

IMPOSSIBILITY OF PERFORMANCE AS A CONTRACT DEFENSE

Occasionally, design professionals and contractors engaged in real estate improvements, as well as design engineers and manufacturers engaged in the design and manufacturing of products, encounter unanticipated problems which frustrate their performance to such a point that they wish to claim impossibility of performance. Therefore, it may be helpful to review what constitutes an adequate defense to contract performance where performance is made impractical or impossible.

It must be recognized at the outset that mere difficulty of performance is not the subject of this article. Normally, a party to a contract is required to perform regardless of the difficulties encountered in performance. Further, subjective difficulties in performance are not usually sufficient to constitute a contract defense. Contracting parties vary in their ability to perform, and the defense of impossibility of performance requires a finding of objective impossibility or severe impracticability rather than subjective impossibility or impracticability.

The terms of a contract may also place upon one of the parties the risk of difficulties in performance or relief from such difficulties. For example, normally a contractor has the risk of difficulties in performing construction services because of adverse weather conditions, and the contract may recite that risk. However, the contract terms may provide that a contractor who is delayed because of adverse weather may seek an extension of time and therefore be relieved of a portion of the risk of delay because of adverse weather conditions.

In manufacturing, the essential raw materials for the manufacturing of a product may become unavailable. Although the manufacturer usually assumes the risk of difficulty in obtaining raw materials necessary for the manufacturing of a product, the written contract may relieve the manufacturer entirely or temporarily from performance where the raw materials are unavailable. Unavailability of raw materials may also be excused only where there is an actual shortage rather than a mere subjective or financial difficulty in obtaining or taking advantage of a limited source of supply.

In real estate improvements, a contractor may find that performance of the specifications is objectively not possible. For example, if the owner's professional designer fails to adequately provide for interior space in which to install owner furnished equipment, the contractor may find it impossible to install the equipment. Such circumstances are normally detected during construction and design and construction changes are authorized to solve the practical impossibility of performance. It is only when impossibility of performance is not remediable through changes in contract terms that the issue arises as to whether the party asserting impossibility of performance may be relieved of performance entirely. A contractor's failure to perform in accordance with technical specifications will seldom be excused because of an assertion that performance was impossible. However, technical specifications which do not achieve the desired level of performance relieves the contractor of liability, although the engineer may be liable to the owner.

The word impossible may have various meanings under contract terms and under factual circumstances, and therefore it may be difficult to anticipate the outcome of a dispute where one party is attempting to be excused from performance because of impossibility of performance. For example, performance specifications may be impossible to achieve. Contracts calling for performance specifications may place the risks of impossibility on both contracting parties. The owner calling for a performance standard may have erred in setting an unreachable objective. The contractor or manufacturer agreeing to meet a performance specification may find such significant difficulties in achieving the performance standard that relief from the contractual responsibility is sought. Whether it is granted may depend on whether the impossibility is subjective (a failure to achieve an achievable result) or objective (a failure to achieve an unachievable report).

The law of impossibility of performance does not necessarily require absolute impossibility, but also encompasses the concept of severe impracticability in ordinary technical or commercial activities. Performance at an extremely and unanticipated difficult and costly level may be sufficient for a court to grant relief. However, since commercial impossibility arises only under severe economic conditions, the contracting party asserting commercial impossibility has a heavy legal burden to meet before relief will be

granted. The subjective difficulty of a party attempting to perform a contract is not an acceptable legal excuse for nonperformance. There must be severe commercial difficulties which would affect all contractors or manufacturers performing under the same or similar circumstances.

In the drafting of contracts, difficulties of performance should be foreseen wherever possible and an allocation of risk may be placed in the written contract document in a manner mutually agreeable to the contracting parties. Thereafter, it is reasonable to expect that unless impossibility of performance arises which objectively would affect any person attempting to perform the contract obligations, any nonperformance will constitute a breach for which contract damages may be awarded. Only where there is an objective actual impossibility of performance, or a severe technical impracticability of performance, or a severe economic impracticability of performance, will performance be excused.

*Published in the *Wisconsin Professional Engineer*, November-December, 2001. Written by Attorney Robert J. Kay.