

Massachusetts – Force Majeure Law

Under Massachusetts law, a force majeure clause in a contract will be construed in accordance with typical rules of contract construction. There are few cases in Massachusetts that have considered force majeure clauses, but the few that do exist have construed the clauses narrowly. For example, in *Baetjer v. New England Alcohol*, 319 Mass. 592(1942) the Supreme Judicial Court refused to apply a force majeure clause where a seller was unable to ship molasses from Puerto Rico to Massachusetts during World War II due to the fact the submarines were sinking tankers carrying the goods. The Court narrowly construed the force majeure clause by referring to the previous clauses in the contract. This narrow rule of construction was subsequently applied in *Goldman Environmental Consultants v. Kids Replica Ballpark, Inc.*, 81 Mass. App. 1125, 964 N.E. 2d 370(2012).

In the absence of a force majeure clause in a contract, Massachusetts also recognizes an “act of God” as a defense to contractual performance. The recognized definition of an “act of God” is, “the action of an irresistible physical force, or the violence of natural phenomenon, not attributable to the conduct of man, not referable to participation by man through unreasonable failure to anticipate danger or to put forth protective instrumentalities...”. *Bratton v. Rudnick*, 283 Mass. 556, 561, 186 N.E. 669(1933). As with the construction of force majeure clauses, however, the “act of God” defense is applied narrowly. As noted by the court in *L.G. Balfour Co. v. Ablondi & Boynton Corp.*, 3 Mass. App. 658, 661, 338 N.E.2d 841(1975), “a party may escape liability for damage resulting from such a force only when the force is of such magnitude that the damage cannot be reasonably anticipated, or when reasonable preventive measures are insufficient to avoid the damage.” In that case, flooding that surpassed levels from a recent hurricane was not an “act of God” because there was some evidence that the property owner could have foreseen severe flooding. *See also OneBeacon Ins. Group v. RSC Corp.*, 69 Mass. App. 409, 868 N.E.2d 644(2007) (historically heavy rainfall and high winds did not entitle homeowners to an “act of God” jury instruction.)

Massachusetts also recognizes impossibility and frustration of purpose as defenses to contractual performance. The doctrine of frustration of purpose is considered a companion rule to the doctrine of impossibility. *Karaa v. Kuk Yim*, 86 Mass. App. 714, 20 N.E.3d 943, 948(2014). Under the frustration of purpose doctrine, the performance of a contract is not impossible or impracticable, but because of unanticipated events for which the party seeking to avoid the contract is not responsible, the other party’s

performance would be totally useless or valueless to him. For example, in [*Chase Precast Corp. v. John J. Paonessa Co., Inc.*, 409 Mass. 371, 566 N.E.2d 603 \(1991\)](#), the court applied the doctrine to excuse a company from having to purchase concrete construction barriers when the Commonwealth of Massachusetts deleted a contract specification requiring the barriers. In reaching its decision the court adopted the Restatement (Second) of Contracts, section 265 that articulated the defense. The Restatement explains: "The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." However, a party who assumes the risk of the happening of an event making the contract less advantageous for is not excused from performance and cannot invoke the doctrine of frustration of purpose. *Essex-Lincoln Garage, Inc. v. City of Boston*, 342 Mass. 719, 721-722, 175 N.E.2d 466(1961)(Lessee of parking garage not excused from lease after City changed traffic pattern that impacted business). Similarly, where the conditions that render performance impossible do not amount to a substantial abrogation of the entire contract, a party may be excused from part of the contract, but may not be excused from the remaining part of the contract, unless the circumstances are such that the performance would be unjust to the promisor. [*Van Dusen Aircraft Supplies of New England, Inc. v. Massachusetts Port Authority*, 361 Mass. 131, 279 N.E.2d 717 \(1972\)](#).