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COMMENTARY & ANALYSIS

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"Impossibility of Performance" of Contractual Forum-Selection Clauses When the Chosen Forum is Closed Due to a Pandemic

Conduent Business Services, LLC v. Skyview Capital, LLC,[1] recently filed in the Delaware Chancery Court, involves a multimillion-dollar dispute arising out of an asset purchase agreement (the "Agreement") entered into by the plaintiff and the defendant, both of which are Delaware limited liability companies. The Verified Complaint (the "Complaint") alleges that the defendant, a private investment firm, is wrongfully delaying receipt of certain assets that it agreed to purchase under the Agreement—specifically, call center operations in Jamaica that are alleged to have been operating at a net loss since the deal closed.

According to the Complaint, the Agreement contains a forum-selection clause in which, with respect to any dispute arising out of or relating to the Agreement, the parties agree to submit to the exclusive jurisdiction of "the courts of the State of New York sitting in the County of New York."[2]

Why, then, was the case filed in Delaware? Because, according to the Complaint, as the plaintiff was preparing to file suit in the Commercial Division of the New York Supreme Court in New York County, "New York closed down the Commercial Division to all filings," in light of the "global public health crisis caused by the COVID-19 pandemic."[3] The lawsuit refers to the March 22, 2020 Administrative Order of Chief Administrative Judge Lawrence Marks of the New York Unified Court System, which the Complaint says "suspended all filings (both paper and e-filing) in all but a select few types of cases in all New York Courts."[4] The Complaint invokes the "extenuating circumstances" of the moment and describes how the plaintiff, which is "in urgent need of a judgment," has "no other options" but to seek equitable relief in a jurisdiction other than the one in which it contractually agreed to litigate.[5]

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[1] Case No. 2020-0232-JTL (Del. Ch.).
[2] Compl. ¶ 14.
[3] *Id.* ¶¶ 7, 14.
[4] *Id.* ¶ 15.
[5] *Id.* ¶¶ 14, 19-20.

In other words, the exclusive forum for dispute resolution that the parties selected in their Agreement was, and remains, closed to these parties to litigate this dispute. The Complaint foreshadows a threshold question that will face the Delaware Chancery Court: Does the doctrine of impossibility of performance apply to contractual forum-selection clauses when the chosen forum is closed due to a pandemic or other force majeure?[6]

Forum-selection clauses are common in bilateral agreements entered into by sophisticated parties, and they are presumptively enforceable. "When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. . . . In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain."[7]

But can the parties be held to their bargain if the forum that they chose in their contract is "closed" and therefore unavailable? If that bargain can't be upheld now, *how*, if at all, should the parties' dispute be heard? *Who*, if anyone, decides how the dispute should be heard?

The *Conduent* case raises these and a host of other interesting legal and equitable questions, including the following:

- Given that two *Delaware* LLCs specifically chose to litigate disputes in *New York State Court*, is the forum-selection clause in this case an integral part of the parties' negotiation of the Agreement? Is the clause severable?

- Does the doctrine of impossibility of performance have a temporal component? That is, yes, it is impossible to bring this lawsuit in the New York Commercial Division *today*, but what about next month, or six months from now? Will filing suit in New York State Court in the County of New York be impossible *then*? Does the Agreement contain a provision stating that time is of the essence?

- With all non-essential commercial filings in New York suspended, what makes the plaintiff's commercial case here "urgent" in a way that distinguishes it from other commercial disputes? From a business perspective, is six months too long to wait? What about one month?

- With the New York courts closed, why is it appropriate and equitable for the courts in Delaware—rather than the courts of another state—to hear this case? Both parties are Delaware limited liability companies. Presumably, the Delaware courts have jurisdiction over the *parties*. And, if this lawsuit had involved an internal corporate dispute, the plaintiff might have invoked 18 Del. C. § 109(d), which generally prohibits Delaware LLCs from selecting a foreign jurisdiction as the exclusive forum for internal disputes. That, however, is not this case.[8]

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[6] *Id.* ¶ 14 (alleging that "due to the closure of all New York courts to all commercial disputes . . . performance of this provision [i.e., the forum-selection provision] is impossible . . . .").
[7] *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 66 (2013).
[8] A similar proscription governs internal corporate claims involving Delaware *corporations*. *See* 8 Del. C. § 115; *Bonanno v. VTB Holdings Inc.*, C.A. No. 10681-VCN, 2016 Del. Ch. LEXIS 24, at *47 (Del. Ch. Feb. 8, 2016)

- Is this case an example of one of the "most unusual cases?" Is "the interest of justice" served by allowing this matter to proceed in the Delaware Chancery Court?[9]

- Would allowing this case to proceed in Delaware promote faith and trust in the judiciary during a public health crisis, or would it undermine the principles of private contract?

There is little modern historical precedent for prolonged court closures in the United States. Following Hurricanes Katrina and Rita in 2005, courthouses in southeastern Louisiana (and in parts of Alabama and Mississippi) were severely damaged, including the Louisiana Supreme Court building, which was closed "due to the mandatory evacuation of the city and the loss of basic services, including water and electricity."[10] Heroically, in some instances the courts acted quickly to establish interim offices elsewhere in the State of Louisiana, and they instituted programs to help court personnel, many of whom had lost their homes and all of their possessions, return to service.[11] Still, as one commentator put it, "New Orleans had essentially no court or system in place to seek relief for approximately two months following [Hurricane] Katrina."[12] Indeed, on September 27, 2005, the Louisiana Supreme Court issued an order closing the court until October 25, 2005, which closure was subsequently extended through November 25, 2005.[13] We are not aware of any cases, however, in which a litigant in that time period sought to enforce a mandatory forum-selection clause in a commercial contract calling for litigation in the City of New Orleans.

Even if a chosen forum is "open," sometimes litigating in that forum would be "gravely difficult, inconvenient and dangerous," as it was in *McDonnell Douglas Corp. v. Islamic Republic of Iran*,[14] where the chosen forum was, in effect, unavailable. In *McDonnell Douglas Corp.*, the court declined to enforce a forum-selection clause that said, "Any difference or disputes from the execution of the contract that may not be settled amicably should be settled through Iranian courts."[15] As the court noted:

> "we take judicial notice of the recent escalation of the war between Iran and Iraq, the bombing of Tehran by the Iraqi Air Force, Iraq's threat to shoot down all

("Section 115 precludes placing certain types of exclusive forum selection provisions in a corporation's charter or bylaws.").

[9] *See Atl. Marine Constr.*, 571 U.S. at 66.

[10] Hon. Greg G. Guidry, "The Louisiana Judiciary: In the Wake of Destruction," 70 LA. L. REV. 1145, 1153 (Summer 2010), *available at* https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6327&context=lalrev.

[11] *Id.* at 1156-59.

[12] Phyllis Kotey, "Judging Under Disaster: The Effect of Hurricane Katrina on the Criminal Justice System," in Jeremy I. Levitt & Matthew C. Whitaker (eds.), *Hurricane Katrina: America's Unnatural Disaster* 117 (2009).

[13] *See* Closure Orders of the Louisiana Supreme Court dated Sept. 27, 2005 and Oct. 25, 2005, *available at* https://www.lasc.org/hurricane_information.asp. Courts in Texas were closed for a period of time in the wake of Hurricane Harvey in 2017. Courts in New York City were closed for a period of time following the terrorist attacks of September 11, 2001. Courts in San Francisco, California, were closed for a period of time following the 1906 earthquake. But in all of these cases, the court closures were either short-lived, or the courts were able to relocate their operations because, unlike the COVID-19 pandemic, the events precipitating the closures were relatively limited in geographic scope.

[14] 758 F.2d 341 (8th Cir. 1985).

[15] *Id.* at 343.

> commercial planes over Iran, and the suspension of flights to Iran, by several commercial airlines, which would make it gravely difficult, inconvenient and dangerous for McDonnell Douglas to litigate its dispute with Iran in the Islamic Court of the First Instance in Tehran. We thus take judicial notice that litigation of the dispute in the courts of Iran would, at the present time, be so gravely difficult and inconvenient that McDonnell Douglas would for all practicable purposes be deprived of its day in court."[16]

The same can perhaps be said of the COVID-19 pandemic—that it makes it "gravely difficult, inconvenient and dangerous" for the parties to litigate in "the courts of the State of New York sitting in the County of New York."

Arbitration provides another useful context. An arbitration agreement is a "kind of forum-selection clause."[17] In *QuickClick Loans, LLC v. Russell*,[18] arbitration was not available to parties that had signed an arbitration agreement specifying that "[t]he party requiring arbitration must choose one of the following arbitration organizations as the Administrator: American Arbitration Association ('AAA') . . . or National Arbitration Forum ('NAF')."[19] After entering into the arbitration agreement, but before the parties' dispute arose, the NAF "ceased administering consumer arbitrations," and AAA "issued a moratorium on consumer debt collection arbitrations."[20] The court noted that "[i]n this case, neither the AAA nor the NAF was available to perform the arbitration. . . . Although the parties agreed to arbitration, the exclusive administrators, as outlined in the Arbitration Agreement, are not available to arbitrate the matter. Therefore, external events to the parties' agreement have foreclosed the arbitration of the parties' claims, and thus the circuit court could not enforce the Arbitration Agreement."[21] Where parties designate an organization as the exclusive "forum" to administer arbitration, and that organization is unable to administer arbitration, the arbitration agreement is generally held to be unenforceable.[22]

But as a matter of equity, is it fair to allow these parties to litigate now, when others with non-essential matters are waiting for the New York Commercial Division to reopen its doors to new filings? Will other litigants, including perhaps those without a connection to Delaware, seek to enlist the assistance of the Delaware Chancery to resolve disputes that otherwise would have been filed in the New York Commercial Division in New York County? "History dating back to the time of 15th-century plagues shows that lawsuits typically plummet during pandemics . . . for the obvious reason that courts are closed."[23] During the COVID-19 pandemic, so long as certain courts remain open—even if court business is conducted almost entirely by videoconferences and telephonic hearings—can and should those courts shoulder an increased case load? Are

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[16] *Id.* at 346.
[17] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).
[18] 943 N.E.2d 166 (Ill. App. Ct. 1st Dist. 2011).
[19] *Id.* at 169.
[20] *Id.*
[21] *Id.* at 173.
[22] *See, e.g.*, *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 232-33 (3d Cir. 2018); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1338 (11th Cir. 2016).
[23] Neil MacFarquhar, "Lawsuits Swell as Owners, From Gun Shops to Golf Courses, Demand to Open," *The New York Times* (Apr. 3, 2020) (citing Wellesley College Political-Science Professor Tom Burke).

courts sufficiently prepared to take on cases that, under normal circumstances, would have been filed in other jurisdictions?[24] Lawyers and others will be watching the *Conduent* case carefully for answers to some or many of these questions.

[24] At least one court has already taken into account the burdens placed by the COVID-19 pandemic on other courts. *See Capriole v. Uber Techs., Inc.*, 2020 U.S. Dist. LEXIS 55942 (D. Mass. Mar. 31, 2020) ("[T]he court is reluctant to burden another District with a transferred case (particularly one with an emergency motion for a preliminary injunction pending) in light of the unprecedented staff shortages and delays throughout the courts as a result of the COVID-19 pandemic.").

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