

On March 30, 2020, in *Conduent Business Services, LLC v. Skyview Capital LLC*, C.A. No. 2020-0232-JTL, the Court of Chancery considered whether a Delaware court could assert jurisdiction over claims subject to a New York forum selection clause, where the New York courts' current operating procedures precluded litigation of the case on a schedule that might avert irreparable harm faced by the plaintiff. Vice Chancellor Laster held, in a transcript ruling, that the Court of Chancery is an appropriate venue and can assert jurisdiction over claims that functionally cannot be litigated in the contractually agreed upon venue due to the COVID-19 pandemic, provided that the Court otherwise has personal and subject matter jurisdiction with respect to the dispute.

A party faced with irreparable harm should consider whether Delaware is an option if the contractually specified forum is unavailable by reason of the current COVID-19 crisis.

Background:

Conduent, a Delaware entity, faced an anticipatory breach of an asset purchase agreement with a transfer date of April 30, 2020. The agreement included a New York forum selection clause. Due to the COVID-19 crisis, however, New York courts are indefinitely closed to “non-essential” matters, which include all new commercial filings. Represented by Sheppard Mullin and Young Conaway, Conduent sought declaratory and injunctive relief in the Delaware Court of Chancery.

With respect to venue, the Court of Chancery observed that the New York courts, which are “among the finest in the world,” had halted all civil litigation in response to the COVID-19 crisis:

The reality is that they face an extraordinary situation right now, and so it's understandable that they'd be in a position where they can't handle disputes. That doesn't thrust parties back into a state of nature where people can simply use self-help against each other. It means that people can go to other courts, if the jurisdictional bases are met, and seek relief in those courts. So in terms of the availability of potential relief in this Court, I think it exists.

Vice Chancellor Laster ruled that, due to the current COVID-19 crisis and closure of New York's courts to commercial disputes, the chosen forum was “unavailable” for Conduent to seek

the expedited relief needed to avert irreparable harm. As a result, the Court of Chancery could exercise jurisdiction over this claim despite the contract's forum selection provision.

Ultimately, however, the Court denied expedition of Conduent's claims based upon the balance of the equities: Vice Chancellor Laster observed that he would need to resolve factual disputes to reach a resolution, which would be unduly difficult in the time available, taking into account the effects of the COVID-19 crisis.

The Court's ruling is consistent with precedent, which holds that where parties have agreed to a forum, and that forum later becomes unavailable, an alternative forum able to afford relief can appropriately exercise jurisdiction. *Troy v. Schoon Corp.*, 2007 WL 949441, at *4 (Del. Ch. Mar. 26, 2007); *see also Kemper Mortg., Inc. v. Russell*, 2006 WL 355613, at *3 (S.D. Ohio Feb 16, 2006) (holding court could exercise jurisdiction over claims where forum selection provision designated non-existent forum as exclusive forum); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 346 (8th Cir. 1985) (holding court could exercise jurisdiction where Islamic revolution rendered Iranian courts unavailable to hear claims). Thus, in these difficult times, the Court's ruling highlights that there may be an alternate forum for parties to litigate their disputes where the parties' choice of forum is unavailable due to the COVID-19 crisis and that the crisis will be taken into account in the Court's consideration of whether to permit expedition.