

Newsletter



Robinson Sheppard Shapiro
Avocats • Lawyers

April 15, 2020

COVID-19 and *Force Majeure*: Navigating Exceptional Times as a Business

Everything has changed since the World Health Organization declared COVID-19 a pandemic on March 11, 2020, and it has since become increasingly clear that its impact will be felt across every level of society and industry. Businesses and individuals, reeling from the economic impacts of COVID-19, are wondering how it will impact their various contracts, legal obligations and commitments. In particular many are wondering if force majeure, an often under-considered element of most contracts, is relevant at this exceptional time.

What is Force Majeure?

Under the *Civil Code of Québec*, *force majeure* (or in English, “superior force”) is an event that may allow an actor to free themselves from liability for harm they cause, or from a debt they owe, to another.

In order for the actor to demonstrate that the event was in fact *force majeure*, they must establish three things:

- First, that the event was unforeseeable, and therefore could not have been predicted or anticipated;
- Second, that it was irresistible, meaning there was nothing they could have done to mitigate, avoid, or control it; and

- Third, that the unforeseeable and irresistible event made those obligations **impossible** to fulfill.

It should also be noted that certain contracts can waive the application of *force majeure* altogether, or modify it such that parties don’t have to meet the above criteria for it to apply.

Is COVID-19 Force Majeure?

Whether COVID-19 and its impacts on businesses will fall under the *Civil Code of Québec’s* definition of *force majeure* has yet to be established by the Quebec courts. If a court finds that COVID-19 is in fact *force majeure* then this will undeniably have a major impact on many business and other obligations in the province.

Sharon G. Druker
514 393-4014
sgdruker@rsslex.com

Geneviève Goulet
514 393-7422
ggoulet@rsslex.com

Sara Laraichi
514 393-7465
slaraichi@rsslex.com

Elyssa Leiberman
514 393-7675
eleiberman@rsslex.com

Sydney Warshaw
514 393-7665
swarshaw@rsslex.com

Our newsletters aim to bring to your attention the contemporary legal issues which we believe are and should be of interest to the public at large and under no circumstances are they to be considered as legal opinions. The newsletters are merely intended to alert readers to interesting topics and/or new developments in law. © RSS 2020. No part of this newsletter may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, unless the source is mentioned in writing on the face of the reproduction.

800 du Square-Victoria, #4600, Montréal QC H4Z 1H6 • T 514 878-2631 • F 514 878-1865
255 Racine St. E., #530, Chicoutimi QC G7H 7L2 • T 418 579-3113 • F 418 579-3114
230, De Martigny St. W, #7, Saint-Jérôme QC J7Y 2G3 • T 450 710-0971 • F 450 710-0972
rsslex.com



A global pandemic may very well be an unforeseeable and irresistible event but this does not mean that it will render every obligation affected by it impossible to meet. For example a commercial tenant that is no longer able to run its business because of the Quebec Government's mandatory shutdown of non-essential businesses might still technically be able to pay its rent.

It should be noted that there is case law in Quebec indicating that government regulation following an unforeseeable and irresistible event, and not simply the event itself, can be considered *force majeure*.

Force Majeure Clauses

For many businesses, the most important step when considering *force majeure* will be to check their various contracts to see if there is a *force majeure* clause, and if so, what it says.

Force majeure is not of public order in Quebec and contracting parties are therefore free to modify the circumstances and obligations related to such an event. Many contracts list the specific kinds of events that will constitute *force majeure* and these may or may not include something like a pandemic. Other contracts will waive the application of *force majeure* for elimination of liability altogether.

Many contracts will include other clauses that must be taken into consideration in situations of possible *force majeure*. These include the common requirement for businesses to maintain business interruption insurance to protect them-

selves from the economic fallout of an unforeseeable and irresistible event.

What Should You Do?

The first step for anyone thinking about *force majeure* and its impact on them or their business should be to check their contracts to see what is included in terms of *force majeure* and business interruption insurance clauses.

If their contracts do include such clauses, these will certainly be the starting point for any future interpretation and resulting obligations.

For contracts that do not include these clauses, the analysis will be largely review the facts on a case-by-case basis, exploring the true impossibility of performance of the obligation, and possible liability.

Legal Ramifications

Lawyers will likely give greater thought to the careful drafting of *force majeure* and related contractual clauses going forward. Previously included in contracts as a "miscellaneous" or "boilerplate" provision (if at all), this pandemic has shown us that the application and impact of *force majeure* is anything but standard-form.

As always, we at RSS are here to help you with the drafting and understanding of your contracts. Should you want to know more about any of the above, or if you have any other questions please reach out to any member of our Business Law Group who will be eager to work with you.

