

What if my contract does not have a force majeure clause?

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Even if a contract does not have a force majeure clause, a party looking to excuse its performance under a contract still may have options under the law. The common law doctrines of “commercial impracticability/impossibility” and “frustration of purpose” may provide relief where a contract is silent with respect to force majeure.

Commercial Impracticability/Impossibility

Though the law varies by state, as a general matter, a party may be excused from performance if it can establish that, due to the occurrence of an unexpected event—the “non-occurrence” of which was a “basic assumption” of the parties when entering the agreement—performance has been rendered “impracticable.” This principle has traditionally been invoked in three categories of cases: 1) the death or incapacity of a person necessary for performance, 2) the destruction of a specific thing necessary for performance, and 3) government action that prohibits performance or imposes requirements that make performance impracticable. But these categories are not exhaustive, and the scope of the doctrine has generally expanded over time.

Some jurisdictions (including New York) permit invocation of this excuse only if performance is truly impossible. Other jurisdictions (including California) permit this excuse if performance is “impracticable”—in other words, if performance will involve “extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.” For example, performance may be “impracticable” in the case of a severe shortage of raw materials or of supplies due to an unforeseen event, which causes a marked increase in cost or prevents performance altogether. A mere change, however, in the degree of difficulty or expense, unless far outside the ordinary, will not give rise to impracticability since parties assume such a risk when contracting.

While the principle now has a broader reach than it once did in many jurisdictions, it still cannot generally be invoked on the basis of dramatic market shifts, issues with the availability of credit, and/or the performing parties’ financial health. As a general matter courts take the view that the continuation of existing market conditions and of the financial situation of the parties ordinarily is *not* assumed when entering an agreement. For that reason, much like force majeure, it is critical that the intervening event *itself* have an impact on performance—the further attenuated the connection between the event and contract performance the more difficult it will be to invoke the defense.

Uniform Commercial Code § 2-615 also recognizes that sellers of goods may have an excuse for a delay in delivery or even for non-delivery if delivery as agreed has been made impracticable by the occurrence of an unforeseen event or by compliance in good faith with governmental regulations. Commentators often refer to this as the UCC’s version of impracticability. If invoking 2-615, the seller must notify the buyer that there will be a delay in delivery, a non-delivery, or a partial delivery. In turn, under Section 2-616, the buyer may then terminate the agreement and discharge any unexecuted portion of the contract or elect to modify the contract by agreeing to accept the partial delivery, if a delay in delivery or a partial delivery substantially impairs the value of the whole contract.



Frustration of Purpose

A party may also be excused from performance sometimes if it can show that, due to the occurrence of an unexpected event, the contract's principal purpose is substantially frustrated, rendering the agreement effectively meaningless to the excused party. Unlike commercial impracticability, frustration of purpose involves no true failure of performance. In fact, in many instances the parties are still *technically* capable of performing, notwithstanding the occurrence of a frustrating event, but due to the occurrence of that event, one party's performance has become virtually worthless to the other.

Like commercial impracticability, frustration of purpose is a narrow defense that only arises if the non-occurrence of the unexpected event was a basic assumption of the contract. A party thus cannot invoke frustration of purpose on the ground that a transaction was anticipated to be profitable but is now unprofitable, as unprofitability is a risk assumed when contracting. Further, frustration of purpose only occurs if the purpose of the contract has been totally, or nearly totally, frustrated. The frustration must be so severe that it is not fairly to be regarded as within the risks that the invoking party assumed under the contract.

Unlike the doctrine of force majeure, there aren't really "classic" examples of purpose-frustrating events, because each contract's "purpose" is a little bit different. While it is easy to imagine scenarios where governmental actions—like shelter-in-place mandates—might frustrate commercial purposes, it is not yet clear how far courts will be willing to go in determining that the pandemic itself frustrates a contract's purpose. On the one hand, one could imagine a court allowing a restaurant owner out of its commercial lease obligations in places where Governors have forbidden the dining public from leaving their homes. It is much less clear, however, if the same result would obtain in a state without any such edicts, if the populations in those places simply elected not to leave their houses due to concern about contracting the virus.

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Having a strong understanding of commercial impracticability and frustration of purpose law is critical during these uncertain times. It will often be the case—particularly where the obligation a contracting party is looking to excuse is a payment obligation—where frustration of purpose proves the more natural excuse for nonperformance than force majeure. Likewise, just because the parties did not negotiate a force majeure provision does not necessarily mean that force majeure-like protections are unavailable to a litigant through the various iterations of commercial impracticability. As with force majeure, it is important to be proactive in invoking these rights and communicating issues with your counterparties. These defenses are exceedingly fact-specific and there really is no single answer as to how matters will play out.