



STATE OF DELAWARE FORCE MAJEURE LAW COMPENDIUM (during COVID-19 pandemic)

Prepared by

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A. Introduction

This memorandum will seek to provide Delaware exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

B. Force Majeure in Delaware

1. Introduction - The Governor of the State of Delaware declared a state of emergency on March 12, 2020. There were numerous exempt occupations that were allowed to operate, but residents were directed to stay home and only go out when necessary for essential purposes such as grocery and pharmacy shopping. As a practical matter, some businesses are operating normally, some remotely, and others not at all. The doctrine of force majeure relieves party of its contractual obligation when performance is impossible or impractical. Typically, a force majeure clause is contained within the boiler plate language of contract. It may contain specific events, general impossibilities or various catch all phrases. Where the contract does not contain a force majeure provision, the party seeking to avoid its obligations may need to resort to equitable relief.
2. Requirements to Obtaining Relief Using Force Majeure - A Delaware Court would first look at the specific contractual terms to determine if the parties agreed to be relieved of their obligations. If the term provided for relief based on a virus or pandemic, then the term would be enforced. The contract may also contain a “catch all” such as “any other reason whatsoever beyond the control of party.” Although these catch all phrases may be enforceable, they will be scrutinized in light of the context of the contract. Although the word “whatsoever” implies a liberal approach to its interpretation, a Delaware Court will not allow a party to be excused without further analysis. The Court would look to determine if the event was beyond the reasonable control of the party and the event was not reasonably foreseeable. In the context of COVID-19 it is hard to see how those two requirements would not be met. In addition, the party seeking to be relieved would have to show it could not perform regardless. A contractor may be able to continue his construction unabated in which case his obligations would not be excused. Conversely, he may be unable to get supplies thereby excusing him from delay damages. In addition, force majeure clauses may contain notice provisions where the party seeking to be relieved must give proper notice. Assuming that the notice provisions are reasonable they are enforceable. Therefore, although a party might satisfy the other requirements to establish force majeure, the failure to give notice (if required by the contract) might deprive him of the excuse.
3. Scope of Relief - The Courts would be confronted with several applications for relief. The first, specific performance of the contract according to its original terms. This would require proof consistent with what was previously discussed. The second would be damages. Assuming the court was satisfied force majeure did not excuse

performance, the party refusing to perform would be subject to all damages directly related to breach.

4. Other Considerations - In any application of force majeure, the party seeking relief will be required to mitigate damages. He cannot simply walk away because of COVID-19. The court will require a showing of a good faith effort to perform. Simply because the contract became less profitable does not satisfy that requirement.

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