

The COVID-19 pandemic has impacted the ability of many businesses to maintain operations and to fulfill existing contractual obligations. The following legal principles may serve to excuse or delay a party's contractual obligations during the COVID-19 outbreak.

## Force Majeure Clause

The purpose of a force majeure clause is to relieve a party from performing the contract or the remainder of the contract when an exceptional event or circumstances beyond the reasonable control of the parties prevents or hinders the performance of the contract. The scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term.

## Compliance with law clause

The Compliance with Laws clause usually stipulates that the parties will abide by all applicable international, national, state, regional and local laws and regulations. Since the outbreak of the COVID-19 virus, the United States and other countries have suspended or restricted international travels; several States, including Indiana, have ordered all non-essential businesses to cease in-person operations and have prohibited public gatherings; federal and state agencies have implemented mandatory isolation and quarantine, etc. In light of the governmental regulations and orders arising from the pandemic, the delay or nonperformance of a contract resulting from the compliance with the government regulations may be excused.

## Uniform Commercial Code § 2-615 (not adopted in Indiana)

It is important to determine which state's or country's law applies to a sale of goods contract. Several states, but not the State of Indiana, have adopted the Uniform Commercial Code, Section 2-615, which states that "delay in delivery or non-delivery . . . is not a breach 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." Depending on which state's or country's law applies, Section 2-615 may be applicable.

## Doctrine of Impossibility

For contracts without a force majeure provision, the common law doctrines of impossibility may excuse performance in light of the COVID-19 pandemic. Impossibility of performance is a defense

to an action for damages. Where the performance of a contract becomes impossible, nonperformance is excused, and no damages can be recovered. In Indiana, according to case law, to invoke impossibility, one must demonstrate that performance is “not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract.”

## Commercial Impracticability and Frustration of Purpose

(not recognized in Indiana)

In some contracts, a party is excused from performing when, in pertinent part, an unexpected event has rendered the party’s performance commercially impracticable or when the purpose of the contract can no longer be realized. Indiana has not adopted the doctrines of commercial impracticability and frustration of purpose. Again, these may apply if the contract is governed under the laws of another state or country.

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