

Rhode Island – Force Majeure Law

Rhode Island courts construe force majeure clauses narrowly and will excuse performance where the clause specifically includes the event that actually prevented a party's performance. *URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education*, 915 F. Supp. 1267, 1287 (D.R.I. 1996)(citing *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987)). Otherwise, if not specifically referenced in the clause, the court will determine whether the event was foreseeable to the parties at the time of contracting. Where the circumstance was not foreseeable, the court may then excuse performance. *URI Cogeneration Partners*, 915 F. Supp. at 1287.

In *URI Cogeneration Partners*, for example, the court considered the developer's claim that zoning issues, a circumstance not specifically referenced in an otherwise detailed force majeure clause, excused its failure to meet certain contract milestones. The court rejected the developer's contention that the inclusion of the catch-all phrase, "not limited to" should be construed broadly to include any causes beyond the reasonable control of and occurring without the fault of the developer. Instead, noting that "force majeure clauses have traditionally applied to unforeseen circumstances— typhoons, citizens run amok, Hannibal and his elephants at the gates--," the court held that the clause would only apply "to those situations that were demonstrably unforeseeable at the time of contracting." *URI Cogeneration Partners*, 915 F. Supp. at 1287. Because the factual record demonstrated that difficulties with the local town council were not "unforeseen" by the parties as a potential barrier to contract compliance, the court declined to find that the force majeure provision excused the developer's performance under the contract. *Id.*

Where a contract does not include a force majeure clause or other provision addressing unforeseen circumstances, Rhode Island courts look to the Restatement (Second) of Contracts to determine whether performance may be excused on the basis of frustration or impossibility. To succeed on a theory of frustration based upon the occurrence of a supervening event, a party must show that: "(1) the contract is partially executory, (2) a supervening event occurred after the contract was made, (3) the nonoccurrence of the event was a basic assumption on which the contract was made, (4) the occurrence frustrated the parties' principal purpose for the contract, (5) the frustration was substantial." *Tri-Town Const. Co. v. Commerce Park Associates*, 139 A.3d 467, 475 (R.I. 2016)(quoting *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234, 1238

(R.I.1998)(further citations omitted). “The ultimate inquiry . . . for the purposes of accepting or rejecting a defense of [frustration of purpose] is whether the intervening changes in circumstances were so unforeseeable that the risk of increased difficulty or expense should not be properly borne by [the nonperforming party].” *Grady v. Grady*, 504 A.2d 444, 447 (R.I.1986). In turn, that risk of increased difficulty or expense must be so severe that “the purpose underlying the contract must be totally and unforeseeably destroyed.” *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1219 (R.I.1984) (purpose of contract not frustrated by elimination of statutory requirement that municipal approval be sought before property could be sold). Accordingly, a mere showing that the event caused performance to become more expensive, for example, but not impossible, will not support a finding of excusal on this basis. See e.g., *Tri-Town Const.*, 713 A.3d at 476 (court rejected contractor’s claim of frustration of performance where difficulty in obtaining the requisite financing made the prospect of building an age-restricted condominium more expensive, but “far from impossible”).