The Demand Letter: A Tool That Should Not Be Underestimated

Sending a demand letter is part of the usual process of most recovery files. It is sent at different points in time, depending on the way the claim is handled, and on the elements revealed during the investigation. People usually send it automatically, without necessarily understanding all of its implications. What is the actual purpose of the demand letter? What should it contain? Is it always mandatory? Here are a few reminders.

What is the purpose of the demand letter? What should it contain?

According to the Civil Code of Québec [CCQ], the creditor has the right to demand the performance of the obligation or any other measures provided by law, when the debtor fails to perform his obligation and is in default (Art. 1590 CCQ).

The debtor may sometimes be in default by the terms of the contract between the parties or by the effect of the law (Art. 1594 and 1597 CCQ). When it is not the case, a written notice must be sent in order to remind him of the object of his obligation, the alleged breaches and the debtor must be given reasonable time to perform his obligation.

In addition to being an essential formality in certain situations, the demand letter also gives the debtor the possibility to comply with his obligation or to justify his default. It could also allow the parties to conclude an agreement and avoid proceedings in Court.

In this regard, one must be reminded that the parties have the duty to act in good faith at all time (Art. 1375 CCQ).
Thus, the creditor who refuses to give a chance to his debtor to remedy his default without justification could be criticized later by the Court. Also, the new Code of Civil Procedure, in force since 2016, specifically provides that the parties have the obligation to consider alternative means of resolving their disputes before resorting to the Courts. The demand letter, even when not required by law, may provide the opportunity to open up the lines of negotiation.

It is also used to set the starting point for calculating the legal interests and additional indemnity (Art. 1600, 1617 and 1618 CCQ).

Is it mandatory?

Article 1597 CCQ provides that the demand letter is not necessary in the following situations:

- where the performance of the obligation would have been useful only within a certain time, which the debtor allowed to expire;
- where the debtor failed to perform the obligation immediately, despite the urgency;
- where the debtor has violated an obligation not to do;
- where specific performance of the obligation has become impossible through the debtor’s fault;
- where the debtor has made clear to the creditor his intention not to perform the obligation or where, in the case of an obligation of successive performance, he has repeatedly refused or neglected to perform it.

The creditor who alleges one of the above exceptions has the burden to prove it, both in contractual and extra-contractual matters.

Generally, the absence of a demand letter will not automatically lead to the dismissal of the action. If the debtor performs his obligation within a reasonable period of time following the filing of a legal action by the creditor, the judicial costs of the action are borne by the creditor, if the latter failed to send a demand letter beforehand (Art. 1596 CCQ).

However, there are some situations where the failure to send a notice in a timely manner could be fatal to the creditor’s recourse. Here are some examples:

- **Latent defect.** A buyer who ascertains that the property is defective shall give notice in writing of the defect to the seller within a reasonable time after discovering it.
- **Warranty against eviction.** A buyer who discovers a risk of infringement of his right of ownership shall give notice in writing to the seller within a reasonable time after discovering it. For example, this would apply to a buyer who discovers that his immovable is affected by a servitude that was not declared by the seller.
- **Specific obligation.** A creditor wishing to avail himself of the right to have the obligation executed by a third party at the expense of the debtor shall notify him before the beginning of the execution by such party. For example, a creditor who intends to mandate a third party to repair faulty work shall allow his debtor to come and assess his pretentions before the repairs.
- **Extra-contractual recourse against a city.** A person who intends to claim damages from a city for bodily injury or for damages to movable or immovable property shall send a written notice to the city clerk within 15 days from the date of the incident.

In these situations, the debtor will likely try to have the legal action dismissed, based on the failure of the
creditor to forward a demand letter. Thus, the latter will have the burden to convince the Court that one of the exceptions provided by the law or the case law shall apply to relieve him from his default.

In sum, it is best to be prudent and to notify a debtor as soon as possible once the latter is in default. As the saying goes, better safe than sorry.