

Risk management strategies for your cannabis business during COVID-19 and beyond

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In the weeds: Key consideration in force majeure clauses and contractual obligations

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- Purpose – respond to temporary conditions beyond control/foresight
- Effect – temporary suspension/modification of obligations
- Typical Elements – triggering event, threshold, notice, mitigation

- Subject to clear wording:
 - Triggering must be beyond control/foresight
 - Threshold will be impossibility of performance
 - But allocation dilemma recognized
 - Mitigation obligations regarding event and counterparty impacts
 - May require financial loss

- Frustration – object or purpose of contract destroyed, contract terminates
- Waiver – intentional relinquishment of right, cannot be reclaimed
- Estoppel – promise of forbearance, binding to extent of detrimental reliance
- Variation – requires agreement to vary, may require consideration

- Force majeure exists as a matter of law under the *Civil Code of Québec* (the “**CCQ**”) unless the parties have agreed to exclude, modifies or limit its application
 - If a contract includes a force majeure clause, generally speaking, this clause will prevail
 - If the contract is silent on the issue of force majeure, the CCQ provisions on force majeure shall apply
- The civil law concept of force majeure is codified at art. 1470 CCQ:

1470. A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.

Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.
- Art. 1470 CCQ is not a public order provision, parties may contractually deviate from its application

- **Conditions to establish force majeure under art. 1470 CCQ:**
 - Unforeseeability: whether a reasonable person in the same situation could have, when the contract was entered into, foreseen the occurrence of the relevant event
 - Irresistibility: the impossibility for a party to take reasonable measures to avoid the occurrence of the event. **The event must make performance absolutely impossible.**
 - External causes: the event and consequences are beyond the affected party's control.
- **Consequences:** the affected party is discharged from any liability arising from the non-performance of its contractual obligations due to the force majeure event.
- Art. 1470 CCQ is not of public order – a force majeure clause may exclude art. 1470 CCQ in its entirety or may stipulate more or less onerous conditions than the law (ex: contractual notice requirements)

- An agreement to make an agreement is not an enforceable contract.
- However, a document referred to as a “letter of intent” or a “memorandum of understanding” may create an enforceable contract where it contains the essential terms of an agreement.
- Context is important: Does the document at issue expressly contemplate further negotiations or steps before a binding contract is reached (e.g., “subject to approval by the board of directors” or “subject to contract”)?
- The court will look to the parties’ subsequent conduct.
- Trap for the unwary as the law is separated from commercial realities, particularly in the burgeoning cannabis industry.

1. First, a letter of intent or memorandum of understanding will create an enforceable contract where it contains the essential terms of the parties' agreement even though some further formality is contemplated.
2. Second, where your letter of intent or memorandum of understanding is intended to create enforceable obligations, always ensure that it includes a *force majeure* clause that reflects the realities of the modern world, failing which, you will have to rely on the more uncertain doctrine of frustration of contract to excuse non-performance.
3. Determining whether a party may be relieved from performance of its contractual obligations due to a force majeure event must be analyzed on a case-by-case basis and will depend on the language of the contract, the factual circumstances behind the non-performance and, where the contract is governed by Quebec law, possibly the criteria at art. 1470 CCQ.
4. Parties should assess and document, on an ongoing basis, the cost and delay impact of COVID-19 on the performance of their contractual obligations and take measures to mitigate its effects.

Quebec-specific (where your contract is governed by Quebec law):

1. It is important to review your contracts to determine whether a force majeure clause is included and, if so, what relief is provided for by the contract as it may differ from the relief provided for under the CCQ.
2. If your contract does not contain a force majeure clause, you may still be entitled to relief under the civil law concept of force majeure found at art. 1470 CCQ.

Thank you

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