# COVID-19 AND "TEMPORARY" CONTRACT INTERRUPTION

***Contact:*** ***David L. Pinkston, Snow Christensen & Martineau***

In Jason Hawkins' excellent blog post a few weeks ago, he discussed *force majeure* clauses and how Utah businesses are examining whether such clauses excuse contractual obligations in light of the current pandemic. But what about a contract (oral or written) that does not contain such a clause? And what if performance of the contract is prevented—or just delayed–by COVID-19? What legal principles come into play? This article examines these questions and discusses some of the applicable legal doctrines, as well as some practical issues Utah businesses should consider.[1]

IMPOSSIBILITY/IMPRACTICABILITY

Under the general doctrine of "impossibility" or "impracticability"[2], a party's performance under a contract may be excused when an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable. See *Central Utah Water Conservancy Dist. v. Upper East Union Irr. Co*., 2013 UT 67, ¶ 28, 321 P.3d 1113, 1120. One of the key issues in the application of this doctrine is whether the event rendering performance impossible or impracticable was unforeseen and arose after the parties entered their contract.

In the *Central Utah Water* case**,** the Utah Supreme Court articulated the doctrine of impossibility/impracticability, but refused to apply it. In that case, a party contracted to complete a waterworks project but declined to perform when a statute that supposedly would have allowed the construction was changed to apparently exclude the construction. The constructing party attempted to pay back the contractual funds instead of performing. Importantly, the party never attempted to obtain the permit it claimed would be impossible to obtain.

The court declined to apply the doctrine of impracticability or excuse performance because the party failed to even try to overcome the apparent obstacle. Further, the statute was in existence when the contract was formed, making the erstwhile obstacle foreseeable.

TEMPORARY IMPOSSIBILITY

If the obstacle to performance of the contract is only temporary, the doctrine of "temporary impossibility" may apply to simply suspend the timing of performance. While Utah courts have apparently not spoken on this subject, other courts and treatises many years ago addressed the doctrine—often invoked during wartime—and explained that temporary impossibility may apply when the event that makes performance impossible is only temporary, like current government restrictions on public gatherings. The doctrine does not negate the contract entirely; it merely excuses performance until the temporary obstacle is removed, at which time full performance is required.

The Restatement (2d) of Contracts, Section 462 articulates the rule:

Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise, such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists.

In *London & Lancashire Indem. Co. of Am. v. Bd. of Comm'rs of Columbiana County*., 140 N.E. 672 (Ohio 1923), a road construction project was delayed because of World War I, but was still not completed upon the conclusion of the war. The Ohio Supreme Court held that the contract was impossible but only until Armistice was signed. At that point, performance was once again required. The court stated: "when the subject of the contract is not condemned, but performance temporarily prohibited, the contract is still in force, though dormant, and when the restraint is removed, the obligation, which was all the while in force, must then be completely performed." *Id.* at 676.

This doctrine may generate some interest during the current pandemic. State and local governments have restricted certain types of gatherings and other activities. Thus, if a party agrees to provide certain services but government regulations—or even just common sense and safety—preclude that from going forward until circumstances change, that party may have a defense to a claim of breach or non-performance. It could argue that it is ready, willing, and able to perform when it is safe to do so and, therefore, is not in breach. Again, the Utah courts have not addressed this doctrine, but a party certainly could draw parallels between government wartime restrictions and pandemic-related safety restrictions.

CLUES IN THE CONTRACT

The parties' contract, itself, may hold many answers to how it will be affected by the pandemic. If the contract is silent as to the timing or manner of performance, a party may argue that it is not in breach because it can still fulfill its obligations at a safer time or by a different method, more consistent with government safety protocols. Perhaps the party can make use of technology to complete its obligations. Vagueness in a contract may also give parties flexibility in timing and method of performance and, in some cases, even the opportunity to argue that these issues should be viewed through a lens of public safety, social responsibility, and common sense.

CONCLUSION

Much about COVID-19 has put us in uncharted waters. It has interrupted and affected nearly every aspect of our lives, including some contractual obligations. But the pandemic will not last forever. This article has not covered every possible defense or legal doctrine, so if you find yourselves in a dispute over a contract that has been affected by the pandemic, proceed carefully and seek competent legal counsel to help you navigate these uncharted waters.

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[1] Thanks to David Steffensen for his invaluable assistance in preparing this article.
[2] Utah courts appear to use these terms interchangeably in their discussion of this principle.

**David L. Pinkston**