Imagine these scenarios:

- Your company cannot perform a contract because of the COVID-19 pandemic.
- A vendor informs you that she cannot provide your company with necessary goods because of supply chain issues caused by a governmental emergency declaration.
- A subcontractor cannot perform because its employees are self-quarantining.

These are not hypotheticals. Scenarios like these are playing out around the country. The real-world impact of the COVID-19 pandemic is colliding with contractual requirements, and there is new attention to the legal doctrines of “impossibility,” “frustration of purpose,” “impracticability, and “force majeure.”

What do they mean? In a nutshell, traditional contract law says that an
unforeseeable event occurring after the contract was formed can excuse contract performance, and determining whether an event was unforeseeable will depend heavily on the specific facts and the language of the contract.

**Impossibility:** When virtually cataclysmic and wholly unforeseeable events make performance “impossible,” performance can be excused. Changes in market conditions or economic hardship do not excuse performance. Nor are increased costs enough to excuse performance. Contract performance can be excused only when it is objectively impossible, not just financially unfavorable or impractical. If a party can render performance with additional time, money, energy, or resources, impossibility is not an excuse. Decreased revenues or cash flow due to the pandemic would not excuse contractual performance, but if roads have been closed or transportation has been halted by an executive order, then the performance of a contract to deliver goods could be deemed “impossible.” It objectively cannot be done.

**Frustration of Purpose:** In a situation in which both parties’ primary purpose for entering a transaction is frustrated by an unpredictable event that destroys the basic foundation of the parties’ agreement, a court can find that performance is excused because its purpose is frustrated by an event the nonoccurrence that was a basic assumption upon which the contract was made. One historic example is a fire that necessitated a massive timber rehabilitation and found to frustrate the purpose of a federal contract for the removal and sale of timber. *Spalding & Son, Inc. v. United States*, 28 Fed. Cl. 242 (1993). An analogous situation could occur with COVID-19 if, for example, an event planner had a contract with a venue for conference space but all meetings in the locality were prohibited due to government prohibitions on large meetings. The purpose of the contract—to host the event—would be frustrated through no fault of either party and performance might be excused.

**Impracticability:** Another potential excuse for contractual nonperformance in the context of the COVID-19 crisis is impracticability. This doctrine excuses performance of a duty when the duty has become unfeasibly difficult or expensive for the party who was to perform. This is distinct from the doctrine of impossibility. Impracticability comes into play where performance is still physically possible, but would be extremely and unreasonably burdensome for the party whose performance is due. Supply problems caused by the COVID-19 virus may make performance impracticable. In fact, one of the comments to the Restatement (Second) of Contracts § 261 discusses excusing a duty to deliver goods due to a quarantine-related port closure. Another difference from the doctrine of impossibility is that impracticability may not excuse complete nonperformance—the parties still must fulfill the contract to the extent it is practical and reasonable to do so. This may mean that a party would be required to perform partially during the worst of the COVID-19 pandemic, or to perform fully at a date later than that called for in the original contract.

**Force majeure:** *Force majeure* refers to a contractual provision that limits liability due to unforeseen events outside the control of the parties that delay or prevent performance of the contract. Unlike the defenses discussed above, which are drawn from the common law, a party’s ability to delay or discontinue performance based upon a *force majeure* event depends upon the specific terms of the contract. In general, courts enforce a *force majeure* provision according to its terms. These
clauses will often specify possible events that are considered unforeseeable by the contracting parties. For example, “acts of God” (such as fires, earthquakes, and floods), war, and epidemics may be listed as events that would excuse performance. In the case of COVID-19, if the force majeure clause lists “act of God” as a force majeure event, but not “epidemic” or “pandemic,” a court may or may not agree that COVID-19 is a covered event.

**What can you do about it?** For existing contracts, you should not assume that your company needs to bear the entire cost of dealing with COVID-19. A careful review of the facts and the governing law, as well as the specific contract language, may present opportunities to avoid or delay performance and lead to a more equitable sharing of the burden of the pandemic. For future contracts, the answer is preventative measures. *Force majeure* clauses should include language that would cover pandemics, and parties should consider whether it is appropriate to limit liability using non-punitive liquidated damages provisions.

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