

COVID-19: THE IMPORTANCE OF THE WRITTEN WORD

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Since the outbreak of the COVID-19 pandemic, the situation has evolved rapidly, and the extent of the legal and economic consequences for businesses and their operations remains uncertain. It is imperative, however, that companies remain in control of their operations and be proactive to ensure a smooth return when the storm passes.

In reviewing existing contracts and agreements or drafting and negotiating new ones, businesses need to consider the following questions:

- May I postpone scheduled deliveries or order fulfillment without penalty?
- May I change my source of supply if my supplier defaults or offers to perform late?
- Must I pay my rent (tenant) or can I still demand payment of rent (landlord)?
- Must I reimburse customers to whom the company cannot provide services or goods as originally agreed?

Contractual Clauses

Although the contract forms a whole, and it is essential to read it in its entirety to fully understand its scope, three clauses are directly applicable to the current pandemic: the *force majeure* (or failure to perform) clause, the notice clause, and the choice of court and applicable law clause.

Force majeure

A common mistake is to assume that the current pandemic and the state of emergency involving the closure of some businesses is sufficient on its own to set aside the execution of contracts or to justify any delay in execution. Several contracts expressly provide for situations of *force majeure*, either in general terms, such as an unforeseeable and irresistible event, or in more specific terms, including a pandemic declared by the World Health Organization.

The clauses are rarely the same, and it is essential to be familiar with them in order to apply them correctly. The wording chosen will be decisive. Indeed, *force majeure* must, in fact, prevent or affect the performance of the obligation in question, which will depend on a multitude of factors. In addition, it is possible that the clause

may require mitigating damages. This mitigation will depend on the nature of the contract and the restrictive rules put in place by governments. Thus, it is possible that the current pandemic will be recognized as a *force majeure* for the execution of some contracts and not for others.

In the absence of a specific clause, it will be necessary to turn to the applicable rules of law.

Notices and agreements

To address an inability to act or to invoke the *force majeure* clause, contracts may contain requirements in terms of written notices to be given within a specified time period. Despite widespread knowledge of the pandemic, compliance with deadlines and notices will help avoid unnecessary litigation. It is therefore essential to clearly confirm in writing one's intention to avail oneself of the relevant clause.

The same applies to agreements that could be reached amicably between two contractors. Indeed, it is to be hoped that the parties to a contract, often business partners, will come to negotiated agreements for the future. If this is the case, it is essential to properly document the nature of these agreements in writing in order to avoid any dispute or disagreement as to the scope of these *ad hoc* amendments.

Applicable law

Contracts also include clauses determining which law is applicable and which court to turn to in the event of a dispute. These choices are crucial, since they determine the validity of a *force majeure* or non-performance clause. If the contract is silent, a clause identifying choice of court and applicable law clause would make it possible to identify the applicable rules.

For example, the *Civil Code of Québec* expressly provides that: "Any person may be released from liability for injury caused to another person if he proves that the injury results from a *force majeure*, unless he has undertaken to repair it."

The event must prevent or affect the performance of the obligation. In addition, the event of *force majeure* must have been unknown at the time of the conclusion of the contract. This requirement will be particularly important for contracts concluded at the beginning of the year 2020, as well as for renewals made at that time, and will not fail to generate disputes. Finally, clauses should be added to new contracts or their renewal to take into account the evolving situation.

Case Law Examples

Unique in its scope, the current pandemic is reminiscent of past events affecting Québec. The ice storm, the H1N1 virus, the Oka crisis and the September 11 attacks gave rise to disputes that illustrate how certain situations have been interpreted by the courts. The examples that follow are provided for information purposes

only.

Rent obligation: ice crisis

In 1998, an ice storm hit Québec causing damage and paralyzing activities in several sectors. In the *Pierrevillage*^[1] case, a tenant who had been unable to peacefully enjoy his premises flooded by the storm, refused to pay the rent, even though the landlord had diligently carried out the repair work. The Court rejected the tenant's claim, recognizing the validity of a clause in the commercial lease which expressly provided that the rent would not be reduced in such circumstances.

In another case,^[2] however, residential leaseholders, unable to use their premises due to an extended power failure, were allowed a reduction of their rent under the ordinary law.

Cancellation of events: September 2001 attacks

In *Québec v. New York 2001*,^[3] the latter had entered into a turnkey service contract for the realization of an exhibition to be held in New York. When the contract was cancelled following the attacks, the parties did not agree on payment of the balance of the contract. Applying both contractual clauses and ordinary law, the court decided not to enrich one party to the detriment of the other. Thus, only work carried out at the time of the attack was required to be compensated.

Delay and cancellation of contracts: September 2001 attacks

In the *Caisse Desjardins de St-Paulin*^[4] case, Bombardier invoked the panic and uncertainty in the aeronautics industry following the attacks to avoid penalties and to justify the cancellation of a contract. The court rejected this claim on the grounds that Bombardier had been able to keep its entire order book despite the events, having at most, suffered only a few days of delays.

Conclusion

The importance of the written word cannot be minimized in the present circumstances. On one hand, it is essential to review contractual clauses now to identify whether and how the pandemic is addressed in them. It is also essential to ensure that required notices are given in a timely manner. Finally, to avoid disputes, all interim agreements must be in writing and new contracts should include additional clauses to reflect the current situation.

by Joséane Chrétien

[1] *Pierrevillage inc. v. Construction 649 inc.* 1999 CanLII 11136 (S.C.).[ps2id id='1' target='']

[2] *Lareau v. Régie du logement*, 1999 CanLII 11291 (S.C.).[ps2id id='2' target='']

[3] *Gestion Initiative Développement GID Ltée v. Québec New York 2001*, 2004 CanLII 647 (S.C.).[ps2id id='3' target='']

[4] *Caisse Desjardins de St-Paulin v. Bombardier Inc.*, 2008 QCCS 3725.[ps2id id='4' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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