Nonperformance of Contracts: Understanding the Impossibility Defense

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With the advent of COVID-19, many are seeking relief under the impossibility defense or attempting to enforce a contact against a party that is looking to avoid its obligations. It is important to know the policy behind that defense. It is also important to understand that policy when you are negotiating, drafting and reviewing contracts you will enter into in the future.

Early cases involving the impossibility defense often interpreted the word "impossible" in its literal sense. A landmark U.S. Supreme Court case from 1872 involved a party who had agreed to sell horses to the military attempted to collect the contract sum even though he had not delivered any of the horses, his justification being that a change in the government's inspection procedures rendered his performance impossible. In ruling against the seller, the court said, "As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience."

Some cases lend themselves to the literal interpretation of impossibility. For example, where the seller of specific goods was unable to deliver the goods, because they were destroyed in a fire, the court excused performance. In another early example, a contractor hired to install plumbing and gas fittings on a home project and who was not to be paid in full until issuance of a certificate of compliance of the work was determined to be entitled to payment for the work he had done when the homeowner changed plans and raised the height of the house, rendering it impossible for a certificate to be issued for the work the contractor had done.

Newer cases adopt a more nuanced view of impossibility that does not require the cause of the nonperformance to actually be impossible. Judge Posner of the Seventh Circuit Court of Appeals noted in a 2009 decision, "The doctrine of impossibility in the common law of contracts excuses performance when it would be unreasonably costly (and sometimes downright impossible) for a party to carry out its contractual obligations." So, now we understand impossibility to be associated more with an undue burden than on actual impossibility. Judge Posner favored the analysis set forth in a 1986 case where the court said:

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> . . . "Impossibility" is thus a doctrine "for shifting risk to the party better able to bear it, either because he is in a better position to prevent the risk from materializing or because he can better reduce the disutility of the risk (as by insuring) if the risk does occur.

The impossibility defense will not be available if the party seeking relief is the party that caused the event giving rise to the defense. Nor will it be available to a party that has assumed the risk of the occurrence of such an event. In a more recent U.S. Supreme Court case, the court said the non-occurrence of the event giving rise to the defense must have been a "basic assumption" of the contract. Significantly, the court quoted an older California case with favor to the effect that "[i]f [the risk] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed."

What does this mean for your contracts? First, do not assume something must literally be impossible for it to constitute the basis of an impossibility defense. Second, if there is a risk you are truly concerned about, do not assume that, because the risk, such as COVID-19 and government orders issues concerning it, is well known, you need not mention it in the contract. To the contrary, it is the very general recognition of the risk that may deprive you of an excuse not to perform if the party that will bear the risk is specified in the contract. Failure to deal with the risk in the contract may result in an assumption you knew and appreciated and, as a result, accepted and assumed the risk in entering into the contract.

So, if there is a risk of an event you believe may affect your ability to perform the contract, identify it by type, e.g., "epidemic," "pandemic," "government orders," and insert terms that allow you to avoid performance if the event occurs, so that the risk of the event occurring is shifted to the other party. This can be accomplished in several ways, most typically by referring to the risk as one of the justifying events in a force majeure provision. Doing so should allow you to avoid having to rely on an impossibility defense, which, even if you can successfully invoke it, may entail engaging an attorney, going to court to prove that defense and educating the court on the policy behind it.