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COVID-19 Pandemic: A *Force Majeure*?

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On March 11, 2020, the World Health Organization declared that the novel coronavirus, now called COVID-19, had officially reached the level of a pandemic. A few days later, on March 13, 2020, the Quebec Government declared a state of health emergency invoking section 118 of the *Public Health Act*[1] under decree 177-2020 (the "**Decree**"). In the wake of various public establishment closings, such as schools, sports centers, cinemas and bars, the Quebec Chief Justice and the Justice Minister adopted a ministerial order concerning judicial activities under article 27 of the *Code of Civil Procedure*[2].

Ministerial Order N° 2020-4251 of March 15, 2020 (the "**Order**") provides that, in civil matters, time limits for extinctive prescription, for forfeiture of rights and proceeding delays are suspended until the expiry of the state of emergency, as indicated in the Decree or any renewal thereof. The Decree initially provided a state of health emergency for an initial period of ten days, and was subsequently renewed for an additional ten days on March 20th. With the renewals, the Order will be in force until at least March 29, 2020 and thereafter for any subsequent renewals. Despite the suspension, courts can still hear cases that they consider urgent.

The exceptional circumstances caused by the pandemic, and the measures provided in the Order, raise several questions. In particular, are these circumstances considered a superior force or *force majeure* event, both from a purely legal and a contractual point of view?

The Legislative Framework

The concept of *force majeure* is defined as an **unforeseeable** and **irresistible**[3] event. This means that the debtor of an obligation must be prevented from meeting its obligation in an absolute manner, rendering the obligation **impossible** to perform. Courts regularly add a third condition to the preceding: the impossibility for the debtor to execute its obligation must arise from an external cause over which the debtor has no power or control[4].

In such circumstances, the debtor is released from the performance of its obligation if it has not yet been put on notice to perform it. The debtor is released even if it has been put on notice, if the creditor cannot benefit from the performance of the obligation due to the *force majeure*[5]. The inability to act can be either permanent or temporary. In the latter case, the performance of the obligation is merely suspended, and the debtor is only released from damages resulting from the delay[6].

The party invoking *force majeure*, namely the debtor, has the burden to prove that the event should be

considered to be one[7]. This burden is very heavy and the courts require exceptional and extraordinary circumstances[8] in order to release a debtor from its obligations.

The concept of *force majeure* is not of public order. This means that the parties to a contract can exclude the application of *force majeure* or modify its criteria for the purposes of their contractual relationship. For example, the parties may have expressly agreed in the contract that a pandemic would qualify as a case of *force majeure* allowing the parties to cease performing their respective obligations.

Whether a party alleges *force majeure* under the *Civil Code of Quebec* or under a contract, it is always a case-by-case analysis.

The Case of COVID-19

With respect to the COVID-19 pandemic, it is reasonable to conclude that the courts will consider certain circumstances to be cases of *force majeure*, while other circumstances will not be considered to be *force majeure*.

First, it will be rather difficult, if not impossible, to argue realistically that the debtor caused the pandemic or had any power or control over the events arising therefrom.

It is also clear to us that the unforeseeable condition of *force majeure* is also satisfied. Only a few weeks ago, few had foreseen the scale of the crisis currently experienced.

Regarding the irresistibility criterion, it will also be a question of analyzing each case to establish whether or not, in the circumstances, this is satisfied. As mentioned, to meet this criterion, the debtor will have to prove that it would have been impossible[9] for it to meet its obligations. Businesses that received orders from the government to close their doors would meet this criterion[10].

At present, some establishments and businesses are not included in the list of those that must close. Thus, the requirement of the irresistible character of *force majeure* is not necessarily satisfied. In fact, despite the present circumstances, public transport is still operating, employees are still available to work, with exceptions, and customers are not necessarily confined to their homes as is the case in other countries. For these reasons, it is vital to analyze specific circumstances in each case.

It is also essential to mention that, under Quebec law, non-performance of a contractual obligation is not justified by the simple fact that the performance of said obligation has become considerably more onerous[11]. Thus, having financial difficulties due to the current crisis is not, *a priori*, a case of *force majeure* that would justify failing to execute a contractual obligation. Some contracts contain clauses allowing the parties to renegotiate their financial obligations in the circumstance of a *force majeure*.

Before deciding to cease performing obligations, it will also be important to analyze the contracts that govern the relationship between the parties. Are there specific provisions defining *force majeure*? Parties to a contract often provide modalities that are more flexible and particular definitions of *force majeure*. It is a safe bet that certain cases that would not be considered *force majeure* under the *Civil Code of Quebec*, could be considered as such under the terms of a contract. Inversely, the parties may also have completely excluded the applicability of the concept of *force majeure* for the purposes of their contract. Some examples from our case law illustrate this point.

Despite the above, in Quebec, the concept of exception for non-performance exists. It allows a contracting party, when the other party refuses or fails to perform its obligations, to avoid the execution of its own obligations, to the equivalent or corresponding degree[12].

Concrete Examples of Force Majeure

- **The 1998 Ice Storm**

In *Pierrevillage inc.* v. *Construction 649 inc.*[13], the Superior Court heard a claim from a landlord for unpaid rent and a counterclaim for damages by the tenant. The latter claimed that following the ice storm, it suffered damages amounting to approximately $90,000 and asked the court to offset these amounts against unpaid rent. The landlord claimed that the freezing rain storm that hit Quebec in January 1998 was a case of *force majeure* that prevented it from performing its obligations. As for unpaid rent, the landlord argued that the provisions of the lease provided that the tenant had waived its right to a reduction in rent in the event of damages caused notably by snow or ice.

The Superior Court, after repeating the legal criteria applicable to cases of *force majeure*, concluded that the ice storm was indeed a case of *force majeure*:

> *"The ice storm of January 1998, which affected much of the province of Quebec, was widely publicized. The Montreal region and the cities located on the South Shore of the St. Lawrence River were particularly affected and economic life was temporarily paralyzed. Thousands of trees were damaged and many roofs of houses and commercial buildings collapsed under the*

weight of the ice. Residents were deprived of electricity and heating for several weeks. In the opinion of the Tribunal, this is a case of force majeure within the meaning of article 1470 of the Civil Code of Quebec."[14]

(Our translation)

In the above case, the tenant's counterclaim for damages was dismissed since the landlord, due to the *force majeure*, was prevented from performing its contractual obligations. The court considered the clause in the lease in which the tenant renounced to the reduction of rent as valid, thereby preventing the tenant from avoiding its obligation to pay rent. The court therefore ordered the tenant to pay its rent.

- **The H1N1 Flu Pandemic**

In 2009, the particularly virulent H1N1 strain of influenza A, although on a more modest scale than COVID-19, forced public health officials to take certain measures to control the spread of the virus. Among other things, this led to some trip cancellations. In *Lebrun* v. *Voyages à rabais (9129-2367 Québec inc.)*[15] and *Béland* v. *Voyages Charterama Trois-Rivières ltée*[16], the Court of Quebec concluded that this was a case of *force majeure*:

"The Court concludes that the phenomenon known as "swine flu" constituted a case of force majeure at the time of the formation of the contract, because it was unforeseeable. This event was also irresistible during the performance of the contract since it prevented the defendants from fully performing their obligation."[17]

(Our translation)

In these cases, plaintiffs had fully paid for their trips. Since the defendants had not fully performed their correlative obligations due to the *force majeure*, the plaintiffs were entitled to the reimbursement of any amounts that were paid. A distinction must therefore be made between this reimbursement, which is justified by the non-performance of a contractual obligation for which payment has already been made, and the awarding of damages for the injury suffered. Such damages are not compensated in cases of *force majeure*.

- **1990 Oka Crisis**

In *Sotramex inc.* v. *Quebec*, the Superior Court concluded that the Oka crisis met the necessary criteria and should therefore be considered a *force majeure*.

In this matter, Sotramex had a mandate to transport materials for the Province of Quebec to Ontario, the whole pursuant to a fixed price contract. Sotramex, forced to make a detour due to the closure of the Mercier Bridge during the Oka crisis, claimed a reimbursement for the additional costs incurred due to the route change.

The Superior Court concluded that, as the contract provided for the government's liability in cases of *force majeure*, Sotramex was justified in claiming such reimbursement.

Things to Keep in Mind

In conclusion, it is important to keep in mind that any time a party invokes *force majeure* to justify the non-performance of its obligation, it is necessary to carry out a case-by-case analysis of the facts. The present health emergency linked to the COVID-19 pandemic is no exception. In addition, while certain situations linked to the pandemic could qualify as *force majeure*, in some cases, the courts could dismiss this characterization.

The *Civil Code of Quebec* provides that *force majeure* must be an unforeseeable and irresistible event with regard to the debtor of the obligation. Courts also tend to consider that the event must arise out of a source external to the debtor to conclude that *force majeure* exists. As stated earlier, parties are free to provide for conditions contractually, in more or less broad terms, to manage those events that could affect their contractual relationship.

The COVID-19 pandemic can be considered a case of *force majeure* in certain situations. It cannot become a defense to any form of contractual non-performance, when it does not cause an absolute impossibility of executing a primary obligation, but merely causes difficulties in carrying out a secondary obligation as a consequence, such as, for example, an obligation to pay.

As of the present date, it would be premature to determine conclusively how the courts will treat the current situation and its legal consequences in all circumstances. Without any doubt, once this crisis is over, the pandemic we know today will continue to be a topic of discussion, and there will be many opportunities for our courts to rule on cases giving rise to situations of *force majeure*.

1. RLRQ, c. S-2.2.
2. RLRQ, c. C-25.01.
3. Section 1470 of the *Civil Code of Quebec* (or CCQ).
4. *Taillefer* v. *Cinar Corporation*, 2009 QCCA 850.

5. Section 1693 of the CCQ.
6. Vincent Karim, *Les Obligations*, 2009, 3rd edition, Wilson & Lafleur, p. 1115.
7. Section 1693 of the CCQ.
8. *La Malbaie (Ville de)* v. *Entreprises Beau-Voir inc.*, 2014 QCCA 739.
9. Vincent KARIM, *Les Obligations*, supra note 6.
10. See Order N° 2020-004 of March 15, 2020 from the Minister of Health and Social Services which provides for the closure of various public places, such as cinemas, sports centers, arenas, zoos, aquariums, bars, clubs, buffets, sugar shacks, etc.
11. *Churchill Falls (Labrador) Corp.* v. *Hydro-Québec*, 2018 CSC 46.
12. Sections 1591 and 1694 of the CCQ.
13. 1999 CanLII 11136 (QCCS).
14. *Ibid.*, par. 46.
15. 2010 QCCQ 1877.
16. 2010 QCCQ 2842.
17. *Lebrun* v. *Voyages à rabais (9129-2367 Québec inc.)*, supra note 15, par. 46.

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