STATE OF ILLINOIS FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide an Illinois 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 Illinois

1. Introduction

Outside of the Uniform Commercial Code, parties may rely on the common law doctrines of impossibility, impracticability or the doctrine of frustration of purpose. However, a force majeure clause in a contract will supersede the common law doctrine. Whether a court will enforce a force majeure clause in a contract will be determined by several factors in Illinois. The court will look at the specific language in the force majeure clause including acts of God, governmental actions and catch-all provisions. In addition, Illinois courts apply mitigating factors based on the theory of a duty of good faith. Illinois allows for the inclusion of force majeure clauses in contracts and courts have interpreted such clauses to supersede the common law doctrines where they overlap. Courts have reasoned that force majeure clauses negotiated by the parties serve as the best evidence of the parties' intent to allocate risk when contracting.

2. Requirements to Obtaining Relief Using Force Majeure

Illinois does not have a statute on force majeure. Illinois courts have applied the Black's Law Dictionary (9th ed. 2009at 718) definition of force majeure as an "event or effect that can be neither anticipated nor controlled that includes both acts of; (1) Nature (for example, floods and hurricanes) and (2) People (for example riots, strikes, and wars)." Force majeure is an event or effect that can be neither anticipated nor controlled.[i] The burden of proof is on the party claiming the relief and their inability to perform their contractual obligations. Illinois law is similar to other jurisdictions in that the court's primary objectives when interpreting contracts are to look at the intent of the parties, and view each part in light of the other parts of the contract to ensure its interpretation does not render any provision of the contract meaningless.[ii]

In addition to fitting within the definition of a force majeure event, the party exercising the provision also needs to prove causation. A defendant has to prove that "the non-performance of the contract obligations was proximately caused by the event contemplated in the force majeure clause."[iii]

When interpreting force majeure provisions of contracts, Illinois courts look to the "four corners" of the contract. Illinois courts are more likely to enforce provisions that address a specific situation at issue, such as a pandemic, if it is identified in the contract as a cause to be excused from performance rather than using a catch-all phrase or general provision. "The common law doctrine of impossibility is an "off the rack" provision that

governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision."[iv]

It should be pointed out however, that Illinois courts have also held that if the relevant event was "foreseeable at the time the contract was negotiated" and the party was "on notice of the possibility of a problem" the party cannot then rely on a force majeure provision to excuse the performance.[v] For example, it *could* be argued that COVID-19 or a similar pandemic was foreseeable based on the recent history of the 2009 H1N1 pandemic.

When addressing the specific claim of whether the government action of the forced closure of one's business due to the stay-at-home order qualifies as a force majeure event, a party may need to specifically state the degree to which the government action impacts the party's ability to perform. In general, a government shutdown cannot qualify as force majeure unless an order clearly prohibits an act that proximately causes the non-performance or breach of a contract.[vi] Also the Illinois Supreme Court held in *Phelps v. School Dist. No. 109*, Wayne County 302 Ill 193 that when a party enters a contract to do a thing *without qualification*, performance is not excused because by an inevitable accident or other contingency not foreseen it becomes impossible for him to do that which he agreed to do. In *Phelps v. School Dist. No. 109*, the public school was closed by the Department of Health due to the widespread influenza epidemic. Under the contract, the school board did not stipulate any provision for a contingency based on school closure. The teacher remained ready able and willing to teach. The Court reasoned that "the general rule established by all the decisions is that, where performance of the contract is rendered impossible by an act of God or the public enemy, the district is relieved from liability, but where the school is closed on account of a contagious disease, or destruction of the school building by fire, and the teacher is ready and willing to continue his duties under the contract, no deduction can be made from his salary for the time the school is closed."[vii]

Courts will look to whether a contract contains a specific notice provision associated with the force majeure clause. The notice requirement may involve factors such as a time deadline, it may require specific information be contained within the notice, and/or specific delivery.

Further, acts of God defenses do not cover events if other actors have intervened, such as when there is negligence by a party when he fails to go around the storm clouds preventing a party from relying on an "act of God" defense.[viii] Nor will Illinois courts apply force majeure to contracts of normal risk of price fluctuations or companies operating under fixed-price contracts. "A force majeure clause is not intended to buffer a party against the normal risks of contract, [and a] normal risk of fixed-priced contract is that market price will change."[ix]

3. Scope of Relief

To what extent relief is available in Illinois if a court finds an event falls under a force majeure event will depend on what the contract states as additional factors such as whether the party took any steps in good faith to resolve the event causing the delay. This is often referred to as the duty to mitigate a delay in performance.

The Federal Court of the Northern District of Illinois has elaborated on the duty to mitigate. The Northern District has reinforced the notion that there is an implied duty on the claiming party to make an effort to attempt to resolve the event causing the delay or inability to perform under the contract before invoking a force majeure clause. "Parties have a duty to take reasonable actions to prevent conditions constituting force majeure from arising, and to cure them if they do arise."[x] Parties have a duty of good faith under express contracts, unless waived, to make a bona fide effort to dissolve the restraint that is preventing it from carrying out its promise.[xi]

4. Other Considerations

Businesses today may find themselves both as plaintiffs in some instances and as defendants in contract disputes resulting from COVID-19. It is essential to review your contracts and their provisions as it relates to notice requirements and time frames for making claims.

If force majeure is not an option for temporary or permanent relief, keep in mind that regulations such as shelter-in-place ordered on business activity by the Illinois Governor may provide the basis for relief under the common law theories of impossibility of performance or the doctrine of commercial frustration.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor, or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.

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[i] Stepnicka v. Grant Park 2, LLC, ILL App. Ct. 1st Dist. June 21, 2013; 2013 WL 3213061 at 2

[ii] Dearborn Maple venture, LLC v. SCI Illinois Services, Inc. 2012 IL App (1st) 103513; See also Atwood v. St. Paul Fire and Marine Ins. Co., 363 Ill App. 3d 861 (app. Ct. of Ill 2006).

[iii] N. Ill Gas Co. v. Energy Co-op., Inc. 122 Ill. App. 3d 940, 949-52, 461 N.E. 2d 1049, 1057-58 (1984).

[iv] Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850. 855 (N.D. Ill 1990).

[v] Comprehensive Bldg. Contractors, Inc. v. Pollard Excavating Inc., 251 A.D.2d 951 (3d Dep't 1998)

[vi] N. Illinois Gas Co. v. Energy Co-op., Inc. 122 Ill App. 3d 940, 951 (1984).

[vii] Phelps v. School Dist. No. 109, Wayne County 302 Ill 193, 194.

[viii] Bright v. United States, 149 F. Supp. 620, 624 (E.D. Ill 1956)

[ix] N. Ind. Pub. Serv. Co. v. Carbon Cty Coal Co., 799 F.2d 265, 275 (7th Cir. 1986)

[x] Heritage Commons Partners v. Village of Summit 730 F. Supp. 821, 824.

[xi] Commonwealth Edison Co. v. Allied Gen. Nuclear Servs. 731 F. Supp. 850, 859 (N.D. Ill 1990)