STATE OF WASHINGTON FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide a Washington exemplar for the USLAW 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 Washington

1. Introduction

As the ongoing COVID-19 crisis continues to severely impact commercial activity in Washington, many businesses and commercial actors need to know whether they will be liable for any inability to perform contractual obligations. "Force Majeure" clauses—common to many commercial agreements—generally provide that a party that has been unable to perform under a contract due to the occurrence of certain events outside of their control (such as wars, work stoppages, or natural disasters) may suspend, delay or terminate its performance and will not be liable for costs or damages due to the lack of performance caused by the event. In the absence of any such force majeure language, parties are likely limited to the common law defenses of impracticability or frustration of purpose. That being said, opportunities for negotiation and cooperation are perhaps more available than in pre-COVID 19 times given the uncertain and fluid nature of this crisis, so a lack of a force majeure clause in not necessarily fatal to the ability of contacting parties to come to a workable arrangement in the event of a lack of performance.

2. Requirements to Obtaining Relief Using Force Majeure

Whereas certain other states define "force majeure" via statute, Washington does not mention the term in its state code. Furthermore, Washington has little to no case law specifically addressing the application of force majeure provisions in the context of pandemics or outbreaks of disease.

In Washington, the party seeking the protections of the force majeure clause will bear the burden of establishing (1) that the COVID-19-related event (such as a government order shutting down a business, for example) is indeed a force majeure event according to the language contained in the contract, and (2) that the event caused the inability to perform. Of course, if the event is specifically identified in the language of the force majeure clause (i.e. the word "pandemic" is used, or the phrase "government order designed to limit the outbreak of disease" is included as a qualifying event), it will be relatively easy for the party to establish that the event is indeed a "force majeure" event. The likelihood of standard commercial contracts containing such language is low, however.

If the event in question is not specifically identified in the contract's force majeure clause, the party seeking the protection of the force majeure clause will need to turn to the clause's "catch-all" provision—assuming that there is one—which generally allows for certain unidentified events that are unforeseeable and beyond the party's control. Washington courts

will apply rules of standard contract interpretation to determine the intent of the parties with respect to force majeure provisions in contracts.[i] Washington follows the objective manifestation theory of contract interpretation in which courts will attempt to determine the parties' intent by focusing on the objective terms of the agreement rather than the parties' unstated intentions.[ii]

The Washington Supreme Court has indicated that force majeure clauses will be read narrowly, and that public policy considerations will not cause a court to alter the plain language of the clause.[iii] No Washington state court has examined a force majeure clause in the context of a pandemic, and courts in general have provided little guidance in determining whether a particular event was foreseeable in the context of a force majeure clause. One case – *Citoli v. Seattle*, 115 Wn.App 459, 61 P.3d 1165 (2002)—suggests that performance under a contract may be excused via the invocation of a force majeure clause when the required performance would violate a statute.[iv] Government issued "stay-at-home" orders, among other COVID-19-related invocations of executive power, may qualify as the types of statutes referenced in the *Citoli* case. Parties should bear in mind, however, that a trial may be necessary to resolve ambiguities if the qualifying event is not specifically mentioned in the force majeure language of the contract.

3. Scope of Relief

If a party is able to successfully invoke a force majeure clause, it must next consider the scope of the relief available to it. Typically, a force majeure clause will allow a party to suspend its performance *during* the time of the force majeure event, provided that such party makes a good faith effort to continue to perform during the force majeure event and begins performance as soon as is practicable. Additionally, Washington law prevents a party from obtaining relief for losses they could have avoided had they acted reasonably to avoid them.[v] In *TransAlta v. Sicklesteel Cranes*, 134 Wn. App. 819, 826 (2006), the court held that whether the plaintiff acted reasonably by purchasing power requirements on the open market to meet its contractual obligations to a third party, rather than attempting to "mitigate" by first seeking to invoke a force majeure clause, was a question that could not be resolved as a matter of law and thus was reserved for a jury. This case illustrates that a court's "failure to mitigate" inquiry is fact-dependent and that parties should consider whether to first invoke a force majeure clause before incurring additional costs related to curing or resolving a failure to perform.

Moreover, if the force majeure clause only permits relief for "actual delay", the relief may not cover losses or a continued inability to perform after the event in question has passed. For example, businesses currently closed due to the COVID-19 crisis will likely continue to face obstacles to performance even after their state governments permit them to reopen. Therefore, the nature and scope of the qualifying force majeure "event" (i.e. whether the event refers to the COVID-19 pandemic in general, or more narrowly to a specific government order issued as a result of the pandemic), can be determinative. If the force majeure clause contains broad language regarding the time period of the delay, it may be possible to work with the other party to the contract to determine an appropriate length of time to cover the delay in

performance so as to account for the potential reintroduction or reorganization of the business following the event in question.

4. Other Considerations

A party invoking a force majeure clause must also be careful to establish that its inability to perform under the terms of the contract actually prevented the performance, rather than merely increasing a business' financial hardship incurred in performing its contractual obligations.

Furthermore, a party must take caution to adhere to any specific notice requirements included in the contract in relation to the invocation of the force majeure clause. In Washington, the failure to properly adhere to contractual notice requirements may constitute a bar to relief.

[i] *See Hearst Co. v. Seattle Times*, 154 Wn.2d 493 (2005).
[ii] *See City of Everett v. Sumstad's Estate*, 95 Wash. 2d 853, 631 P.2d 366 (1981).
[iii] *Hearst Co. v. Seattle Times*, 154 Wash. 2d 493, 511 (2005).
[iv] The *Citoli* case involved claimed business loss due to World Trade Organization protestors preventing access to an office building. The court's holding in that case suggests that performance may be excused when the required performance would violate a statute. *Citoli v. Seattle*, 115 Wn.App 459, 61 P.3d 1165 (2002). In that case, the statute was a tariff allowing service to be ceased in the event of a civil emergency. Here, the COVID-19 emergency declarations issued by the president, the governor, county executives and mayor are based upon similar statutory delegations of power.
[v] Wash. Pattern Jury Instr. Civ. WPI 303.06 ("A party who sustains damage as a result of another party's breach of contract has a duty to minimize its loss. The party is not entitled to recover for any part of the loss that it could have avoided with reasonable efforts. The defendant has the burden to prove the aggrieved party's failure to use reasonable efforts to minimize its loss, and the amount of damages that could have been minimized or avoided. The aggrieved party may recover expenses connected with reasonable efforts to avoid loss.").