

## IS SARS AN "EVENT" THAT TRIGGERS A FORCE MAJEURE CLAUSE?

by Mario Nigro and Marianne Smith

Force majeure clauses, with their archaic boilerplate language, are often overlooked in the drafting of commercial agreements. However, in light of the recent outbreak of severe acute respiratory syndrome (SARS) in Toronto, and the potential effect of SARS on the ability of parties to perform their contractual obligations, particular attention is now being focused on the drafting and interpretation of force majeure clauses. This article considers whether a force majeure clause may be invoked in light of the SARS outbreak in Toronto. The discussion also evaluates the responsibilities of affected parties to mitigate against an event such as SARS. Finally, the analysis provides insight as to how force majeure clauses should be drafted to allocate risk for an event similar to that of SARS.

### Acts of God

"Force majeure" is defined in contracts as an "act of God." Even in contracts that are silent on force majeure, courts have considered events that are "acts of God" as being ones that justify relief from performance. The Supreme Court of Canada (SCC) defined an "act of God" in *Atlantic Paper Stock Ltd. v. St. Anne-Nack*, [1976] 1 SCR 580 at 583 (hereinafter, "Atlantic") as an "event, beyond control of either party, [that] makes performance impossible." The SCC describes the uncontrollable character of the event as being something "unexpected" and "beyond reasonable human foresight and skill." In addition to the unexpected character of an event, the SCC states in *Atlantic* that the event must also be "radical as to strike at the root of the contract." When considering the occurrence of a force majeure event, courts are not interested in the occurrence of the

event per se, but the specific effect of the event on the terms of the contract and the obligations of the parties thereunder.

In circumstances where an event such as SARS is not considered an "act of God," the event may still be captured by inclusion in a more specific list of triggering events. For example, it is not uncommon for a list of specific triggering events in a commercial contract to include an "epidemic" or "emergency." As of yet, Canadian courts have not had the opportunity to deal with the specific facts of the SARS outbreak. As a result, Canadian case law does not provide guidance as to whether SARS reaches the threshold of an event that triggers an "epidemic" or "emergency" for the purposes of invoking a force majeure clause.

Although the news media described the outbreak as an "epidemic," it is unclear whether there is evidence for a Canadian court to declare it as such. The World Health Organization (WHO), has classified SARS on a global scale as a "communicable disease outbreak" rather than the category of "infectious epidemic." Locally, the Ontario government has classified SARS as a "communicable and virulent disease" as defined in section 1 of the *Health Protection and Promotion Act*, RSO 1990, c.H.7. Canadian health authorities have not classified SARS as an "epidemic." However, the SARS outbreak in Toronto may fall within the definition of an epidemic as set out in *Stedman's Medical Dictionary*: "The occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health related events clearly in excess of

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normal expectancy.” Uncertainty regarding the applicability of “epidemic” to the classification of the SARS outbreak makes reliance on this clause difficult for the purpose of determining contractual obligations.

With respect to the SARS outbreak, it may be possible for parties to suggest that the Ontario government’s declaration of an “emergency” under the *Emergency Management Act*, RSO, 1990, c.E.9 (the “EMA”) qualifies as a triggering event in circumstances where a force majeure clause includes an “emergency” as a triggering event. The EMA defines an emergency as “a situation or an impending situation caused by the forces of nature, an accident, an intentional act or otherwise that constitutes a danger of major proportions to life or property.” Canadian case law offers little guidance with respect to the interpretation of a public health emergency in the context of a force majeure clause.

### SARS as a Force Majeure Event

For the purposes of invoking a force majeure clause, the SARS outbreak in Toronto appears to qualify as an unexpected event. However, it may be difficult to demonstrate that the SARS outbreak “strikes at the root” of a contract as prescribed by the SCC in *Atlantic*. Courts have suggested that in order for the SARS outbreak to affect a contract in such a manner as to justify relief from performance, the following should be evidenced:

- the event and its effects are immediate (longer periods raise questions regarding changes in market conditions and a party’s obligation to mitigate losses);
- performance is commercially impracticable, unreasonable, or fundamentally at variance with the business of a party (it is not necessary to show that an event made it impossible to carry out a contract, but it will be necessary to show that the effect of the event, in terms of what is commercially feasible or

reasonable, are out of the control of a party); and

- the loss of control by a party is related to one fundamental event and not to a variety of market conditions as exacerbated by one unexpected event.

The difficulty in assessing whether the SARS outbreak constitutes a force majeure is related to how one defines the triggering event. The development of the SARS outbreak in Toronto was not an immediate event, but rather was evidenced over a period of weeks. A brief chronology of the outbreak illustrates the difficulty in assessing what may constitute a triggering event:

- On March 13, 2003, the first reported death attributed to SARS occurred in Toronto.
- Health Canada issued its first SARS advisory on March 16, 2003. At the time there were seven cases in Canada, six of which were in the Toronto area.
- Also on March 16, 2003, the WHO declared Canada an “affected area.”
- On March 25, 2003, the Ontario Health Minister declared SARS a “reportable, communicable and virulent disease.”
- On March 26, 2003, Ontario declared a “public health emergency” and ordered thousands of people to quarantine themselves in their homes.
- On April 23, 2003, the WHO issued a SARS-related travel advisory for Toronto.
- On April 30, 2003, the WHO lifted the SARS travel advisory for Toronto.
- On May 14, 2003, the WHO removed Toronto from the list of areas with recent local transmission.
- On May 26, 2003, the WHO added Toronto to the list of areas with recent local transmission of SARS. The change in status follows information, communicated by Health Canada, about new clusters of 26 suspect and eight probable cases of SARS linked to four Toronto hospitals.

The development of the SARS outbreak does not appear to provide a clear and identifiable “unexpected” event that triggers force majeure. Even in the context of industries that have been particularly affected by the SARS outbreak – for example, the tourism and restaurant industry – it will be difficult to determine a specific event in the development of the outbreak that was beyond the control of the parties and rendered performance commercially impossible or unreasonable. One possibility of an identifiable event is the decision to quarantine a location, establishment, or business that is essentially prevented from carrying on business.

### **Duty to Mitigate**

Even if an event is considered unexpected, courts will impose a duty to mitigate the effects of an event. An event that can be mitigated is considered one that is not beyond the control of a party, as highlighted by the Alberta Court of Appeal decision in *Atcor Ltd. v. Continental Energy Marketing* (1996), 38 Alta. LR (3d) 229 at 243–244 (CA): “...if a contracting party can otherwise continue to satisfy its contractual obligations in a commercially reasonable manner, the force majeure clause will not operate to absolve that party from its contractual responsibilities.” As a result, the development of SARS over a period of weeks provided parties to a contract with the opportunity to take action to mitigate the effects of the event. In fact, it appears that courts will have difficulty in accepting the SARS outbreak as an event that triggers force majeure where it may be shown that the parties did not act reasonably over the development of the SARS outbreak to mitigate effects of the outbreak on the performance of the contract.

### **Suggestions for Drafting Force Majeure Clauses**

Canadian case law provides suggestions as to how to draft a force majeure clause with respect to allocating the

risk of specific events such as SARS. Parties who seek to broaden the scope of a force majeure clause, particularly in those specific industries that may be affected by communicable diseases, should consider using additional language beyond the term “epidemic” to cover risks associated with communicable diseases such as SARS. For example, suggested language could include “communicable disease outbreak” or “communicable and virulent disease” to capture diseases that may not qualify as an “epidemic.” Another possibility, based on the need to provide specific language that triggers an identifiable event, is the addition of language that follows the authority of government officials to make declarations such as the authority to declare a “reportable, communicable and virulent disease” or a “public health emergency.” Linking a triggering event to a specific event provides certainty to contractual parties that may be beneficial for the purpose of dealing with unforeseen events. However, when including lists of specific events in a force majeure clause, parties should also be mindful of the rules of interpretation, particularly the contra preferendum rule, and draft accordingly.

On the other hand, parties who seek to limit the risks of SARS triggering an event of force majeure should consider using language that generally describes force majeure as an “act of God” with no additional specific triggering events. An all-inclusive force majeure clause may limit the possibility that the clause will apply to a SARS outbreak as we have recently experienced it. However, in drafting a force majeure clause for the purpose of limiting its application to an “act of God,” a drafter should be aware that Canadian courts have indicated that ambiguous drafting of force majeure clauses may be interpreted against the drafter.

### **Conclusion**

A force majeure clause is drafted to consider unexpected determinable

events, usually defined as “acts of God,” that have immediate and drastic implications on a party’s ability to perform contractual obligations. The development of the SARS outbreak in Toronto over a period of four to six weeks provided opportunities for the mitigation of adverse effects on contractual performance and raised the possibility that events were not beyond the control of the parties. Although the SARS outbreak may not be considered an “act of God,” force majeure clauses may also provide for a list of more specific triggering events, such as “epidemic” or “emergency.” Relying on these lists of specific events may be problematic, as Canadian courts have provided no interpretation of the thresholds for the triggering of these events.

Drafting a force majeure clause to ensure its application to an event, such as the SARS outbreak, should consider including triggering events that are linked to specific and identifiable events such as “communicable disease outbreak,” “public health emergency,” or “reportable, communicable and virulent disease.” In the alternative, limiting a force majeure clause to a discussion of “acts of God,” if drafted clearly, is likely to exclude the application of the clause to a SARS outbreak.

### **REFERENCES**

John H. Dirckx, *Stedman’s Concise Medical Dictionary for the Health Professions*, 4th ed. (New York: Lippincott Williams & Wilkins, 2001) s.v. “epidemic.”

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