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COVID-19 and Force Majeure

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The COVID-19 pandemic and the state of health emergency declared by the Québec government will inevitably affect business relationships in general and the performance of contractual obligations in particular. Although the repercussions will depend to a great extent on the specific circumstances of each case and how things evolve in the coming days and weeks, we can expect that some situations will be considered “force majeure,” allowing a party to a contract to be released from its obligations without being liable for breach of contract.

Force majeure is generally considered an unforeseeable and irresistible event that makes it impossible to fulfil an obligation.

What Does the Contract Say?

Many contracts contain clauses covering force majeure, defining what events are included and their consequences on the parties’ obligations, such as suspension of the performance of the obligations in question.

The first step is therefore to analyze the contract itself and the facts specific to the case in question to determine whether the COVID-19 pandemic and its consequences could be considered force majeure. In particular, it must be determined whether there are concrete impacts on the performance of one or more obligations set forth in the contract. Note that some clauses specifically mention pandemics. A party to a contract can also voluntarily take on the risk associated with force majeure.

Contracts that contain a force majeure clause also usually provide that a party to the contract wishing to take advantage of that clause must notify the other party. These clauses generally specify when the notice must be given and what it must say. Failure to send notice could have serious consequences. Even if the COVID-19 crisis has not yet affected a particular contract, it is important to check what the contract says about force majeure.

Rules Under the *Civil Code of Québec*

In the absence of a force majeure clause in a contract governed by Québec law, the general rules under the *Civil Code of Québec* (CCQ) apply.

The CCQ sets out the principle that a debtor is released from an obligation when it is impossible to perform it due to force majeure. The party required to perform an obligation has the burden of proving that the event that prevented performance constituted force majeure within the meaning of the CCQ. He must prove that the event was unforeseeable and that a reasonable person placed in the same circumstances would also have been unable to fulfil the obligation.

Under certain circumstances, we believe that the COVID-19 pandemic and its practical consequences, and in particular those imposed by the government (such as confinement, the inability of non-residents to enter Québec and closure of public places), could be considered force majeure. An analysis of the facts specific to each situation is required.

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