

Legal update

Pandemia: Superior force (“force majeure”) and its impact on business obligations in Quebec

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On March 17, 2020, we published a [legal update](#) on the application of “force majeure” clauses and the doctrine of “frustration” in common law in the context of the COVID-19 pandemic.

This update also discusses force majeure, but as it applies in Quebec civil law (which uses the term “superior force”). Below are the answers to four questions frequently asked by our clients in the current context.

What is superior force and in what circumstances could it be raised?

Short answer: The general concept of superior force in civil law, unless modified contractually, makes it possible to be relieved of the performance of an obligation when an unforeseeable and irresistible event (i.e., one that cannot be prevented) makes the performance of that obligation impossible.

- To determine whether superior force could be relied upon to release you from your obligations, you should first check whether your contract contains a superior force clause that modifies or disregards the general civil law concept. If this is the case, the clause will prevail over civil law unless, depending on the circumstances (e.g., an abusive clause in a contract of adhesion), it is declared invalid. If your contract does not contain a superior force clause, the general civil law concept will apply by default.
- According to the general civil law concept, Quebec courts would most likely hold that the current pandemic is an unforeseeable situation. However, for the pandemic to constitute an event of superior force that would relieve you of an obligation, the pandemic must make performance of that obligation impossible, not just more difficult or more costly.

- Every case is unique and applicability of the concept of superior force will depend on the specific circumstances. For example, although this legal update cannot consider all possible instances of superior force, it is readily imaginable that a company whose activities have been banned by the government or whose key employees are in quarantine would be unable to perform certain obligations.

Could you invoke the pandemic to be relieved of the performance of an obligation that has become too costly?

Short answer: In most circumstances, no, but you would need to check the relevant clauses in your contract and determine whether your co-contracting party is able to perform its own obligations.

- Under Quebec law, the occurrence of unforeseen or unforeseeable events rendering the performance of a contract economically not viable is generally not a reason for a party not to honour its contractual commitments.¹
- However, your contract may contain provisions designed to adjust or adapt the obligations of the parties in the event of a situation such as the current pandemic. For example, a hardship clause could, depending on the circumstances, entitle you to renegotiate the amount of your contractual payments.
- In any event, the key for many companies in the current context lies in commercial negotiation. Appeal to your business partners' sense of responsibility. Even if you are concerned about the short-term situation, try to secure your long-term relationships by proposing viable solutions to your partners.
- You must also keep in mind that if your business partner is not able to substantially perform its own obligations, you may refuse, to perform your correlative obligation to a corresponding degree.

You are a tenant in a commercial building. By government order, you have had to suspend your operations. Can your landlord still demand payment of your rent?

Short answer: First and foremost, refer to the terms and conditions of your commercial lease.

- Many commercial leases stipulate that an event of superior force will not release the tenant from its obligation to pay rent. In such cases, the suspension of your commercial activities, even if government imposed because of the current pandemic, will not relieve you of your obligation to pay your rent. In certain circumstances, your landlord could even obtain a court order to force you to pay your rent.
- Your commercial lease may also contain clauses entitling you to renegotiate the rent, to be relieved of certain obligations or even to terminate your lease. For instance, courts have concluded that a commercial lease contained an implied obligation to assure customer traffic on the part of the landlord, which, depending on the terms of your lease, could give rise to an obligation to renegotiate or make other adjustments (for example, with respect to the obligation to occupy the premises, the right to use the premises, etc.)
- We also suggest that you review your insurance policies to determine the extent to which you are covered for business interruption losses.

Is the temporary injunction an appropriate recourse to force a counterparty to execute obligations that it refuses to perform due to the current pandemic?

Short answer: Only in exceptional circumstances, where the situation is truly urgent, where your counterparty's refusal appears clearly unjustified, and damages cannot adequately compensate you for the breach you are seeking to prevent.

- A temporary injunction is an order to do or to cease to do something issued by the court, in an urgent situation, on the basis of summary evidence. It cannot exceed a duration of 10 days.
- Only truly urgent situations can give rise to a temporary injunction. This criterion is all the more strict since all non-urgent judicial proceedings have been currently suspended until further notice.
- If your counterparty's refusal to perform its obligations does not appear, on its face, clearly unjustified the courts could, considering the seriousness of the global situation, be reluctant to issue temporary injunctions without further proof regarding the effects of the pandemic on your counterparty's ability to perform its obligations.
- If the potentially adverse consequences of the current situation are strictly financial, the injunction is not the appropriate recourse. You will be able to bring an action in damages in due course, once normal judicial activity has resumed.
- In the other cases, that is, when the situation is truly urgent, when your counterparty's refusal to perform its obligations appears clearly unjustified and when an award of damages would not adequately compensate you, then you could be able to apply for an injunction (or a safeguard order). Note, however, that the injunction is generally not the appropriate recourse to enforce a pecuniary obligation.
- Furthermore, even if you are entitled to it, before seeking injunctive relief, ask yourself if such recourse would be truly effective on a practical level. In many circumstances, it will not necessarily be the case, particularly if your contract is part of a set of interdependent contractual relationships (e.g. a chain of supply contracts) in which the ability of some to perform their obligations is dependent on that of the others to perform theirs.
- Finally, in many cases, commercial negotiation would be advisable before resorting to injunctive relief. Precipitous action before the courts could be detrimental to your interests, especially given your obligation to exercise your rights in a manner consistent with the requirements of good faith and your duty to mitigate your damages.
- In the current context, recourse to injunctive relief should therefore be a last-resort solution.

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Footnote

¹ *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, [2018] 3 S.C.R. 101.

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