



**STATE OF
RHODE ISLAND
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

Prepared by

Andro S. Hannoush, Esq.
Adler Pollock & Sheehan P.C.
One Citizens Plaza, 8th Floor
Providence RI 02903
401.274.7200

ahannoush@apslaw.com

www.apslaw.com

A. Introduction

This memorandum provides a Rhode Island 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 Rhode Island

1. Introduction

As the outbreak of the COVID-19 pandemic continues to severely impact business activity in Rhode Island, the question on the minds of many individuals is whether a business that is unable to perform their obligations under a contract will be held liable. Businesses have been dissecting their contracts to determine if they contain provisions that would excuse performance, either temporarily or permanently. Accordingly, businesses should be on the lookout for a force majeure clause and should consider seeking advice regarding the scope and consequences of such a provision on their obligations.

A force majeure clause provides parties to a contract relief from their contractual obligations upon the occurrence of an unforeseeable event outside their control (such as accidents, acts of God, acts of war, or terrorism). Such events render performance impracticable, illegal, or impossible. Typically, the triggering events will depend on the particular transaction that is the subject of the contract. It is common for agreements to include a list of qualifying events that trigger the provision as well as specific exclusions. Triggering a force majeure clause may suspend, delay, or even permanently terminate performance due on a contract without the risk of damages for breach due to the failure to perform.

Without a contract containing force majeure provisions, a party would be left with common law defenses of impossibility, impracticability, and frustration of purpose for non-performance, which seldom excuse performance under a contract. While the lack of a force majeure clause may not be catastrophic, businesses or individuals who are under an existing contract or those who are negotiating terms of a contract should consider the current uncertainty posed by COVID-19.

2. Requirements to Obtaining Relief Using Force Majeure

Although “force majeure” is defined in certain state statutes, Rhode Island does not define the term in its general laws. Moreover, Rhode Island has little case law addressing the application of force majeure provisions or the effect of pandemics or contagious outbreaks on contractual obligations.

Currently, with the COVID-19 pandemic, a party seeking relief for their non-performance under a force majeure provision will carry the burden of showing that the COVID-19 event, such as business closure ordered by the governor, is a force majeure event based on the language in

the agreement governing both parties. The party seeking relief will have to prove that the qualifying event led to their inability to perform.

The question of whether a force majeure provision can be invoked requires an inquiry into the facts of the events and will depend on the terms of the governing agreement. Typically, whether an event qualifies as a force majeure event depends on the industry in which the parties to the agreement operate and the agreement's subject matter. For instance, a contract for the sale and delivery of goods might contain a force majeure clause that is triggered by shortages of supplies, transportation, or organized labor activities (such as a strike) while a contract for services might include natural disasters such as floods, earthquakes, and hurricanes. Nevertheless, most contracts containing force majeure provisions include a "catch-all" provision allowing for other unforeseeable events beyond a party's control not specifically enumerated in the list of qualifying events that triggers its effects.

Rhode Island state courts have neither reviewed force majeure provisions in connection with a global pandemic, nor considered how unforeseeable an event must be to invoke this protection. Generally, when the Rhode Island Supreme Court has interpreted cases regarding nonperformance by a party, the court has interpreted all excuses narrowly. In *Tri-Town Const. Co. v. Commerce Park Assocs. 12, LLC*, however, while not directly analyzing a force majeure provision, the Rhode Island Supreme Court held that the collapse of the economy during the "Great Recession" that led to the purchaser's failure to obtain financing was not a substantial frustration under the doctrine of frustration of purpose that would excuse the purchaser's obligations under the agreement. See 139 A.3d 467, 474 (R.I. 2016). While COVID-19 responses such as Rhode Island Governor Gina Raimondo's "Stay-at-home" Order may trigger a force majeure provision, parties to an agreement should be on the lookout for any ambiguities in their agreements that may lead to future litigation.

3. Scope of Relief

Invoking a force majeure clause will typically either completely excuse a party's performance or temporarily suspend performance until a time when performance is possible. Force majeure clauses also often contain a notice requirement that establishes when and how a party must give notice of its intent not to perform after a triggering event. The failure to give notice may waive a party's right to obtain relief under a force majeure provision.

Moreover, each contract containing a force majeure clause may set a standard that requires a certain degree of impossibility before a party's obligations are excused. Some contracts contain a strict impossibility standard that requires performance to be impossible before it is excused. On the other hand, some contracts provide a more forgiving standard requiring performance to be merely impracticable or infeasible. For example, in Rhode Island, social gatherings through phase 1 of the reopening of the economy are limited to 10 people. If a contract set to commence shortly after phase 1 requires a gathering of 15 people, it may not meet the standard of "impossibility" but may nevertheless be "impracticable" to perform.

4. Other Considerations

While Rhode Island law has not specifically addressed whether a party relying on a force majeure clause in an agreement must attempt to mitigate the consequences of a qualifying event, other jurisdictions have held that parties will have to show that there were no alternative means of performing under the agreement. Rhode Island courts are likely to follow this approach. With the COVID-19 pandemic limiting many channels of business and transportation, mitigation options are limited.

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.