Coronavirus Disease (COVID-19) – Update for Business Owners
PANELISTS

Christina L. Fugate  
Partner  
(317) 236-2374  
Christina.Fugate@icemiller.com

Andrew J. Miroff  
Partner  
(317) 236-2267  
Drew.Miroff@icemiller.com

Nicholas B. Reuhs  
Partner  
(317) 236-2160  
Nicholas.Reuhs@icemiller.com
316 Million Americans Under Stay at Home Order

What We've Been Seeing
How is Performance Excused?

- Force Majeure (Contractual Only)
- Commercial Impracticability (Sale of Goods)
- Impossibility
- Frustration of Purpose
- Other Contractual Provisions Excusing Performance
Force Majeure—Brief Overview

- Provision found in many contracts.
- Relieves or suspends parties from performance of certain obligations based on certain defined events.
Contract Terms are Important!

- Is there a Force Majeure provision

- If so, does it include such phrases as Acts of God, epidemic, pandemic, government orders?

- What rights are triggered?
The Force Majeure Terms Matter

What obligations are excused or suspended? Is it temporary or permanent?

22.10  **Force Majeure**

Whenever a period of time is provided in this Agreement for either party to perform any act, except pay monies, neither party shall be liable nor responsible for any delays due to strikes, lockouts, casualties, acts of God, war, terrorism, governmental regulation or control or other causes beyond the reasonable control of the parties, and the time period for the performance of such act shall be extended for the amount of time of the delay. This clause shall not result in an extension of the term of this Agreement.

3.1  **Force Majeure**  The term "Force Majeure" means any cause beyond a party’s reasonable control that prevents a party from meeting its obligations under this Agreement, including, but not limited to, acts of God or the public enemy, acts of terrorism, war or other outbreak of hostilities, civil commotion, strikes, lockouts, and labor disputes (but excludes events described in Section, the remedies for which are described therein). A party shall promptly notify the other party that it will be unable to perform its obligations hereunder due to a Force Majeure. In such event, the time for such party’s performance shall be extended for the pendency of such event, provided, however, that should such non-performance extend beyond thirty (30) days, the unaffected party may at its option terminate this Agreement upon written notice to the other party. For the avoidance of doubt, Purchaser’s failure to make timely payment, for any reason whatsoever, is excluded from Force Majeure.
The Force Majeure Terms Matter

Is the provision one-sided?

FORCE MAJEURE
No damages shall be due for a failure of performance due to Acts of God, declared war in the United States, terrorist act in the city where Hotel is located, government regulation, riots, disaster, Centers for Disease Control Level 3 Travel Advisory regarding the city in which Hotel is located, or any other circumstance beyond the Parties' reasonable control which makes it illegal, impossible or commercially impracticable for Hotel to hold the event. The Hotel shall have no liability for power disruptions of any kind.

Are there any obligations that cannot be excused?

22.10 Force Majeure

Whenever a period of time is provided in this Agreement for either party to perform any act, except pay monies, neither party shall be liable nor responsible for any delays due to strikes, lockouts, casualties, acts of God, war, terrorism, governmental regulation or control or other causes beyond the reasonable control of the parties, and the time period for the performance of such act shall be extended for the amount of time of the delay. This clause shall not result in an extension of the term of this Agreement.
SECTION 34 - FORCE MAJEURE

In the event that there is a strike, riot, shortage of material or other thing beyond the control of either the Lessor or the Tenant and not the fault of that party preventing either party from performing under this Lease, it shall not constitute a breach or other violation of this Lease for so long as the affected party is disabled by such act or governmental regulation from performing hereunder, and performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this Section shall not operate to excuse Tenant from prompt payment of fixed annual rental, Percentage Rent, additional rent or any other payments required by the terms of this Lease.

3.1 Force Majeure. The term "Force Majeure" means any cause beyond a party's reasonable control that prevents a party from meeting its obligations under this Agreement, including, but not limited to, acts of God or the public enemy, acts of terrorism, war or other outbreak of hostilities, civil commotion, strikes, lockouts, and labor disputes (but excludes events described in Section, the remedies for which are described therein). A party shall promptly notify the other party that it will be unable to perform its obligations hereunder due to a Force Majeure. In such event, the time for such party's performance shall be extended for the pendency of such event, provided, however, that should such non-performance extend beyond thirty (30) days, the unaffected party may at its option terminate this Agreement upon written notice to the other party. For the avoidance of doubt, Purchaser's failure to make timely payment, for any reason whatsoever, is excluded from Force Majeure.
The Force Majeure Terms Matter

- Are there any notice provisions?

- What law is your contact governed under?
UCC 2-615 Excuse by Failure of Presupposed Conditions (Commercial Impracticability)

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
Commercial Impracticability—Brief Overview

- Limited to transactions involving the sale of goods (i.e. not services).
- Gap Filler—No force majeure clause/the parties otherwise failed to allocate risks in their agreement.
- Typically, only invoked by Seller, but UCC allows Buyer to as well.
- Elements needed:
  1. Invoking party did not assume risk of unknown contingency;
  2. The nonoccurrence of the contingency must have been a basic assumption underlying the contract; and
  3. The occurrence of that contingency made performance commercially impracticable (proximate cause).

- Foreseeability is key to analysis.
Commercial Impracticability – Examples

- Epidemic/Pandemic
- Government Order (generally yes)
- Substantial rise in seller’s production costs (typically no)
- Failure of Supply Source (maybe if anticipated sole source)
- Destruction or Loss of Goods
- Strikes/Labor Disputes
- Currency Fluctuations
Commercial Impracticability—Other Considerations

- Seasonable Notice
- Excuse contract performance or just delay
- Full performance v. Partial
- Fair and Reasonable Allocation
Impossibility—Brief Overview

- Common law defense.
- Nor recognized in all states (but is recognized in Indiana).
- Hard standard to meet—Must be *absolutely* impossible, owing to the act of God, the act of the law, or loss or destruction of the subject-matter of the contract.
- Inability to perform due to financial reasons generally will not constitute impossibility.
Impossibility—Examples

Allowed:

School Teacher’s contract was found to be impossible to perform because flu epidemic forced the closing of the school.

Not Allowed:

Covid-19—Purchasers of $43M multi-family property sought to invoke proactively doctrine of impossibility due to remote working to prevent their forfeit of earnest money.

Court: Absolute impossibility required, not just more difficult or even relatively impossible.
Frustration of Purpose—Brief Overview

- Common law defense *not* recognized in Indiana.
- Frustrating event is not something contemplated by the parties when contract was entered into.
- Neither party at fault.
- The event renders performance of the contract impossible or radically different from what was contemplated at the time of contracting.
Other Contractual Situations/Provisions

- Battle of Forms
- Contradictory provisions (Force Majeure/Cancellation Refund Provision)
- Exclusivity/Requirements
- Choice of Law
Addressing Nonperformance Situations

- Consult Counsel
- Read the Contract
- Document
- Communicate
- Immediately Understand Impact Going Forward and Plan
- Consider Impact to Your Business Partners and Whether You Need to Notify Them
- Consider Legal Action (TRO/Injunction v. Damages)
Post-Force Majeure Considerations

- Bankruptcy considerations?
- Guarantees?
- Mitigation required?
- Is this an opportunity to negotiate?
- Impact on future performance? (Adequate Assurance/Anticipatory Breach)
- Drafting considerations for future contracts.
Nicholas Reuhs
Partner Indianapolis
One American Square Suite 2900
Indianapolis, IN 46282
Nicholas.Reuhs@icemiller.com
p 3172362160
Insurance

Third-party Coverages
- GL
- WORKERS COMP
- E&O

First-party Coverages
- COMM. PROPERTY
- INLAND MARINE
- SPECIALTY
  - PROPERTY
  - BUSINESS INCOME
Insurance

Third-party Coverages

First-party Coverages

COVERS:
Third-party “bodily injury,” including “disease.”

KEY TO COVERAGE:
Finding an “Occurrence”
Insurance

KEY TO COVERAGE:
Showing “Physical Damage or Loss”

COVERS:
Loss of income due to casualty event
Insurance

Third-party Coverages

First-party Coverages

COVERS:

Loss of income due event cancellation or postponement

KEY TO COVERAGE:

“Legal or physical requirement”
TWO MOST IMPORTANT THINGS:

- EVERY POLICY IS DIFFERENT
- ERROR ON THE SIDE OF TENDER
ICE MILLER's COVID-19 Resource Center and Task Force

COVID-19 Resource Page

Task Force

Primary Contacts
- Josh Christie, joshua.christie@icemiller.com
- Tami Earnhart, tami.earnhart@icemiller.com
- Christina Fugate, christina.fugate@icemiller.com
THANK YOU