a contract is impracticable for violation of a government rule even if the rule is later ruled invalid. Accordingly, even if courts rule the COVID-19 stay-at-home orders were unconstitutional violations of the First and Fourteenth Amendments, the stay-at-home orders would have still validly excused the parties' performance under contracts.

What happens when a contract becomes impracticable? Like an impossible contract, as a general matter, courts will relieve both parties from performance. If a change in law prevents one party from [performing under a contract](#):

*"The duty of the other party to the contract is also discharged, not because that party's performance is prohibited or prevented, but because it is not required to give something for nothing."*

## **Frustration of purpose**

A contract may still be possible to perform, but a change in circumstances might frustrate the entire purpose of the contract. To illustrate the point, assume that two parties entered into a contract to purchase billboard advertising space next to multiple Olympic venues for the 2020 Summer Olympics. Assume further the contract was to be governed under US law and was only specifically to be performed during the timeframe of July 20 to August 10, 2020.

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This contract is still certainly performable. The owner of the billboards can still sell the billboard space in the summer of 2020, and the buyer of the billboard ad space can still put up their advertisements in the summer of 2020. However, the entire purpose of the contract has been frustrated as the Olympics are no longer occurring in the summer of 2020 due to the COVID-19 pandemic.

Millions of spectators will not see the billboards, and no television cameras will capture for worldwide viewing these advertising images. As such, the frustration of purpose doctrine provides a basis to avoid a contract. It relieves the parties of performance even though the contract may still technically be able to be performed because the purpose behind the contract has disappeared.

## **Notice and alternative performance**

No discussion of the law of impossibility, impracticability, and frustration of purpose can be complete without a discussion of two key requirements of the party who is not performing its obligations under the contract.

First, the party who will not perform usually must provide notice in order to be excused from performance. As the UCC explains, “[t]he [seller must notify the buyer](#) seasonably that there will be delay or non-delivery” of the goods owing to impossibility, impracticability, or frustration of purpose.

Second, if a party can still partially perform the contract, or perform the contract by alternate means, it is still required to do so. In other words, if a company can no longer obtain the necessary raw materials from its usual foreign source due to COVID-19 import or export restrictions, but it can obtain those same raw materials from another country, it may well be obligated to do so and continue its performance under the contract.

[\[Make It Work: Finding Normalcy in Uncertain Times\]](#)

Likewise, partial performance, as long as it is practical, is still required. Thus, if a company was required to supply 1,000 widgets under a contract, but the inability to get raw materials due to COVID-19 restrictions means it only has 500 widgets it can supply, it is still required to at least supply 500 widgets.

Similarly, depending upon the circumstances, a party to a contract may still have to perform the contract once the COVID-19 pandemic is over, even if the COVID-19 pandemic temporarily excuses its failure to perform.

## **Financial condition of the parties**

No doubt, many readers of this article are facing a situation where their clients cannot possibly carry out their contractual obligations because they can no longer afford to do so. The economic reality of COVID-19 shutting down entire industries, or decimating bottom lines even in companies that remain viable, may make execution of a contract unwise from the standpoint of trying to stay in business. How could, and why would, a business pay for goods or services from which it can no longer benefit?

In these situations, despite facing potential contractual liability, a party to a contract may nevertheless

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choose not to perform. If this is a scenario you or your clients find yourself in, communication is key. All contracts can be amended by subsequent writings. Negotiate to amend your contracts to the extent possible. And realize that the party on the other side of your contract may in fact be in your shoes vis-à-vis another contract they are in. A bargain can almost always be struck, especially in times of unprecedented uncertainty.

Visit [ACC's COVID-19 Resource Center](#) for more legal best practices on the coronavirus pandemic.

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