

# Three Key Defenses to Contractual Performance: Force Majeure, Commercial Impracticability, and Frustration of Purpose

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## Supply Chain Disruption: Article 8

With disruptions affecting every aspect of the supply chain, companies are increasingly encountering legal arguments offered to justify a failure to meet supply obligations. This article in the Supply Chain Disruption Series provides a concise summary of the three legal theories frequently invoked to excuse nonperformance of contractual duties.

## Force Majeure

### Overview

The concept of force majeure (French for “superior force”) originates in common law. Today, however, force majeure primarily comes into legal play as a result of an express provision in a commercial contract. This mechanism is used to reallocate the risks of loss associated with a failure to perform if the failure is caused by specified events or occurrences. Force majeure provisions have taken on greater importance given the increased supply chain disruptions, labor stoppages and slowdowns, and freight delays arising directly and indirectly from the COVID-19 pandemic.

Force majeure clauses set forth the circumstances in which a party owing a duty under the contract (the obligor) is excused from all or partial performance of that obligation, typically due to circumstances beyond the obligor’s reasonable control. Although state law varies, courts tend to construe force majeure clauses narrowly. If the alleged force majeure event is expressly listed in a contract as an occurrence that excuses performance, the parties obviously contemplated the risk and

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decided to shift the risk of the specified event to the party benefitting from the obligation (the obligee). If the specified event occurs, the obligor is excused from performance for the duration of the event or for some other time period specified in the force majeure provision. If the force majeure event is not listed or is expressly excluded, however, courts are likely to find that the risk of that event should remain with the obligor.

For any specified circumstances to be excused as a force majeure event, the event must actually prevent performance. In addition, the event must be wholly outside of the impacted party's influence or control, unless otherwise provided in the contract. Stated differently, if an event may be prevented by the impacted party, or if the impacted party did not do everything it could do to avoid the event, it may not constitute a condition excusing performance under the force majeure clause.

## **Catch-All Provisions**

Although courts narrowly construe force majeure provisions, many provisions contain "catch-all" language such as "or any other circumstances beyond a party's reasonable control." Courts in some states construe these provisions very narrowly so that only events similar to the itemized list will be captured under the catch-all provision.<sup>1</sup> Courts in other states construe these provisions more expansively, focusing more closely on whether or not the event was beyond a party's reasonable control.

## **Duty to Mitigate**

Even if a contract states that a party must mitigate a force majeure event, the scope of the duty to mitigate will vary from state to state. In some states, the duty arises only when mitigation can be done at minimal or reasonable expense or effort. In states that do not have any case law regarding mitigation of damages in the force majeure context, courts generally hold parties to the same general standard of mitigation used in breach of contract cases.

In addition to specifying whether there is a requirement to mitigate under the terms of the contract, parties also may expressly state that partial performance may (or may not) be excused. Courts may consider partial performance, if practical or reasonable, to be an attempt to comply with the common law duty to mitigate damages.

## **Commercial Impracticability**

### **Overview**

If a contract is silent on force majeure or if the event does not meet the definition of force majeure under the parties' contract, a party's performance may still be excused in certain circumstances under the doctrine of commercial impracticability. That doctrine is applied if there is an unanticipated circumstance that has made the performance of the contract vitally different from what should reasonably have been within the contemplation of the parties when the contract was executed. The rationale for the impracticability defense is that the circumstance causing the breach has rendered performance so critically different from what was anticipated, that the contract cannot be reasonably thought to govern the scenario. Impracticability functions as a gap filler, and therefore does not alter the allocation of risk already existing in a contract.

Impracticability is a common law doctrine. In some states, the doctrine is impossibility, rather than impracticability, with impossibility being a higher standard that requires the obligation be impossible

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to perform, as opposed to only impracticable.

In states that have adopted Article 2 of the Uniform Commercial Code (UCC) to govern contracts for the sale of goods, the doctrine of impracticability has been codified as UCC § 2-615.<sup>2</sup> That section provides that performance of the contract's obligations may be excused if it is made impracticable either (1) "by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made" or (2) "by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid."<sup>3</sup>

## **Four Part Test Under The UCC**

In determining whether an event renders performance under the contract to be "commercially impracticable" under UCC §2-615, courts employ a four part test, which requires a showing that there was:

1. An unanticipated circumstance.
2. That the circumstance was not foreseeable.
3. The non-performing party did not contribute to the circumstance
4. The non-performing party tried all practical alternatives

The test for whether the event was foreseeable involves consideration of whether the risk of the circumstance, event, or contingency was unusual or unforeseen, and the result so severe that performance would grant the other party an advantage not bargained for in the contract. If a contingency is foreseeable, commercial impracticability is not applicable since the parties may have contemplated the contingency's occurrence in the contract.

## **Seasonable Notice and Reasonable Allocation Under the UCC**

A non-performing party must seasonably notify the other party of delay or non-delivery.<sup>4</sup> If the cause of impracticability only partly impairs a supplier's ability to deliver goods, then the party must allocate production and deliveries among customers and seasonably notify such customers of the estimated quota made available to the customer.<sup>5</sup> In allocating production and deliveries, the non-performing party may include regular customers not then under contract and the party's own requirements for further manufacture, so long as the allocation is fair and reasonable.

## **Frustration of Purpose**

### **Overview**

The legal theory of frustration of purpose excuses performance when the cessation or nonexistence of some particular condition or state of things has rendered performance impossible and the object of the contract frustrated. This theory comes into play when, based on the contract and surrounding context, the parties obviously assumed a particular condition or state of circumstances would continue to exist. If that condition or state ceases to exist, a court may find that the entire purpose of the contract is frustrated.

Unlike force majeure and impracticability, which focus on the ability of the obligor to perform,

frustration of purpose focuses primarily on the obligee's ability to enjoy the benefits of the bargain. A simple example illustrates the difference. Sallie contracts with a swim coach to help her prepare for the Olympics. After executing the contract but before the coaching begins, Sallie gets in a car accident and is left quadriplegic. The swim coach may still stand ready to coach Sallie, but Sallie's purpose for entering the contract has been frustrated.

## Restatement (Second) of Contracts

The Restatement (Second) of Contracts § 265 provides that frustration of purpose may excuse performance when, so long as the language or circumstances do not indicate the contrary: (1) a party's principal purpose is substantially frustrated; (2) such party is not at fault; and (3) the contract was made on the basic assumption that the cause of the frustration would not occur.

## Two Part Test

The doctrine is generally given a narrow construction to be applied sparingly. Further, courts apply a "rigorous" two-part test. It must be shown that (1) the frustrating event was not reasonably foreseeable; and (2) the value of performance has been totally or nearly totally destroyed by the frustrating event.

## Conclusion

When navigating supply chain disruptions and uncertainties, companies should understand the legal defenses available to excuse performance. Companies can allocate certain risks through express force majeure provisions in their contracts. In the absence of such bargained-for provisions, additional defenses to performance such as commercial impracticability and frustration of purpose may arise under statute or common law.

Legal Theory	Source	Focus	What events trigger excuse?
Force Majeure	Contract	Ability to perform	Listed events
Commercial Impracticability	Common law (services)	Ability to perform	Unforeseen events
	UCC (goods)		
Frustration of Purpose	Common law	Value of performance	Unforeseen events

## FOOTNOTES

<sup>1</sup> This approach follows the doctrine of *ejusdem generis* (a Latin term meaning "of the same class"). Under this doctrine, general catch-all clauses are construed to include only those unlisted events that are of the same type as the other listed events.

<sup>2</sup> Louisiana is the only state that has not adopted Article 2 of the Uniform Commercial Code. Uniform Laws Annotated (Ed. Note 2021).

<sup>3</sup> UCC § 2-615(1)

<sup>4</sup> *Id.* § 2-615(3)

<sup>5</sup> *Id.* § 2-615(2)

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