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# The Impact of COVID-19 on Contracts

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With the ongoing COVID-19 pandemic, governments and agencies are implementing an increasing number of measures of all kinds. The state of emergency is giving rise to a multitude of legal concerns, in particular contractual ones. The temporary closure of many businesses, public places and borders and the resulting economic uncertainty is leading businesses to question their contractual obligations, which may have become difficult to meet.

**In such a context, can debtors fail to meet their obligations without being held liable?**

The answer to this question can be found either in the text of the contract binding the parties or in the *Civil Code of Québec* (hereinafter "**C.C.Q**."). Many contracts do in fact provide for exemption mechanisms. They set out which of the parties will bear the risks associated with events beyond their control. In the absence of contractual provisions to that effect, the rules set out in the C.C.Q. apply.

**The *Civil Code of Québec* and superior force**

Article 1693 C.C.Q. provides that the debtor of an obligation is released from said obligation when it cannot be performed by reason of **superior force**. However, the burden of proof of superior force is on the debtor.

In Quebec law, superior force is defined as an unforeseeable and irresistible event that is external to the party subject to the obligation. It makes the performance of an obligation impossible[1]. Thus, in certain circumstances, natural phenomena, such as earthquakes, floods and others, or human acts, such as a state of emergency declared by a government, illness or death, may be considered superior force. Determining whether an event in a particular context constitutes superior force must be done by taking into account all relevant factors.

For an event to qualify as superior force, it must meet the following three conditions or criteria. It

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must be:

- Unforeseeable
- Irresistible
- Exterior

An event is **unforeseeable** when the parties to a contract, acting as reasonably prudent and diligent persons, could not foresee it at the time that the contract was concluded. There is no need for the event to be a new phenomenon. For example, ice storms in Quebec are not unusual. In 1998, however, the ice storm led to an unforeseeable situation. The magnitude of the 1998 ice storm was such that it was sometimes described as superior force.

An event is **irresistible** when (i) any person placed in the same circumstances cannot reasonably avoid it and (ii) it makes the performance of an obligation impossible. Thus, if the performance of an obligation remains possible, but is simply more difficult, more perilous or more expensive, the event having caused the complication cannot be considered superior force.

For an event to be considered **exterior**, the debtor must have no control over it and must not be responsible for causing it. The debtor must even be able to demonstrate that it has taken all reasonable steps to mitigate its consequences.

On the basis of these criteria, the current state of emergency in Quebec may be deemed to be a situation of superior force for some debtors. The analysis must be made on a **case-by-case basis and consider the specific obligations of each debtor**.

For example, the production stoppage ordered by the Government of Quebec, imposing the suspension of workplace activities other than priority activities as of March 25, 2020, makes it absolutely impossible for certain businesses to perform the obligations covered by this decree. For others, the state of emergency may have financial consequences, but these do not make their obligations impossible to perform. While the ongoing crisis can be considered an unforeseeable event for the purposes of a contract concluded years ago, this can hardly be the case for a contract concluded in the last few days, when the disease was already endemic or the pandemic had been announced by the health authorities.

In the event of superior force, a debtor is released from the obligation(s) affected by the superior force[2]. Depending on the importance of these obligations, the release may, in certain cases, lead either to the termination of the contract in its entirety, or to the suspension of the performance of certain obligations. Thus, suspension should only occur when the obligations are to be performed successively and the impossibility of performance is only temporary. A debtor who is released from an obligation by reason of superior force may not demand consideration from the other contracting party[3].

Superior force cannot be used as a means of exemption for a debtor who is subject, under the terms of the contract, to an obligation qualified as an obligation “of warranty[4]”. The debtor must then perform the obligation and assume all risks related to the occurrence of an unforeseeable and irresistible event over which it has no control.

A debtor faced with the current difficulties arising from the global COVID-19 pandemic must, in all cases, take steps to minimize the damage. For example, it must try to find new suppliers or subcontractors before claiming that it is unable to fulfil its obligations.

**Contracts may provide for different conditions**

Parties to a contract may include provisions in the contract governing the consequences of uncontrollable situations, such as superior force, and thus deviate from what is provided for in the C.C.Q.

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In practice, many contracts contain a broader or more restrictive definition of events that may constitute superior force. For example, strikes and fires will generally not be considered cases of superior force within the meaning of the C.C.Q., but may be under the terms of a contractual provision.

Likewise, a party may, at the time that a contract is concluded, undertake to fulfil its obligations even if it is subject to a situation of superior force. In so doing, it waives the right to invoke such grounds for exemption in advance.

The parties may also provide for steps to be taken in order to benefit from a contractual provision governing superior force, such as the sending of a notice within a stipulated time limit. The usual provision dealing with superior force requires the party invoking it to send a notice to the other party justifying its use of the provision. Failure to send such notice within the prescribed time limit may result in the affected party being barred from availing itself of the superior force provision. It is therefore particularly important for a party to pay close attention to the formalities and other requirements set out in the contract when invoking such a provision.

A contract may additionally contain a provision that determines what effects the occurrence of an event considered as superior force will have. For example, the parties may agree that superior force will result in the termination, suspension or modification of an obligation, such as the proportional adjustment of a minimum volume to be delivered.

Finally, the parties to a contract may set out the consequences of unforeseen and external situations that do not, strictly speaking, make the performance of an obligation impossible. For instance, the parties may anticipate the risk of an unexpected increase in the cost of an input by means of a hardship clause. A matter of sound foresight, such a clause may have significant consequences in the current situation, even if it does not specifically address superior force.

**Conclusion**

A superior force situation and the exercise of the rights that may result from it must be analyzed with the following in mind:

1. A case-by-case analysis is required for each situation.
2. Other legal concepts may apply depending on the circumstances, such as the duty of good faith of the parties to a contract, the duty to minimize damage, and the duty to demonstrate the absence of an alternative.
3. Business risks or reputation risks may apply to both the party wishing to invoke superior force and the party against whom it is invoked.

A review of the terms and conditions of the parties' insurance policies, which may provide compensation for financial losses, may also be appropriate.

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1. Article 1470 C.C.Q.
2. Article 1693 C.C.Q.
3. Article 1694 C.C.Q.
4. This is opposed to obligations qualified as "of result" or "of means," for which the debtor may be released by reason of superior force.

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