

**FORCE MAJEURE CLAUSES AND
FINANCIAL MARKETS
IN AN EU CONTEXT**

November 2003

NOTICE

This Report is published by the European Financial Market Lawyers Group (EFMLG). The members of the EFMLG, whose names are set out in the Annex 3, are each expert in the field of financial markets law in the legal system of their Member State with a high degree of practical experience. The members of the EFMLG participate in its work on a strictly personal basis. The views expressed in this paper are those of the EFMLG members and do not necessarily reflect those of their institutions or of the European Central Bank (ECB).

Copyright © 2003 by the European Central Bank.

All rights are reserved. Excerpts may be reproduced or translated provided that the source is stated.

Contents

Introduction	5
Executive summary	6
I. Force majeure and Community law	8
1. ECJ/CFI case-law	8
2. Community legislation	9
3. Community legislation in the financial sector	10
II. Guidelines for OTC financial transactions affected by force majeure events	12
A. Scope	12
1. Force majeure events	12
2. Transaction/financial market specific considerations	13
B. Waiting periods	13
C. Deferral/termination of affected transactions	13
D. Valuations	13
III. Strikes as force majeure events: criteria to model force majeure clauses	14
A. Elements to be taken into account when drafting a force majeure clause in relation to strikes	15
1. Externality	15
2. Unforeseeability	15
3. Unavoidability	15
4. Obligations of the affected party	15
a) Notification of the occurrence of a force majeure event	15
b) Termination of the occurrence of a force majeure event	16
5. Main distinction (internal/external) strikes	16
B. Strikes and lockout – model clause	16

IV. Computer breakdowns as force majeure events: criteria to model force majeure clauses	17
A. Relevant issues in relation to computer breakdowns	17
1. Definition and features	18
2. Acceptable causes of computer breakdowns	18
3. Allocation of responsibility	18
4. Due care and evidence issues	19
5. Initiative for the provision of services	19
6. Extent of the computer breakdown and use of remedies	20
B. Elements to be taken into account when drafting force majeure clauses in relation to computer breakdowns	20
1. “Event or circumstances”	20
2. “Beyond the reasonable control of the affected party”/ “that cannot be foreseen or avoided”	20
3. “Precautions commonly adopted”/“with due diligence”/“after using all reasonable efforts”	21
4. “Cannot overcome such event or circumstances”/ “performance has been or would be so prevented, hindered or delayed or made unlawful or impossible”	21
5. “Use all reasonable efforts to mitigate the effects of such event while it is taking place”	21
Annex 1 – EFMLG survey on strikes and force majeure	23
Annex 2 – The force majeure clauses used in the market and contractual documentation in the financial sector	41
Annex 3 – List of EFMLG members and Sub-group members	51

INTRODUCTION

The European Financial Market Lawyers Group (EFMLG) has undertaken the task of considering whether it would be suitable to harmonise force majeure clauses which are incorporated, for example, into the standardised master agreements governing financial transactions in the European Union (EU), with a view to decreasing legal impediments to cross-border financial activity.

As an outcome of these efforts and also taking into account the *status of force majeure clauses under EU law* (See **Chapter I of the Report**), the EFMLG has produced some *guidelines for Transactions Affected by Force Majeure Events* (See **Chapter II of the Report**) as well as *recommendations* which focus respectively on *strikes* and *computer breakdowns* as possible force majeure events (See **Chapters III and IV respectively**).

The aim of the guidelines would be to provide guidance to market participants by addressing in a harmonised manner the impact of certain force majeure events on over-the-counter (OTC) financial transactions commonly entered into in the euro markets.

The EFMLG has also devoted attention to the conditions under which strikes and computer breakdowns in the context of financial transactions may qualify as a force majeure event. Two series of criteria to model force majeure clauses have thus been prepared concerning the criteria for force majeure clauses in respect of strikes and computer breakdowns.

Although there is no standard treatment of strikes as force majeure events in the EU, the EFMLG has investigated the possible conditions which should be met in order for a strike to be considered as a force majeure event.

With the increasing importance of information technology in the performance of international financial markets transactions, a uniform legal approach concerning the characterisation and the consequences of a computer breakdown might be warranted. The EFMLG initiative, through establishing a model definition of “computer breakdown” which is as clear as possible and introducing some interpretative criteria, aims to contribute to the safety of transactions among credit and financial institutions in a uniform manner that is applicable to all such institutions irrespective of differences in legal systems.

EXECUTIVE SUMMARY

European Court of Justice/Court of First Instance Law and Force Majeure

- According to the European Court of Justice (ECJ), force majeure implies non-performance due to abnormal and unforeseeable circumstances beyond the control of the person invoking force majeure whose consequences could not have been avoided in spite of the exercise of all due care. As the concept of force majeure is not identical in the different branches of law and the various fields of application, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect.
- Although the case law of the ECJ or the Court of First Instance (CFI) has not so far expressly acknowledged the existence of a general principle of Community law enabling force majeure to be pleaded in the absence of an express statutory basis, it is necessary to consider in a given case whether, according to the criteria established by the courts where the relevant legislation provided for the possibility of pleading force majeure, the conditions for the existence of a case of force majeure are met.

OTC Financial Market Transactions and Force Majeure

- Standard industry master trading agreements for OTC financial market transactions commonly entered into within the euro markets should contain clauses addressing the impact of force majeure events. The scope of such clauses should include force majeure events taking into consideration transaction or financial market specific considerations. The clauses should include force majeure events which prevent or make impossible or impracticable a party's ability to make or receive a payment or delivery under an affected transaction. It would be desirable for the same force majeure termination clause to apply across all traded markets to allow for termination of related transactions across markets which are affected by the same force majeure event. The clauses should contain a waiting period after the occurrence of a force majeure event during which affected obligations are deferred until the earlier of the cessation of the event or the expiry of the waiting period. After the expiry of the applicable waiting period, both parties should have the right to terminate all or less than all transactions affected by a force majeure event in order to avoid cherry picking of transactions to be terminated. It is also desirable for waiting periods to be uniform across industry standard documentation so that similar products traded under different master agreements will be capable of being terminated within the same time frame.

Strikes and Force Majeure

- Although discrepancies do exist among national jurisdictions, it is possible to detect common conditions which must be met in order for an event, including a strike, to be classified as force majeure. In most Member States it is required that the event be unforeseeable, beyond the control of the debtor, insurmountable and unavoidable even if due care is exercised. In general, it could be said that strikes do not automatically constitute force majeure events. A distinction is at times made between “external” (i.e. caused by factors external to the debtor) and “internal” (i.e. caused by events internal to the debtor such as salary demands, general working conditions, etc.) strikes, the former being more likely to fall within the notion of “force majeure”. “Wild” strikes, i.e. strikes which take place without prior notification, may also be considered under certain conditions force majeure events.
- The criteria for a force majeure clause in relation to strikes would be the following: externality, unforeseeability, unavoidability. The affected party should immediately inform the other party upon the occurrence of a Force Majeure Event. The affected party should notify the other party of the end of the Force Majeure Event within [X] Business Days after such end.

Computer Breakdowns and Force Majeure

- Due to the external character of a force majeure event, financial institutions should only be allowed to invoke a force majeure clause in the case of an externally-caused problem. On the other hand, problems related to the internal maintenance of the system/operation of computers should not excuse a party from performing its obligations, considering that each party should adopt measures to safeguard the stability and safety of its computer system. A further distinction in connection with the cause should be made regarding responsibility, i.e. to determine the origin of the failure and to assess who controls it and/or has the responsibility for it and/or could have prevented it.
- The extent of due care exercised in relation to the prevention and insurance against computer breakdown could provide an important tool for measuring the financial institution’s efforts to avoid or limit the likelihood of occurrence of such a breakdown.
- Based on market documentation standards, the criteria for elements contained in model force majeure clauses in relation to computer breakdowns would be the following: “event or circumstance”, “beyond the reasonable control of the (affected) party”/“that cannot be foreseen or avoided”; “precautions commonly adopted”/“with due diligence”/“after using all reasonable efforts”; “cannot overcome such event or circumstance”/“performance has been or would be so prevented, hindered or delayed or made unlawful or impossible”; "use all reasonable efforts to mitigate the effects of such event while it is taking place".

I. FORCE MAJEURE AND COMMUNITY LAW

Although not harmonised in nature, the concept of force majeure is well known under Community case-law and appears in several pieces of Community legislation, including in relation to financial markets.

A. ECJ/CFI Case-Law

The ECJ traditionally defines the notion of force majeure as follows: “*Even though the concept of force majeure is not limited to absolute impossibility, it nevertheless implies that the non-performance... is due to abnormal and unforeseeable circumstances beyond the control of the person invoking force majeure whose consequences could not have been avoided in spite of the exercise of all due care.*”¹

It is settled case law that the concept of force majeure does not have the same scope in the various spheres of application of Community law and that its meaning must be determined by reference to the legal context in which it is to operate². The ECJ has also ruled that “*As the concept of force majeure is not identical in the different branches of law and the various fields of application, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect.*”³

In an Opinion delivered on 16 March 2000, Advocate General Jacobs stated the following:

*“Force majeure is a legal notion which exists, in different linguistic guises and with certain variations, in the legal systems of many of the Member States. It has the effect of relieving a person from a legal obligation or liability if, essentially, an unforeseeable change of circumstances has made it impossible to fulfil the obligation. The Court has never ruled explicitly that force majeure is a general principle of Community law, and it is doubtful whether one can deduce such a principle, applicable to all areas of Community law, from the existing case-law. This does not mean, however, that force majeure has no role in Community law. The Court has often ruled on the scope of force majeure...It is settled case law that a trader can plead force majeure only if circumstances which are unusual, unforeseeable and beyond his control create insurmountable difficulties for the fulfilment of the relevant legal obligation which could not have been avoided even if all due care had been exercised. The application of those conditions is intimately linked with the facts of each individual case. Force majeure is by its very nature a flexible doctrine, which is more concerned with equitable outcomes than with precisely defined conditions.”*⁴

¹ Case C-4/68 *Schwarzwaldmilch v Einfuhr- und Vorratstelle* [1968] ECR 377, p. 385. See also Case 158/73 *Kampffmeyer v Einfuhr- und Vorratsstelle für Getreide*.

² Case C-286/88 *Falcolia v Comune di Pavia* [1990] ECR I-191; Case C-208/01 *Parras Medina and A. Parras Medina v Consejería de Agricultura y Medio Ambiente de la Junta de Comunidades de Castilla-La Mancha*.

³ Case C-4/68 *Schwarzwaldmilch v Einfuhr- und Vorratstelle* [1968] ECR 377, p. 385. See also Case 158/73 *Kampffmeyer v Einfuhr- und Vorratsstelle für Getreide*.

⁴ Opinion of Advocate General Jacobs delivered on 16 March 2000, Case C-236/99, *Commission v Kingdom of Belgium* (items 16 and 17).

In a recent judgment⁵, the CFI assessed this concept concerning the situation where there is no legal act expressly providing for the possibility of pleading the existence of force majeure to justify failure to comply with its obligations. The CFI considered in particular that "*the case-law of the Court of Justice or the Court of First Instance has not so far expressly acknowledged the existence of a general principle of Community law enabling force majeure to be pleaded in the absence of such a possibility being expressly provided for in the relevant regulations*". However, the CFI indicated that "*The existence of an administrative practice, even one that is not based on any legislation, under which the Commission considers whether there is a case of force majeure which should cause it to refrain from discontinuing aid may bind the Commission each time a case of force majeure is pleaded before it.*" It is therefore necessary to consider whether, according to the criteria established by the courts in cases where the relevant legislation provided for the possibility of pleading force majeure, the conditions for the existence of a case of force majeure are met in a given case.

B. Community Legislation

A quick overview of the Community legislation adopted over the last few years confirms that the notion of force majeure is used rather extensively, although the content attached to this notion may vary substantially according to the type of legislation and the sector concerned.

A number of Community texts, notably in the agricultural sector and in the fields of Community customs and social policies, refer to the notion of force majeure. This concept also appears relatively frequently in the "liberalisation" directives adopted over the last few years, notably in order to define the scope of the "universal service provision" in the sectors concerned. For example, the Directive on common rules for the development of the internal market of Community postal services and the improvement of quality of service provides that universal service provision shall meet a certain number of requirements and in particular "*shall not be interrupted or stopped except in cases of force majeure*"⁶.

Similarly, the "liberalisation" directives in the telecommunication sector contain some provisions ensuring the availability of universal service and notably the security of network operations during "periods of emergency", in the event of a "*catastrophic network breakdown or in cases of force majeure*". This issue is further developed in the section of this report devoted to computer breakdowns. By contrast, a strike seems to be more rarely considered as a possible force majeure event in Community legislation, although ECJ case-law does not expressly exclude such a hypothesis (see further the section III. devoted to this issue).

⁵ Court of First Instance (Second Chamber), 6 March 2003, Joined Cases T-61/00 and T-62/00 *APL/AIPO v- Commission of the European Communities*.

⁶ Article 5 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L15, 21.1.1998, pp. 14-25.

The concept of force majeure has also emerged in new areas of Community law (such as personal data protection⁷, electronic data interchange⁸, or the use of computerised systems⁹) and more recently in the financial sector (for instance in relation to cross-border credit transfers). This may notably be justified by the increasing recourse to sophisticated technologies for the performance of financial activities (see below in section IV.).

As mentioned above, the content given to this notion in Community legislation reveals important differences, depending upon the area of activity covered. Frequently, the notion is not defined at all, which means that its interpretation is subject to the existence of national implementing laws or to the ECJ's interpretation. In other documents such as market documentation, some concrete examples of force majeure events are expressly mentioned. They vary, however, considerably from one sector to another.

Force majeure provisions in Community texts often aim at exempting the service provider from any liability in certain exceptional circumstances. For example, the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides a liability regime according to which the person determining the purposes and means of processing personal data may be exempted from this liability, in whole or in part, "*if he proves that he is not responsible for the damage...or in case of force majeure*"¹⁰.

C. Community Legislation in the Financial Sector

The notion of force majeure can also be found in the Community legislation related to the financial sector. The Directive on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover mentions in its Annex concerning common principles for export credit insurance: "*Cases of force majeure occurring outside the country of the insurer, which could include war including civil war, revolution, riot, civil disturbance, cyclone, flood, earthquake, volcanic eruption, tidal wave, and nuclear accident, in so far as its effects are not insured otherwise.*"¹¹

⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp.31- 50.

⁸ See Commission Recommendation of 19 October 1994 relating to the legal aspects of electronic data interchange, 94/820/EC, OJ L 338, 28.12.1994, pp. 98 –117.

⁹ See Commission Regulation (EC) No 1404/97 of 22 July 1997 amending Regulation (EEC) No 3719/88 as regards the use of computerised systems for licences and certificates, OJ L 194, 23.7.1997, pp. 5-6.

¹⁰ See Recital 55 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31- 50. See also the Agreement between the European Community, the European Space Agency and the European Organisation for the Safety of Air Navigation on a European Contribution to the development of a global navigation satellite system (GNSS), OJ L 194, 10.7.1998, pp. 16-24. Article 11 ("*Force majeure*") provides that "*No Party shall be considered in breach of this Agreement if any failure to provide its contribution hereunder arises from or is caused by force majeure.*"

¹¹ Article 22 of the Annex to Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover, OJ L 148, 19.5.1998, pp. 22-32.

The Directive on cross-border credit transfers¹² distinguishes, among the circumstances with which institutions involved in the execution of a cross-border credit transfer may be confronted, including circumstances relating to insolvency and force majeure. Article 9 (“*Situation of force majeure*”) provides that “*institutions participating in the execution of a cross-border credit transfer order shall be released from the obligations laid down in this Directive where they can adduce reasons of force majeure, namely abnormal and unforeseeable circumstances beyond the control of the person pleading force majeure, the consequences of which would have been unavoidable despite all efforts to the contrary, which are relevant to its provisions*”¹³.

The definition of force majeure in the Directive on cross-border credit transfers is based on Article 4(6) of the Directive on package travel, package holidays and package tours¹⁴, which defines “*reasons of force majeure*”, as “*unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised*”¹⁵ (emphasis added). However, it is noted that the concept of “all due care” or “reasonable care” or “reasonable control” used in this Directive might be seen as more in line with ECJ case-law than with the wording of the Directive on cross-border credit transfers (“*despite all efforts to the contrary*”).

Guideline ECB/2001/3 of 26 April 2001 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET)¹⁶, as last amended by Guideline ECB/2003/6¹⁷, contains a force majeure clause which only applies between national central banks (Article 9) and provides:

“*There shall be no liability on the part of the NCBs/ECB for non-compliance with this Guideline to the extent that, and for so long as, there is an inability to perform the obligations in question under the Guideline, or such obligations are subject to suspension or delay, owing to the occurrence of any event arising from any reason or cause beyond reasonable control (including, but not limited to, equipment failure or malfunction, acts of God, natural disasters, strikes or labour disputes); provided that the above shall not prejudice the responsibility to have in place the back-up facilities required by this Guideline, to carry out the error-handling procedures, referred to in Article 4(f), as far as possible despite the force majeure event, and to use all reasonable efforts to mitigate the effects of any such event while it is taking place.*”¹⁸

¹² Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997, pp. 25-31.

¹³ In its report to the European Parliament and to the Council on the application of Directive 97/5/EC, the European Commission noted some diverging implementations of Article 9 into the national law of certain Member States, see http://europa.eu.int/comm/internal_market/en/finances/payment/directives/97-5impl.htm.

¹⁴ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, pp. 59-64.

¹⁵ Case C-338/89 *Danske Slagterier v Landbrugsministeriet*

¹⁶ OJ L 140, 24.5.2001, pp. 72-86.

¹⁷ OJ L 113, 7.5.2003, pp. 10-13.

¹⁸ Article 8 of the Guideline, which deals with the TARGET Compensation Scheme, also provides: “(c) *Unless otherwise decided by the Governing Council of the ECB, the TARGET Compensation Scheme shall not apply where the malfunctioning of TARGET is caused by: (i) external events beyond the control of the ESCB; or (ii) the failure of a third party other than the operator of the national RTGS system where the malfunctioning occurred.*”

II. GUIDELINES FOR OTC FINANCIAL TRANSACTIONS AFFECTED BY FORCE MAJEURE EVENTS

A number of developments in recent years, including in particular the severe market disruptions of 1998 and the tragic terrorist attacks in the US in September 2001, have prompted renewed interest in the issue of force majeure and similar clauses in financial market contracts¹⁹. In the context of the euro markets, while the force majeure legal doctrine differs from jurisdiction to jurisdiction, many jurisdictions recognise the potential for certain unforeseen and uncontrollable events to modify or excuse the performance obligations of the parties under otherwise valid and enforceable contracts. Moreover, the standard industry master trading agreements commonly used to govern OTC financial transactions in the euro markets do not uniformly address force majeure events.

The EFMLG considered it desirable to produce these Guidelines to provide guidance to market participants by addressing in a harmonised manner the impact of force majeure events on OTC financial transactions commonly entered into in the euro markets. The primary focus of these guidelines is to foster certainty in the euro markets by promoting common force majeure clauses for inclusion in standard industry master trading agreements which will help to ensure that transactions affected by force majeure events are settled in accordance with the expectations of the parties and in a consistent manner regardless of which EU legal system governs the transactions. While the force majeure doctrine differs from jurisdiction to jurisdiction, there are certain basic common features. As a result, similar, but not necessarily identical, results may occur depending upon the applicable law.

A. Scope

Standard industry master trading agreements for OTC financial market transactions commonly entered into within the euro markets should contain clauses addressing the impact of force majeure events. The scope of such clauses should include both force majeure events, taking into consideration transaction or financial market specific considerations as outlined further below.

1. Force majeure events

The clause should include force majeure events which prevent or make impossible or impracticable a party's ability to make or receive a payment or delivery under an affected transaction. The force majeure event must be beyond the reasonable control of the affected party. It should not be necessary to define force majeure in the contract where the parties are satisfied with the definition given to it by the law governing that contract.

¹⁹ See, for instance, the detailed study of H. Konarski on force majeure and hardship clauses in international contractual practice, IBLJ, n°4, 2003, pp405-428

2. Transaction/financial market specific considerations

It would be desirable for the same force majeure clause to apply across all traded markets to allow for termination of related transactions across markets which are affected by the same force majeure event. Consideration should be given as to whether or not modifications would be desirable for particular markets/products (e.g. scope, waiting period or remedy). For example, some repurchase agreement market participants may not deem it desirable to develop contractual provisions addressing force majeure events separately from other performance defaults.

B. Waiting Periods

This is the period from the occurrence of a force majeure event to the date when such force majeure or illegality shall constitute a termination event under the applicable master agreement. During the waiting period, all affected obligations are deferred until the earlier of the cessation of the event or the expiry of the waiting period. It is desirable for there to be an appropriate waiting period providing an opportunity for the force majeure or illegality event to cease and allow affected transactions to settle in accordance with their original terms and the parties' expectations. Due consideration should be given to the appropriate length of the waiting period. It is also desirable for any such waiting period to be uniform across industry standard documentation so that similar products traded under different master agreements will be capable of being terminated within the same time frame.

C. Deferral/Termination of Affected Transactions

After the expiry of the applicable waiting period, both parties should have the right to terminate all or some of the transactions affected by a force majeure event. Cherry picking of transactions to be terminated should be avoided by giving both parties the right to terminate. If an affected transaction is not terminated, all obligations thereunder will effectively be deferred until the force majeure event ceases. During such a deferral period, the recipient of any deferred payment or delivery should be compensated for such delay by the other party.

D. Valuations

On the termination of transactions affected by a force majeure event, consideration should be given to the appropriate valuation method for terminated transactions. As force majeure/illegality tend to be "no fault" events, valuation on termination should be as market neutral as possible (e.g., mid-market).

III. STRIKES AS FORCE MAJEURE EVENTS: CRITERIA TO MODEL FORCE MAJEURE CLAUSES

The EFMLG examined the possibility of adopting a standard provision dealing with the specific issue of strikes. The enforceability of such a provision needs however to be tested against the existing EU and national legal frameworks.

As mentioned above, the concept of force majeure is not harmonised at the EU level. The ECJ/CFI has laid down certain criteria, which need to be fulfilled in order for an event to qualify as a force majeure event. Essentially, this concept covers unforeseeable occurrences beyond the control of the party invoking force majeure, which are of an insurmountable character, and which cannot be avoided even if all due care is exercised. The criteria are cumulative, i.e. force majeure is deemed to occur only when all conditions are met.

There is no standard treatment of strikes as force majeure events at the EU level. In determining whether a strike falls within the notion of force majeure, the ECJ has had recourse to the criteria mentioned above. Its ruling depends on the particular circumstances of each case. Article 137(6) of the Treaty establishing the European Community precludes any Community action with respect to the right to strike. However, as long as the right to strike itself remains unaffected, appropriate action might in principle be taken in order to ensure a harmonised legal treatment of strikes as force majeure events in the context of financial markets.

Broadly speaking, there are no specific provisions in national laws stipulating that a strike constitutes a force majeure event. The issue has been addressed by national case-law and/or legal doctrine. Although discrepancies do exist among national jurisdictions, it is possible to detect common conditions which must be met in order for an event, including a strike, to be classified as force majeure. Indeed, in most Member States it is required that the event be unpredictable, beyond the control of the debtor, insurmountable and unavoidable even if due care is exercised. In general, it could be said that strikes do not automatically constitute force majeure events. A distinction is at times made between “external” (i.e. caused by factors external to the debtor) and “internal” (i.e. caused by internal events such as salary demands, general working conditions etc.) strikes, the former being more likely to fall within the notion of force majeure. “Wild” strikes, i.e. strikes which take place without prior notification, may also be considered under certain conditions as force majeure events. In any event, the decision will depend on the specific circumstances of each case. National courts are expected to decide on the merits of each case based to a large extent on the conditions mentioned above. A survey on the characterisation of strikes as possible events of force majeure in EU Member States is attached in **Annex 1**.

In the EFMLG’s view, the current legal frameworks do not seem to give rise to any major concerns with regard to the enforceability of a contractual provision dealing with the issue of strikes as force majeure events. The following interpretative criteria could be taken into account when drafting a force majeure clause in relation to strikes.

A. Elements to be Taken into Account When Drafting a Force Majeure Clause in Relation to Strikes

1. Externality

A debtor is always responsible for persons and things it is deemed to have control over. Consequently a party may not invoke the failure of its employees (internal strikes) in order to be released from its obligations. Such events cannot be considered external. Generally speaking, external refers to an event that is beyond the control of the party.

2. Unforeseeability

The force majeure event must have been unforeseen/unforeseeable by the parties at the time of conclusion of the contract. This criterion has to be evaluated in relation to the concrete and actual circumstances of the case.

3. Unavoidability

The event makes the obligation completely impossible to be performed. The impossibility has to be so great that even if the event was foreseeable, the debtor will be excused if this prediction would not have attenuated the consequences of the event. The debtor has to take in advance all reasonable measures to avoid the consequences of the event. The debtor shall not be excused if the performance was only made much more costly for it due to the occurrence of the impediment. Whether an event is “unavoidable” has to depend on an evaluation *in concreto* (situation of the creditor, weather, place, etc.) and, at the same time, *in abstracto* (with reference to a “normal person” exercising reasonable care) of the circumstances. Irresistibility is the main attribute of force majeure.

4. Obligations of the affected party

a) Notification of the occurrence of a force majeure event

Upon the occurrence of a force majeure event, the affected party shall immediately inform the other party without delay, and shall provide a written statement with respect to such event within [X] business days from its occurrence to the other party. Such a written statement shall include a precise description of the force majeure event and the reasons for the delay or the inability to perform the obligations resulting

from the agreement. If the affected party does not immediately inform the other party and/or does not provide the written statement described above, it shall be liable for the non-execution of its obligations during the continuance of the force majeure event and all consequences caused by and resulting from such force majeure event.

b) Termination of the occurrence of a force majeure event

The affected party shall notify the other party of the end of the force majeure event within [X] business days after such end. It should be however noted that this may not be practicable in certain circumstances as the affected party would be the party suffering from the impact of the strike and, therefore, perhaps there should be a conditional obligation to notify of a strike on both parties using all reasonable efforts to so notify. In developing the 2002 ISDA Master Agreement, ISDA adopted this latter approach in Section 6(b)(i) of the master agreement.

5. Main distinction (internal/external strikes)

When the cause of a strike is internal (for example a strike motivated by salary demands or dissatisfaction with general working conditions), it cannot be considered as a force majeure event because it constitutes a situation which can normally be resolved by the management through adequate negotiations and, normally, may be prevented or, at least, foreseen. This means that the event must not be dependant upon the debtor's conduct (the force majeure event is not the result of an event internal to the debtor). An external strike can exempt a party from liability when it affects third parties whose activities are closely connected with the non-performing party's activity and is capable of paralysing it, provided that the debtor has done all it could to avoid being affected or, at least, has done its best to minimise the effects of such an event. In any case the external strike has to match the features characterising force majeure events (see above). In practice, however, this distinction might be difficult to apply in certain circumstances. As an example, in 1990 in Sweden, there was a labour dispute in the banking sector and all Swedish banks closed since it was not possible to continue operations. Despite the decrease of organisation of trade unions, it might not be excluded that such events still occur. This type of strikes should be examined in the light of the above criteria; however the concept of general strike, as described in the case of Sweden, seems to imply an important degree of "externality".

B. Strikes and Lockout –Model Clause

“XXX shall bear no liability whatsoever for any loss or damage incurred by YYY in the event of a failure to duly perform its obligations [under this Agreement], resulting from a labour dispute falling outside its sphere of influence”.

IV. COMPUTER BREAKDOWNS AS FORCE MAJEURE EVENTS : CRITERIA TO MODEL FORCE MAJEURE CLAUSES

Due to the increasing importance of information technology in the performance of transactions in the financial markets, and in consideration of the internationalisation of such markets, the adoption of a uniform legal approach concerning the characterisation and the consequences of computer breakdowns has become necessary.

The differences in the theories developed by legal doctrine concerning the notion of force majeure (i.e. objective and subjective theory and variations thereof) and the lack of a predictable case-law in most of the Member States lead to the conclusion that the treatment by case-law of the various computer breakdown incidents under the current legal situation would not be the same in all Member States. This means that, besides the legal uncertainty and the insecurity in transactions, there is the danger of different treatment and, therefore, possibly of unequal treatment.

The EFMLG initiative aims, through establishing a model definition of “computer breakdown” which is as clear as possible, mainly by transforming technical features and circumstances into legal notions, and providing relevant risk allocation rules, essentially through the introduction of interpretative criteria, to contribute to the safety of transactions among credit and financial institutions in a uniform manner applicable to all such institutions irrespective of differences in legal systems.

The objective of the present chapter is to provide background information for developing basic common rules and contractual interpretation practices by identifying the relevant issues in terms of definition, causes, consequences, etc. of computer breakdowns (Section **A**) for the purpose of attributing to the elements of the existing force majeure clauses the specific interpretation rules in relation to computer breakdowns (Section **B**). This analysis is based on the force majeure clauses existing in the current market documentation. A few examples of these clauses are attached in **Annex 2**.

A. Relevant Issues in Relation to Computer Breakdowns

The scope of analysis of this section should be confined to computer breakdowns in the financial sector, including the banking and investment services field but excluding the insurance services industry and should only focus on the relation between credit and financial institutions themselves and not on the transactions between these institutions and their consumers/clients. More specifically, the present elaboration should only be made in regard to the financial institutions as listed and described in Article 2(b) to (g) of the Directive on settlement finality in payment and securities settlement systems²⁰ (the “**financial institutions**”). On the other hand, it is suggested that no limitation should be made as to specific products or services provided by the financial institutions.

²⁰ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, pp. 45-50.

1. Definition and features

A clear definition of the term “computer breakdown” has to be agreed upon, not for reasons of theory but for practical purposes in order to develop – possibly differentiated – appropriate contractual risk allocation approaches. In the process of definition, it might appear necessary to elaborate also on the main technical features of the computer system (e.g. network, hardware, software, etc.). Once defined, and depending on its content, the term computer breakdown (or any other term which might have been chosen as more appropriate) might have to be differentiated, if necessary, from other associated notions, such as computer or system failure, mechanical breakdown, computer malfunction, electronic network breakdown, technical or equipment failure, etc. Should an event not fall within the agreed definition of computer breakdown (the “**computer breakdown definition**”), then it should not qualify as a force majeure event (or at least not as a computer breakdown-related force majeure event). The computer breakdown definition could be amended from time to time in order to always reflect the latest changes in technology.

2. Acceptable causes of computer breakdowns

Due to the mandatory external character of a force majeure event, a financial institution should only be allowed to invoke a force majeure clause in the case of an externally-caused problem (such as attacks by unknown viruses, power supply failure, disturbance or interruption in telecommunication services, failure or malfunction of communication media, etc.)

On the other hand, any problems related to the internal maintenance of the system/operation of computers – both in terms of software and hardware – should not justify a party from not performing its obligation, considering that both parties have to adopt all the available measures to guarantee the stability and safety of the computer system.

3. Allocation of responsibility

The origin of the failure should be determined and an assessment made of who controls it and/or has responsibility for it and/or could have prevented it. A distinction is therefore made between:

- failure of the financial institution’s own systems,
- failure of the system through which the financial institution connects to the payment systems or securities settlement systems (e.g. S.W.I.F.T.),
- failure of the payment system, trading system, securities settlement system, central securities depository, etc.

It is suggested that in cases where the failure originates from a system which is not under the control of a specific party, such a party should be entitled to invoke a force majeure clause, provided however that it has demonstrated reasonable diligence and has chosen a reliable or the only existing service provider.

4. Due care and evidence issues

The extent of due care exercised in relation to the prevention and insurance of computer breakdown risks could provide an important tool for measuring the financial institution's efforts to avoid or limit the likelihood of the occurrence of such risks. In order to support the evaluation of due care and to provide adequate means of evidence to be used in dispute resolutions (possibly to be referred to specialised arbitration tribunals), a rating system combined with the issuance of compliance certificates should be introduced and updated on a permanent basis. In addition, specific guidelines and standardised packages for insurance cover could be launched for that purpose.

The following test should be applied, inter alia, when measuring a financial institution's compliance:

- adherence to standard rules and specifications (e.g. back-up systems, etc.) and use of a standardised check list for the technical examination of the computer systems (a set of rules and specifications to be prepared and updated by the financial services industry),
- adequacy and regularity of the technical examination,
- appropriateness of insurance cover.

Provided that a financial institution is in compliance with the industry standards (which will have to be proven by the financial institution invoking a force majeure clause), it should be deemed, in the case of an unforeseeable and irresistible computer breakdown event which is not covered by any existing common insurance package, as having taken all "precautions commonly adopted".

5. Initiative for the provision of services

In some cases it might be advisable to follow a more detailed approach by examining by whom the initiative for the particular transaction was taken, i.e. which contractual party has chosen the specific financial instrument or the relevant market (especially in cases of collapse of the trading, clearing or settlement systems of such a market).

In particular, a party should be more easily prevented from invoking a force majeure clause when offering, and actively marketing, a standardised product or service, as opposed to these cases where it is not "technically ready" to support the performance of a service which was initiated by another party.

6. Extent of the computer breakdown and use of remedies

The degree of malfunction or failure (e.g. whether the breakdown is complete or partial) and the possibility or not of providing adequate remedies (e.g. by using alternative systems) should also be of relevance in order to assess the extent of liability. In particular, a financial institution might be prevented from invoking a force majeure event in the case of partial breakdowns, whereas it might be entitled to in cases where no computer system (or part of it) is available.

B. Elements to be Taken Into Account When Drafting Force Majeure Clauses in Relation to Computer Breakdowns

1. “Event or circumstance”

Only an event meeting the legal and technical criteria of the computer breakdown definition could qualify as an “event or circumstance” for the purposes of a force majeure event.

2. “Beyond the reasonable control of the (affected) party”/“that cannot be foreseen or avoided”

A computer breakdown force majeure event could only derive from circumstances which are beyond the control of the relevant party. In order to meet this requirement (containing the elements of externality and unforeseeability), one or both of the following criteria have to be fulfilled:

- the source of the breakdown is external (as described in Section IV.A.1 and provided that the requirements of Section IV.A.4 are met),
- the relevant party is not responsible for the breakdown (as described in Section IV.A.3).

Furthermore, the event must have been unforeseeable, meaning that the affected party was not in a position to reasonably foresee its occurrence.

The fulfilment of the criteria has to be proven by the affected party/financial institution.

It is important to identify with clarity which kind of computer breakdown problems may be considered “manageable” by the financial institutions through adequate ordinary and preventive maintenance. Mutatis mutandis the events which may be classified as beyond the institution’s control will have to be described.

3. “Precautions commonly adopted”/“with due diligence”/“after using all reasonable efforts”

The affected party will have to prove that, although it has adopted all common precautions (and/or has acted with due diligence and/or has used all reasonable efforts) the event made the performance of the relevant obligations impossible.

4. “Cannot overcome such event or circumstance”/“performance has been or would be so prevented, hindered or delayed or made unlawful or impossible”

The impossibility has to be so important that even if the event was foreseeable, the financial institution will be excused if this prediction would not have attenuated the consequences of the event. The financial institution has to take in advance all reasonable measures to avoid the consequences of the event. The financial institution shall never be excused if the performance was only made much more costly for it due to the occurrence of the impediment. Whether or not an event is irresistible has to depend on an evaluation *in concreto* (situation of the creditor, weather, place, etc.) and, at the same time, *in abstracto* (with reference to a “normal person” exercising reasonable care) of the circumstances. Irresistibility is the main attribute of force majeure.

5. "Use all reasonable efforts to mitigate the effects of such event while it is taking place"

The affected party will have to prove that it has undertaken all available and reasonable measures to inform the other party of the force majeure event and to provide the required assistance.

Annex 1: EFMLG Survey on Strikes and Force Majeure²¹

1. Which national rules apply to strikes (constitutional law, labour law, etc.)?	
AUSTRIA	<ul style="list-style-type: none"> • In Austria there is almost no legal basis for strikes or labour disputes. Almost no court decisions exist and the minor relevant material there is comes from academic theses. The reason may be twofold. On the one hand the system of « social partnership » constituted in the middle of the 20th century enables an early negotiation of growing disputes and provides for a mediation process. On the other hand the lack of regulations could also have an impact on the acceptance of labour disputes. Only some regulations based on constitutional, plain vanilla law and ordinances give some indications: Constitutional and Ordinary law ? • <u>Constitutional Law</u> Right of assembly: Article 11 European Convention on Human Rights, Article 12 StGG. These articles provide for the freedom to strike in general and lay down the neutral position of the state. • <u>Ordinary Law</u> § 1-3 KoalitionsG 1870: also lays down the neutral position of the state and abolishes some provisions of the former penal law. § 2 Strike Act 1914: Prohibition of strikes by public employees There are also some general provisions based on Social Law (i.e.: Unemployment Insurance Law = no support during the strike; Labour Market Law = no transfer to companies subject to strikes) The above shows that strikes are basically neither prohibited nor supported.
BELGIUM	<ul style="list-style-type: none"> • There is no direct formal legal basis defining or regulating strikes or lock-out, but the Belgian Supreme Court has confirmed the legal basis for strike by referring to the Law of 19 August 1945 regulating some vital services to be kept operational in case of a recognised strike in Belgium. • The right to strike is recognised in Belgium and striking is regulated to a minimal degree. This minimal statutory regulation is supplemented by sectoral legislation of contractual

²¹ As of December 2002

	<p>origin (collective labour agreements). These rules are only binding for trade unions and not for individual workers. A so-called “wild” not recognised strike always remains possible.</p>
LUXEMBOURG	<ul style="list-style-type: none"> • The right to strike is enshrined neither in the Constitution nor in a law. It derives from an extensive interpretation by the courts of the concept of « union freedom » set out in Article 11(5) of the Constitution, which provides that “<i>the law guarantees union freedom</i>”. • In a landmark decision of 24 July 1952, the Luxembourg Cour de Cassation ruled that “<i>Participation in a strike, which is professional, legitimate and authorised, is a workers’ right implicitly foreseen by Article 11(5) of the Constitution</i>” (Pas. Lux. 1954, p. 355). However, any strike or lockout declared before recourse to all conciliation means available is illegal (Articles 9 and 25 of the Grand-Ducal Regulation of 6 October 1945 on the National Conciliation Office). Such effective recourse must be established by a non-conciliation certificate (<i>procès-verbal de non-conciliation</i>) issued by the National Conciliation Office.
ITALY	<ul style="list-style-type: none"> • The right to strike is guaranteed by the Italian Constitution under Article 40, but has to be co-ordinated with the other rights mentioned by the Constitution.
IRELAND	<ul style="list-style-type: none"> • N/A
DENMARK	<ul style="list-style-type: none"> • In Denmark this area of Labour law is regulated by the social partners in the form of collective agreements which are legally binding both for the parties (organisations) which have concluded them and for the members of the organisations. The settlement of industrial disputes is based on a distinction between disputes of interest and disputes of right. Disputes of interest concern fields which are not covered by any collective agreement. • The Danish Parliament has passed an act on conciliation in industrial disputes, known as the Official Conciliator’s Act. If notice has been given of a strike or other industrial action, the conciliator may order a postponement of the action as long as negotiations are still going on. Disputes of rights concern disagreement regarding questions regulated by a collective agreement. In such cases the labour market organisations have agreed to settle all such disputes through negotiation.
FINLAND	<ul style="list-style-type: none"> • Rules regarding strikes (mainly employees’ right to participate) are set out in Labour law: 1) Act on conciliation of industrial disputes (Laki työriitojen sovittelusta § 7,8 and 10); 2) Act on collective contract regarding civil servant salaries (Virkaehtolaki 8); 3) Act on unemployment benefits (Työttömyysturvalaki 6 °); 4) Act on social welfare (Sosiaalihuoltolaki 34 §). • Finnish Labour law is based on the principle of the universal binding force of collective agreements. These agreements are of two types: 1) branch-based where they cover all workers within a branch, irrespective of their profession; and 2) profession-based which covers all members of certain professions, irrespective of their branch. Collective agreements may provide specific regulations regarding employees’ right to strike.
SWEDEN	<ul style="list-style-type: none"> • Force majeure is not a defined statutory term under Swedish law. However, the concept of force majeure is generally recognised. • In relation to financial transactions, the statutory provisions of interest are embodied in the Swedish Sale of Goods Act 1991. • It is difficult to describe exactly which specified circumstances will be treated as “force majeure circumstances” under Swedish law. According to the preparatory work for the Sale of Goods Act, natural catastrophes, accidents, such as fires or explosions, and labour disputes could be considered as « force majeure circumstances ».

<p>PORTUGAL</p>	<ul style="list-style-type: none"> • The Constitution of the Portuguese Republic 1976 (<i>Constituição da República Portuguesa</i>) establishes in Article 57 the right to strike as a fundamental right. • Law 65/77 of 26 August 1977, amended by Law 30/92 of 20 October 1992 and by the Constitutional Court Judgment 868/96 of 4 July 1996, regulates the exercise of this right. • Broadly, it should be mentioned that 1) the employer must receive five days' prior notice of a strike; and 2) the employer is limited in the measures it can take to minimise the effects of the strike on its activity. For example, the employer is not allowed to substitute the workers on strike with temporary external workers.
<p>GREECE</p>	<ul style="list-style-type: none"> • The right to strike is a fundamental right protected by Article 23(2) of the Constitution, according to which: <i>“Striking constitutes a right which may be exercised by trade unions that are duly established with a view to protecting and promoting the economic and the labour interests in general of the employees...The right to strike is subject to the specific restrictions laid down by the law governing it. »</i>
<p>THE NETHERLANDS</p>	<ul style="list-style-type: none"> • In the Netherlands the courts determine the lawfulness of collective actions of workers, such as strikes. There is no legislation on the right to strike, other than that contained in the European Social Charter, Article 6(4).
<p>SPAIN</p>	<ul style="list-style-type: none"> • The right to strike is guaranteed by the following laws: • Constitutional Law is this actually the Spanish Constitution ?(Article 28) according to which the strike is considered a fundamental and insuppressible right for workers, • Real Decreto Legislativo 1/1995 (Article 4) amending the Statute of Labourers, • Real Decreto-Ley 17/1977, Article ?concerning relations between employer and employee, • Ley Orgánica 4/1981 (Article 23) regarding the possibility that the Government has to forbid strikes in the case of extraordinary circumstances. <p>According to Article 1105 of the Spanish Civil Code, a subject does not have to respond to the obligations which have become impossible to realise due to unexpected or unavoidable circumstances.</p>
<p>FRANCE</p>	<ul style="list-style-type: none"> • The right to strike is a fundamental right under France's Constitution. It is subject to Article 7 of the Constitution: “the right to strike is to be exercised as laid down in the relevant laws”. • Therefore, the conditions attached to the exercise of the right to strike are provided for by French Labour law, under Article L. 521-1 and following of the Labour Code (Code du travail) (collective conflict and the strike regime).

<p>GERMANY</p>	<ul style="list-style-type: none"> • According to the leading opinion the right to strike is set out in the German Constitution. There are also regulations on strikes in various Labour and other laws. [(ArbGG; BetrVG; BpersVG; SGB III; AÜG). According to Article 9(III) of the Grundgesetz employees are entitled to form a coalition. It is also granted that these coalitions may fight for their rights in a labour dispute (including by striking). There are several laws that refer to the right to strike (e.g. Betriebsverfassungsgesetz, Arbeitsgerichtsgesetz). The criteria for justification (legality) of a strike, however, are not defined by law, but have been developed by the Supreme Court for Labour Matters. • There is also case-law on strikes concerning the question of their legality, the question of whether a strike constitutes force majeure as well as on the legal consequences of legal/illegal strikes.
<p>UNITED KINGDOM</p>	<ul style="list-style-type: none"> • Not available

2. Are there any national legal provisions which expressly provide that a strike or any other related social conflict may be considered under certain circumstances as a force majeure event?

AUSTRIA

- There are no legal provisions according to which strikes are considered as force majeure events.
- In general the questions of illegality and legality of labour disputes and the consequences thereof have to be considered in the framework of the legal system as a whole. In that respect the illegality of strikes could result from: 1) legal prohibition (e.g. public employees); 2) violation of contractual obligations (e.g. labour contract, *Friedenspflicht* from collective labour contracts); and 3) other overall provisions of the civil right civil law (e.g. immoral acts, “ultima ratio”). Therefore if strikes do not violate the aforesaid provisions then, given the constitutional freedom to strike the strike itself does not constitute an illegal action.

BELGIUM

- There are no legal provisions according to which strikes are considered as force majeure events. For that matter, the concept of force majeure is **not legally defined** in Belgium. Only Article 1147 of the Civil Code specifies the principal legal consequence of proven force majeure: “if the non-fulfilment of the agreement is the result of an extraneous cause that cannot be attributed to the debtor”, there is no reason to find the debtor guilty of breach of contract (see also Article 1148 of the Civil Code).
- The bulk of legal doctrine defines force majeure as “the non-imputable impossibility of fulfilling the stipulated obligation” (see: Kruithof, R., “Guilt, risk, unforeseen circumstances and *force majeure* in the non-fulfilment of contractual obligations. A comparative-law approach”, in: *Tribute to René Dekkers*, Brussels, Bruylant, 1982). Therefore if a *strike* 1) **made fulfilment of the obligation (virtually) impossible**; 2) **was relatively unforeseeable and unavoidable**; and 3) **excludes the debtor’s responsibility according to the criterion of *culpa levissima***, this occurrence must be recognised as force majeure, with all the consequences thereof. However, there still is a very wide-ranging interpretation by the courts. The Supreme Court has not yet taken a standpoint on the strike as a possible form of force majeure. The interpretation of the criteria accepted in case-law can be summarised as follows (see Kruithof, R., “Staking en overmacht”, *T.P.R.* 1965, pp. 516-531):
 - 1) when the fulfilment of the obligation is virtually impossible, or at least when the fulfilment thereof would threaten the company’s existence or cause heavy losses to be incurred, could temporarily or permanently disrupt the national economy, disrupt the balance between strikers and employers, and jeopardise people’s health – has in other words become *especially difficult or socially irresponsible* (cf. the doctrine on unforeseen circumstances rejected by the Court of Cassation):

provided the employer proves:

that it met the employees’ reasonable demands and that the strike nonetheless went ahead, that the strike had a political character, or that the granting or rejection of the demands was partly or solely dependent on public authorities,

that it was not able to take on enough (or any) new employees with the same job profile and under roughly the same terms of employment or that – in the event of a partial strike – there were not enough non-strikers,

that it was not able to have the work performed by another firm.

	<p>2) <i>Relative unforeseeability:</i> A strike which could not reasonably have been expected, or a fairly unexpected strike, or a strike which was expected, but the date on which it started and its duration and scope were not known with sufficient exactitude beforehand – all this solely on the condition that the strike lasts a certain length of time.</p> <p>Inevitability:</p> <p>When there was no longer any good chance of the labour dispute being solved without a strike, even if this strike could have been anticipated a long time before the fulfilment of the obligation – this on the condition that when the contract came into being the strike had not yet broken out (except if the parties were not aware of it), or could not yet be anticipated.</p> <p>3) <i>Non-imputability to the debtor:</i> In principle, this is fulfilled unless the <i>slightest blame</i> can be attributed to the employer (<i>culpa levissima</i>).</p>
LUXEMBOURG	<ul style="list-style-type: none"> • There are no Luxembourg legal provisions expressly providing that strikes or any other related social conflicts may be considered as force majeure events.
ITALY	<ul style="list-style-type: none"> • The only regulations that, though indirectly, put the right to strike on a par with force majeure are incorporated in the Ministry of Treasure Decree of 16 December 1998, whereby « the bank is held harmless in the case of any strike by its employees or any external subjects whom they resort to, as well as in any other causes of force majeure ». According to the literal contents of such rule, whose specific aim is to regulate the collection of taxes by banks as a service of the State provincial treasury, it comes out that the strike, both by the bank’s employees, and any external collaborators of theirs, is put on a par with force majeure either to exclude or to limit its responsibility towards the counterparty.
IRELAND	<ul style="list-style-type: none"> • N/A
DENMARK	<ul style="list-style-type: none"> • No
FINLAND	<p>No specific rules regarding strikes as force majeure events exist in Finland. In statutory rules there are some general definitions regarding force majeure events. These rules are contained in:</p> <ul style="list-style-type: none"> • Act on promissory notes 7 § (<i>Velkakirjalaki</i> 1947/622)• Act on credit transfers § (<i>Tilisiirtolaki</i> 1999/821) • Act on interests (<i>Korkolaki</i> 1982/633) • Act on negotiable promissory notes, 54 § (<i>Vekselilaki</i> 1932/242) • Act on cheques, 48 § (<i>Shekkilaki</i> 1932/244) • In Finnish statutory law, a strike is specifically mentioned as a force majeure event only in a decision of the Ministry of Trade and Industry regarding public supplies (Section 11(1), KTMP – 1993/417).
SWEDEN	<ul style="list-style-type: none"> • No

PORTUGAL	<ul style="list-style-type: none"> • No
GREECE	<ul style="list-style-type: none"> • No
THE NETHERLANDS	<ul style="list-style-type: none"> • No
SPAIN	<ul style="list-style-type: none"> • There are no legal provision that expressly defines strikes or any other related social conflict a force majeure events. Such an evaluation has to be carried out on a case by case basis, considering Article 1105 of the Spanish Civil Code. It provides that "...nobody may respond, during the execution of the obligation, of not predictable or not avoidable (when expected) facts".
FRANCE	<ul style="list-style-type: none"> • There are no legal provisions expressly providing that a strike may be a force majeure event. Traditionally, case-law has defined force majeure as an event having the following characteristics: unforeseeability, irresistibility and externality ([imprévisible, irrésistible et extérieur). See: Cass. 1st civ., 31 May 1989, No 87-17.236, Resp. civ. Et assur. 1989, No 255; Cass. 1st civ., 16 May 1977, No 75-14.575, Bull. Civ. I, No 229; Cass. Soc., 11 Jan. 2000, No 97-18.215. • Nevertheless, as a rule, a strike does not automatically exempt a company from its obligations, except if the circumstances or the movement, by its extent, exceed the context of the company. For an illustration of this principle see: Cass. 1st civ., 24 Jan. 1995, No 92-18.227 where EDF is not responsible for the electricity cut because of a strike, the event has an external character i.e. it is capable of affecting all the public and nationalised industries. • The courts, however, seems to attach great importance to « irresistibility » to determine if the event could be considered a force majeure event. This could be the main factor or attribute of a force majeure event. The assessment of irresistibility by the [Court] is usually <i>in abstracto</i>, in reference to a normal person exercising reasonable care. However, the Court could exceptionally consider personal factors in the judgement of the event.
GERMANY	<ul style="list-style-type: none"> • No • It is admissible to agree in contracts on a clause that defines a strike as a force majeure event. Such a definition is not contained in the common General Terms and Conditions of German banks. However, Section 3(3) of the General Business Conditions of the German private sector banks excludes liability of the bank for losses caused by force and "other events for which the Bank is not responsible (such as strikes ...)". The strike is thus not defined as, but in effect is treated as, a force majeure event.
UNITED KINGDOM	<ul style="list-style-type: none"> • Not available

3. If the answer to Question 2 is affirmative, what are the legal consequences, e.g. in terms of exemption of liability for a service provider?

AUSTRIA	<p>The legal consequences in terms of the law of torts and liability (i.e. delivery default, guarantee are dependent on provisions of the civil law.</p> <p>The consequences are considerable if a party does not meet its contractual obligations due to a strike:</p> <p><u>Delivery default</u>: the creditor may call for the performance of the contract or may withdraw from it after reasonable extension. If the debtor defaults and the creditor withdraws from the contract the creditor may call for indemnification (positive interest).</p> <p><u>Guarantee</u>: the creditor even has the right of guarantee if the creditor does not cause a delivery default but also if the performance is inadequate and irrespective of the conditions for indemnification.</p> <p><u>Law of torts</u>: any right of indemnification is dependent on material damage, causality, fault and illegality of the debtor. Based on the overall constitutional freedom of strike a strike is not illegal per se unless any violation of the [aforementioned provisions ?] applies. However there are currently no court decisions on the scope of illegality of strikes.</p> <p>Indemnification claims against the striking labour force may not be successful due to the legality of the strike. In addition each strike was ended in the past under the condition that no indemnification claims will be taken against the striking force.</p> <p>On the other hand if there are any claims for indemnification against the debtor under strike these claims will probably be successful because the striking labour force may be attributed to the company and due to the change of burden of proof (operational hazard).</p> <p>Any indemnification claims would fail if the conditions for the indemnification are not met (i.e.: damages resulting from third party strike).</p>
BELGIUM	<ul style="list-style-type: none"> • A distinction needs to be made between: <ul style="list-style-type: none"> - the consequences of the strike in the relationship between employer and employees. The strike can be presented as a case of force majeure: i.e., first of all, as an extraneous cause exempting the worker from all responsibility when it has been made impossible for it to carry out the promised services – this is the hypothesis of a strike by fellow workers being invoked by non-strikers as force majeure, and - the consequences of the strike in the relationship between the employer as a debtor and his creditor, i.e. also as an extraneous cause temporarily or permanently exempting the manager of the company from the obligations that it has been unable to fulfil, either vis-à-vis third parties (for example the customers) or vis-à-vis certain members of its staff. • In expounding the legal consequences of force majeure, the following distinction also has to be made. Should the impossibility be of a temporary nature, the obligation to

	<p>render the service that is incumbent upon the party invoking the force majeure is suspended. As soon as execution becomes possible, the service must be rendered, unless there is no longer any point in the work being done.</p> <ul style="list-style-type: none"> • However, in the event of lasting impossibility, the debtor is exempted from the execution both <i>in natura</i> and by way of equivalent performance in the form of the payment of compensation (<i>res perit creditori</i>). In the event of reciprocal contracts, the question then arises as to whether the counterparty is still obliged to fulfil its commitment. As a general rule, it can be stated that on account of the <i>quid pro quo</i> principle, the consideration in return also lapses, so that the rule <i>res perit creditori</i> is reversed to become <i>res perit debitori</i>, given that the debtor (of the service that it has become impossible to render) bears the loss in that case.
LUXEMBOURG	<ul style="list-style-type: none"> • N/A
ITALY	<ul style="list-style-type: none"> • [Given the nature of secondary source, of which to the decree under A/2) hereof, it is correct to believe that such regulations do not have any consequences regarding the responsibility of the service provider.
IRELAND	<ul style="list-style-type: none"> • N/A
DENMARK	<ul style="list-style-type: none"> • N/A
FINLAND	<ul style="list-style-type: none"> • The legal consequence (of force majeure) according to the above mentioned acts is either exemption from performance or exemption from penalty interest.
SWEDEN	<ul style="list-style-type: none"> • See answer to Question 1 above?
PORTUGAL	<ul style="list-style-type: none"> • N/A
GREECE	<ul style="list-style-type: none"> • N/A
The Netherlands	<ul style="list-style-type: none"> • See answer to Question 2 above?
SPAIN	<ul style="list-style-type: none"> • N/A

<p>FRANCE</p>	<ul style="list-style-type: none"> • The counterparty may be exempted from its contractual liability if it can proven that the failure to meet its obligations is due to a force majeure event. See Article 1148 of the French Civil Code. Consequently, that counterparty has to prove that it was totally impossible for it to perform its obligations. <ul style="list-style-type: none"> • Furthermore, it should be pointed out that the force majeure doctrine is not a public order regime. The parties to a contract may freely define the content and the consequences of a force majeure event. • However, according to legal doctrine, force majeure cannot exempt the debtor from its obligation to make cash payment (for example in the case of a cash settlement); by nature, money is a fungible good. It is not impossible to execute a financial obligation, because it is always possible for the debtor to find the same quality and quantity of money, whatever the cost could be.
<p>GERMANY</p>	<ul style="list-style-type: none"> • N/A
<p>UNITED KINGDOM</p>	<ul style="list-style-type: none"> • N/A

**4. Does case-law or legal doctrine provide guidance in this field,
especially with respect to strikes affecting or within financial sector undertakings?**

AUSTRIA	<ul style="list-style-type: none"> As mentioned above, as there are not many legal regulations or much case-law no substantial guidance is provided except what is described under Question 1. Some contracts are used bilaterally where strikes are considered as force majeure events and which excludes any liability on a contractual basis (unless the debtor has acted with negligence or wilful default). negligence or has wilfully defaulted
BELGIUM	<ul style="list-style-type: none"> There is no specific case-law applicable to the financial sector.
LUXEMBOURG	<ul style="list-style-type: none"> There is no specific case-law relating to strikes affecting financial sector undertakings. The only court decision relating to strikes and force majeure the authors are aware of dates back to 1929. In this decision, the court stated that a seller, which claims that a strike depriving it of the raw materials necessary to its trade constitutes a force majeure event, must establish that it immediately took all steps necessary to obtain such raw materials from other sources, but that this proved impossible Cour , 3 December 1929, 12, 100/Article 1648 of the Civil Code).
ITALY	<ul style="list-style-type: none"> If a bank does not comply with its obligations, due to an “external” strike, its responsibility is excluded due to causes of force majeure, while if the non-compliance is due to its employees’ strike, it may be considered accountable if, based upon actual verification, it is possible to demonstrate that the bank was indeed in a position to comply with its obligations, such as paying a cheque, notwithstanding the absence of a part of its employees.
IRELAND	<ul style="list-style-type: none">
DENMARK	<ul style="list-style-type: none"> It is not possible from legal provisions or legislative history to derive anything established regarding the status of industrial conflicts as force majeure events. However, it is provided in the legislative history to Section 2 of the Danish Sale of Goods Act that strikes come under the circumstances that may constitute force majeure. This part is supposed to be about case-law/doctrine Furthermore, the cause of the conflict is relevant. Strikes/boycotts that have their source in external relations will basically be regarded as force majeure events. On the other side, strikes/boycotts that have their source in their own internal affairs are unlikely to be regarded as force majeure events.
FINLAND	<ul style="list-style-type: none"> No case-law exists considering a strike as a force majeure event regarding financial sector undertakings. Nor has the status of a strike as a possible force majeure event been established in legal doctrine. However, according to Finnish law, illegal strikes amount to force majeure irrespective of the subjective guilt of the employer. Also, a legal strike may constitute a force majeure event. Due to legal uncertainty a strike is usually defined as a force majeure event in general terms of service agreements regarding provision of financial services.
SWEDEN	<ul style="list-style-type: none"> No

PORTUGAL	<ul style="list-style-type: none"> • Most legal doctrine does not consider a strike as a force majeure event. • Force majeure is dealt with in Article 790 of the Portuguese Civil Code. This Article provides that an obligation is terminated when it is impossible to comply with it, provided that the debtor is not liable for such impossibility. Further, Article 792 establishes that, when such an impossibility is temporary, the debtor is not responsible for the delay and therefore no compensation is deemed to be payable to the creditor. In both cases – permanent or temporary impossibility – the impossibility must be external, unforeseen and beyond the control of the debtor.
GREECE	<ul style="list-style-type: none"> • According to the prevalent doctrine and the most important case law, strike does not in principle constitute a force majeure event, as it is a common, thus not unforeseeable, albeit the most drastic, expression of industrial conflict in democratic societies. • Only « wild strikes » and strikes that break out without any prior notice or announcement by any source of information (including the mass media) may be considered as force majeure events, provided that the prevention, as well as the limitation of their harmful consequences on the normal operation of the undertaking are objectively impossible to achieve under the specific circumstances, even if extraordinary care is exercised.
THE NETHERLANDS	<ul style="list-style-type: none"> • There is hardly any recent case-law on the question whether an obligor which failed in the performance of its obligations vis-à-vis its creditor obligee as a consequence of a strike is required to repair the damage which the obligee suffers therefrom, on the basis of the provisions of the Dutch Civil Code (DCC) pertaining to the consequences of non-performance of an obligation. • Legal doctrine provides little guidance on this subject. See below under Question 5. • Pursuant to Section 6:74(I) DCC, every failure in performance of an obligation shall require the obligor to repair the damage that the obligee suffers therefrom, unless the failure is not attributable to the obligor. Section 6:75 DCC provides that a failure in performance cannot be attributed to the obligor if it is neither due to its fault nor for its account pursuant to the law, a judicial (legal) act or generally accepted principles. Section 6:76 DCC states that where, in the performance of an obligation, the obligor uses the services of other persons, it is responsible for their conduct as if it was its own.
SPAIN	<ul style="list-style-type: none"> • According to the <i>Tribunal Supremo</i>, an event may be considered as force majeure where it unites the following characteristics: it has to be 1) unpredictable; 2) unavoidable; 3) not due to the debtor's behaviour; 4) capable of making execution of the obligation impossible; and 5) the cause of the breach. The Tribunal Supremo has rarely considered a strike to be force majeure event. • As regards doctrine, it should be underlined that it is mainly focused towards a clear definition of subjective and objective impossibility of performing an obligation (see, inter alia, Albadalejo and Díez Picazo).
FRANCE	<ul style="list-style-type: none"> • No particular case-law or legal doctrine relating to a situation where a strike had affected the financial sector is known.

<p>GERMANY</p>	<ul style="list-style-type: none"> • The question has particularly been discussed in the fields of impossibility to perform, default, travel contracts and in the area of standardised business conditions. Generally there is no distinction between strikes affecting manufacturing (the delivering of goods) or services. Also, there are no special rules governing strikes in the financial sector. • There is no case-law with respect to the question of whether a strike may constitute a force majeure event. Legal doctrine on this issue is not uniform. Some authors deny the question altogether. Others differentiate according to the type of labour dispute or the party's involvement in it. <p>Generally, force majeure presupposes that the event in question and its consequences were/are</p> <ul style="list-style-type: none"> - unforeseeable, - unavoidable, - caused by external factors, <u>and</u> - unusual. <p>Accordingly, if a strike was foreseeable or its consequences can be compensated for by alternative solutions, or if it was caused by inappropriate actions of the party, it does not constitute a force majeure event. Some authors take the view that, furthermore, an illegal strike of the party's own employees does not constitute force majeure (for the financial sector and Section 3(3) of the General Business Conditions of the private sector banks, see Sonnenhol, in: Bankrecht und Bankpraxis, Vol. 11, Part 1, note 110 with further citations).</p>
<p>UNITED KINGDOM</p>	<p>Not available</p>

5. Is a distinction made between « internal » and « external » strikes, i.e. external events, which could directly affect/impair the activity of the counterparty?	
AUSTRIA	<ul style="list-style-type: none"> • There is only a hint in the literature that only labour disputes which correlate with actual labour conditions could be considered as legal actions. If “external” strikes are not based on the wish to change company inherent circumstances (e.g.: political strikes) they may be considered as illegal.
BELGIUM	<ul style="list-style-type: none"> • Within the French legal doctrine (MAZEAUD and TUNC, <i>Traité</i>, I, No 1566) there is a growing number of supporters of the doctrine of guilt (force majeure begins where guilt ends) supplemented by the risk principle (force majeure does not discharge the debtor). This view focuses on the term “extraneous cause” in Article 1147 of the Civil Code in order to establish which cases are subject to the risk liability regulation. Thus, in order to be free of blame, the debtor must prove not only that the event was not attributable to a fault on its part, but also that the event was external to it and its enterprise. It follows from this that the debtor is always liable, for example, in the event of insolvency, but also that the distinction between “external strikes” and “internal strikes” is crucial, since only the former can constitute force majeure. • Belgian legal doctrine has rejected this view (DE PAGE, <i>Traité</i>, II, No 599; DEKKERS, <i>Handboek</i>, II, No 121). Participation in a strike should not be considered as a fault, but as the exercising of a right (exception: “Misuse of the right to strike” – see: Rigaux, M., “The right to strike and labour contract law: the <i>status quaestionis</i> after the Court of Cassation judgement of 21 December 1981”, in: <i>The laws governing industrial lockout and labour disputes</i>, Association for Labour Law, die Keure, Bruges, 1988, No 235). • Mostly, however, an external strike will more easily be considered as a force majeure event. After all, the second condition (<i>relative unforeseeability</i>) will in most cases be met. This is also true of the third condition (<i>non-imputability to the debtor</i>): when the debtor proves that it made every effort necessary to render the service, it is discharged.
LUXEMBOURG	<ul style="list-style-type: none"> • Such a distinction is made by French courts, to which Luxembourg may turn in civil matters. To this extent, it could be made by Luxembourg courts. In two decisions of 4 February 1983, the French Cour de Cassation found that a strike was a force majeure event because it united the three characteristics of force majeure, one of them being that it was external to the company because the strike was set off due to governmental decisions. French commentators hold, generally, that a strike is external if it stems from political reasons. On the contrary, when the strike is due to decisions of the company itself, it is generally regarded as internal and does not constitute a force majeure event (Starck Roland & Boyer, <i>Droit Civil, Les Obligations</i>, 2. Contrat, No 1716 et seq.).
ITALY	<ul style="list-style-type: none"> • See answer to Question 4
IRELAND	<ul style="list-style-type: none"> • N/A
DENMARK	<ul style="list-style-type: none"> • See answer to Question 4

FINLAND	<ul style="list-style-type: none"> • There is no significant distinction between internal and external strikes.
SWEDEN	<ul style="list-style-type: none"> • No
PORTUGAL	<ul style="list-style-type: none"> • The doctrine distinguishes between internal and external strikes and considers that an external strike may constitute a force majeure event, depending upon the particular circumstances of the case and after verifying the referred general requirements – external and unforeseen event beyond the debtor’s control – of force majeure cases.
GREECE	<ul style="list-style-type: none"> • See answer to Question 4
THE NETHERLANDS	<ul style="list-style-type: none"> • Several situations can be distinguished. In this respect it is assumed that the obligor is actually prevented in the performance of its obligation by the strike, and there is no other way, e.g. by way of the involvement of a third party, to meet its obligation. • Firstly there is the situation that the collective action is taken by the persons referred to in Section 6:76 DCC of the obligor. It is argued that if this failure in the performance were to be its own the obligor would be responsible towards the obligee on the basis of Section 6:75 DCC and accordingly it is also responsible on the basis of Section 6:76 DCC. • Secondly there is the situation that the persons of the obligor who fall within the scope of Section 6:76 DCC are prevented by other persons, who take collective action e.g. a blockade, from the performance of their obligations. • Legal commentators have held that if [which ?]these strikers work for the obligor [this is what is ?]attributable to the obligor on the basis of generally accepted principles. On the other hand if the collective action and the strikers are not in any way connected with the obligor, in principle [this] is not attributable to the obligor.
SPAIN	<ul style="list-style-type: none"> • See answer to Question 4 above.
FRANCE	<ul style="list-style-type: none"> • Traditionally defined in case-law and legal doctrine, a force majeure event has to be external to the counterparty, which means that the event must not be dependant upon the debtor’s conduct (the force majeure event is not the result of an event internal to the debtor). When the cause of a strike is internal (for example a strike motivated by salary demands or general working conditions), it cannot be considered as a force majeure event.

<p>GERMANY</p>	<ul style="list-style-type: none"> • In case-law and legal doctrine a distinction is made between strikes of employees of one of the contracting parties and strikes of employees of other companies that indirectly affect one such party. There also is a distinction between legal and illegal strikes. Most of the details are still disputed. • There is an opinion that (unless the contract expressly provides otherwise) a party is liable for a strike of its own employees, as employees are in the sphere of that party. On the other hand, there is another opinion saying that a legal strike cannot be the basis for a claim for damages as the right to strike is an institutional right and thus the risk cannot be allocated to the employer alone. • If a trade dispute is illegal, one opinion states that the party whose ability to perform is affected by the strike does not have to take the responsibility for it and does not have to pay damages, unless it has for some reason caused the dispute, i.e. by shutting the employees out. Other writers are of the opinion that there is always a liability of a party for illegal strikes. • Regarding external strikes, the party indirectly affected by it cannot be held liable.
<p>UNITED KINGDOM</p>	<p>Not available</p>

6. Are you aware of any market conventions or market practices dealing with this issue?

AUSTRIA	<ul style="list-style-type: none"> Market conventions are not known because if there were strikes they were not supported or organised by sectors or associations of the market. There were no concerted actions which could have established some market practices. The only practice is the agreed indemnification for the benefit of the strikers in the case of the end of the strike.
BELGIUM	<ul style="list-style-type: none"> No
LUXEMBOURG	<ul style="list-style-type: none"> No specific market conventions or practices
ITALY	<ul style="list-style-type: none"> In the banking industry there are many regulations governing the bank's responsibility in the case of force majeure. As an example, the Uniform Customs and Practice for Documentary Credits 1993 Revision, International Chamber of Commerce, Publication No 500 states in Article 17 that "Banks assume no liability or responsibility for the consequences arising out of the interruption of their business by acts of God, riots, civil commotion, insurrections, wars or any other causes beyond their control or by any strike or lockouts. Unless specifically authorised, banks will not, upon resumption of their business, incur a deferred payment undertaking, accept draft(s) or negotiate under credits which expired during such interruption of their business".
IRELAND	<ul style="list-style-type: none"> N/A
DENMARK	<ul style="list-style-type: none"> In the relationship between Danish banks and their customers the following clause regulating force majeure is used: « The Bank shall not be liable for any loss caused by statutory provisions, measures adopted by any governmental or other authority, actual or imminent war, insurrections, civil commotion, terrorism, sabotage or acts of God. Nor shall the Bank be liable for any loss caused by strikes, lockouts, boycotts or blockades, whether or not the Bank itself is a party to the dispute, and notwithstanding that the dispute may affect only part of the Bank's functions. These provisions shall not exempt the Bank from liability for damages resulting from errors or negligence on the part of the Bank. »
FINLAND	<ul style="list-style-type: none"> No. In the event of strike Finnish financial institutions usually jointly define the situation on a case by case basis.
SWEDEN	<ul style="list-style-type: none"> The « General Terms and Conditions for Trading in Financial Instruments » , issued by the Swedish Securities Dealer's Association in 1999, establish the rule of the "Limitation of Bank's Liability", providing that « The Bank shall not be responsible for damage resulting from Swedish or foreign legislation, Swedish or foreign actions by public authorities, acts of war, strikes, blockades, boycotts, lockouts, or other similar circumstances...Any damage which occurs in other circumstances shall not be compensated by the Bank, provided the Bank has exercised normal care. The Bank shall not be liable for damage which is caused by Swedish or foreign securities exchanges or other marketplaces, custodian institutions, central securities depositories, clearing organisations, or other parties which provide equivalent services. »

PORTUGAL	<ul style="list-style-type: none"> • There are no market conventions or practices dealing with this issue. Commonly, financial contracts do not have any force majeure clauses and therefore the referred general provisions of the Portuguese Civil Code are applied.
GREECE	<ul style="list-style-type: none"> • Greek legal practice, with few exceptions, has not so far developed any product-specific force majeure clause, probably due to the fact that the parties have always preferred to rely on the general rules of interpretation (notably Articles 173 and 200 of the Greek Civil Code) than to list specific events, knowing that such listing would never be exhaustive.
THE NETHERLANDS	<ul style="list-style-type: none"> • The General Banking Conditions – drawn up by the Netherlands Bankers’ Association – provide <i>inter alia</i> that insofar as liability is not already excluded by operation of the law, the Bank shall not be liable if a shortcoming of the Bank is the result of: « labour disturbances among the staff of third parties or the Bank’s own staff ».
SPAIN	<ul style="list-style-type: none"> • By virtue of the concept of freedom of contract, the parties may agree to consider strikes as force majeure events; however recourse to such clauses is quite rare.

Annex 2: The Force Majeure Clauses Used in the Market and Contractual Documentation in the Financial Sector

I. Examples of Force Majeure Clauses Used in Market Documentation

A. The Foreign Exchange and Options Master Agreement (FEOMA)²²

The Foreign Exchange Committee (“FXC”) in association with several other similar organisations including the British Bankers’ Association published The International Foreign Exchange Master Agreement (“IFEMA”), The International Currency Options Market Master Agreement (“ICOM”) and The FEOMA in 1997 for foreign exchange and currency option transactions. These agreements contain a force majeure provision which is substantially identical. The FEOMA provision is as follows.

“‘Force majeure event’, on any day determined as if such day were a Value Date of an FX Transaction or the Settlement Date of an Option (even if it is not), means (i) either Party, by reason of force majeure or act of state, is prevented from or hindered or delayed in delivering or receiving, or it is impossible to deliver or receive, any Currency in respect of a Currency Obligation or Option, and which event is beyond the control of such Party and which such Party, with reasonable diligence, cannot overcome, or (ii) it is unlawful for either Party to deliver or receive a payment of any Currency in respect of a Currency Obligation or Option. A Party whose delivery or receipt of Currency has been or would be so prevented, hindered or delayed or made unlawful or impossible is an ‘Affected Party’, and an FX Transaction or Option under which performance has been or would be so prevented, hindered or delayed or made unlawful or impossible is an ‘Affected Transaction’ unless the Parties have expressly agreed in an Agreement, another writing or in regard to a particular FX Transaction or Option that other disruption events or fallbacks will apply to that FX Transaction or Option; in such event, that FX Transaction or Option will be subject to such disruption events or disruption fallbacks as the Parties have otherwise agreed.”

In 1999, the FXC published an optional bilateral amendment to the force majeure provisions of FEOMA, IFEMA and ICOM which introduced a Waiting Period of three Business Days (or days that would have been Business Days but for the Force Majeure Event) after the Force Majeure Event occurs before either party can elect to close-out and liquidate.

²² www.ny.frb.org/fmlg/; www.bba.org.uk

B. European Master Agreement (EMA)²³

The European Banking Federation (EBF) Master Agreement for financial transactions (the “European Master Agreement” or “EMA”) published in January 2001 by the EBF contains a force majeure clause entitled “illegality, impossibility” in its section relating to termination due to changes of circumstances²⁴. It provides:

“As a result of any change in law or in the application or official interpretation thereof, or, if so specified in the Special Provisions, as a result of an Impossibility Event, in each case occurring after the date on which a Transaction is entered into, it becomes, or is likely to become, unlawful or impossible for the party (A) to make, or receive, a payment or delivery in respect of such Transaction when due or to punctually comply with any other material obligation under the Agreement relating to such Transaction or (B) to perform any obligation to provide margin or collateral as and when required to be provided by it under the Agreement”. ‘Impossibility Event’ means ‘any catastrophe, armed conflict, act of terrorism, riot or any other circumstances beyond the party’s reasonable control affecting the operations of the party’.²⁵”

The occurrence of such illegality or impossibility gives the right, subject to a 30 day notice period for the party which is directly affected by the change of circumstances (the “affected party”), to the affected party and the non-affected party to terminate the transactions affected by such change by giving not more than 20 days’ notice. The termination will become effective as from the date specified in the notice provided, however, that the termination date may not be earlier than 30 days before the day on which the change of circumstances becomes effective²⁶. Furthermore, the affected party can only give notice of termination after the expiry of a period of 30 days following a notice informing the other party of such event and if the situation has not been remedied within such a period²⁷.

C. 2002 International Swaps and Derivatives Association (ISDA) Master Agreement²⁸

A 2002 version of the International Swaps and Derivatives Association (ISDA) Master Agreement has been published. One of the key changes of this version as compared with the 1992 version is the inclusion of a specific force majeure clause introducing force majeure as one of the termination events enumerated under Section 5(b) of the Agreement. The new clause provides:

“Force majeure event. After giving effect to any applicable provision, disruption fallback or remedy specified in, or pursuant to, the relevant Confirmation or elsewhere in this Agreement, by reason of force majeure or act of state occurring after the date on which a Transaction is entered into, on any day:

²³ www.fbe.be

²⁴ EMA General Provisions, Article 6(2)(a)(ii).

²⁵ EMA General Provisions, Article 6(2)(a)(ii).

²⁶ EMA General Provisions, Article 6(2)(b).

²⁷ EMA General Provisions, Article 6(2)(b).

²⁸ www.isda.org

the Office through which such party (which will be the Affected Party) makes and receives payments or deliveries with respect to such Transaction is prevented from performing any absolute or contingent obligation to make a payment or delivery or to receive a payment or delivery in respect of such Transaction, or from complying with any other material provision of this Agreement relating to such Transaction (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such Office so to perform or comply (or it would be impossible or impracticable for such Office so to perform or comply if such payment, delivery or compliance were required on that day), or

such party or any Credit Support Provider of such party (which will be the Affected Party) is prevented from performing any absolute or contingent obligation to make a payment or delivery or to receive a payment or delivery which such party or Credit Support Provider has under any Credit Support Document relating to such Transaction, or from complying with any other material provision of such Credit Support Document (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such party or any Credit Support Provider of such party so to perform or comply (or it would be impossible or impracticable for such party or Credit Support Provider so to perform or comply if such payment, delivery or compliance were required on that day),

so long as the force majeure or act of state is beyond the control of such Office, such party or such Credit Support Provider, as appropriate, and such Office, party or Credit Support Provider could not, after using all reasonable efforts prior to the end of any applicable Waiting Period (which will not require such party or Credit Support Provider to incur a loss, other than immaterial, incidental expenses), overcome such force majeure or act of state.”²⁹

The 2002 ISDA Master Agreement builds in an eight local business days waiting period. To constitute a force majeure event for the purposes of this agreement, an event must be beyond the control of the party affected, and such a party must show that it could not, having used all reasonable efforts for a period of eight local business days, overcome it³⁰.

Upon the occurrence of a force majeure event, as defined in Section 5(b)(ii), the Agreement provides that each party will promptly upon becoming aware of the event use all reasonable efforts to notify the other party specifying the nature of the event and give the other party such other information about the event as it may reasonably require³¹.

If a force majeure event, as defined in Section 5(b)(ii), has occurred and is continuing, each party may, by giving not more than 20 days' notice to the other party, designate a day not earlier than two local business days following the day on which such notice becomes effective as an early termination date in respect of those of the affected transactions which the party issuing the termination notice specifies in the notice to be subject to the notice³².

²⁹ 2002 ISDA Master Agreement, Section 5(b)(ii).

³⁰ 2002 ISDA Master Agreement, Sections 5(b)(ii) and 14.

³¹ 2002 ISDA Master Agreement, Section 6(b)(i).

³² 2002 ISDA Master Agreement, Section 6(b)(iv)(2).

D. Global Documentation Steering Committee³³

The objective of the US-based Global Documentation Steering Committee (GDSC), established in the aftermath of the Asian and LTCM crises of the late 1990s, is to encourage harmonisation in standard documentation used in OTC markets, thereby reducing documentation basis risk so that when firms conduct trades in different OTC markets using different agreements, disparities in documentation do not exacerbate market, credit or legal risk.

The GDSC has developed a proposed standard definition of a force majeure event. The Committee considered that the occurrence of a traditional force majeure event generally should not constitute an excuse from performance. It felt that the definitive allocation of risk with respect to various market events is a critical element of financial market contracts and the occurrence of unforeseen events, even when outside the control of the parties, should not enable one party to deprive the other of the benefit of its bargain.

Acknowledging that market participants have an important interest in establishing a clear framework for effecting early termination of transactions when a force majeure event occurs, the Committee prepared a definition of force majeure event that would capture the types of events that, while not constituting an excuse from performance, ordinarily should trigger early termination of a financial market transaction. The GDSC's definition encompasses two categories of events: those that preclude performance as a result of force majeure or act of State and those that would render performance illegal.

The GDSC's proposed definition is:

“Force majeure event shall mean, on any date, that:

a party, by reason of force majeure or act of state, is or would be prevented from complying with, or it is or would be impossible or impracticable to comply with, any material provision of this Agreement relating to a Transaction (but only where (i) such event or circumstance is beyond the control of the affected party and (ii) such party has taken precautions commonly adopted by financial market participants to anticipate, and cannot with reasonable diligence overcome, such event or circumstance);
or

it is or would be unlawful for a party to comply with any material provision of this Agreement relating to a Transaction.

For purposes of this definition, it is acknowledged and agreed that the failure to make or receive a payment or delivery on a timely basis in respect of a Transaction shall constitute a failure to comply with a material provision of this Agreement.”

³³ www.newyorkfed.org/globaldoc/gd_docs.html

E. International Primary Market Association (IPMA) force majeure clause (Explanatory notes relating to issues of debt and equity-linked debt instruments – Appendix C) ³⁴

The managers and underwriters are normally discharged from their underwriting obligations if certain events occur before the payment date.

It is recommended by the IPMA that one of the **following two force majeure clauses** be used in straight debt issues and that it should be promptly disclosed which of Clause 1 or Clause 2 is being used. Any material variation to, or the non-use of, either clause should also be promptly disclosed.

“Clause 1

Notwithstanding anything contained in this Agreement, [...] (“the Lead Manager”) on behalf of the Managers may by notice to the Issuer [and the Guarantor] terminate this Agreement at any time before the time on the Closing Date when payment would otherwise be due under this Agreement to the Issuer in respect of the Securities if:

- *in the opinion of the Lead Manager, circumstances shall be such as:*
 - *to prevent or to a material extent restrict payment for the Securities in the manner contemplated in this Agreement; or*
 - *to a material extent prevent or restrict settlement of transactions in the Securities in the market or otherwise; or*
- *in the opinion of the Lead Manager, there shall have been:*
 - *any change in national or international political, legal, tax or regulatory conditions; or*
 - *any calamity or emergency*

which has in its view caused a substantial deterioration in the price and/or value of the Securities,

and, upon notice being given, the parties to this Agreement shall (except for the liability of the Issuer [and the Guarantor] in relation to expenses as provided in Clause [...] and except for any liability arising before or in relation to such termination) be released and discharged from their respective obligations under this Agreement.”

³⁴ www.ipma.org.uk/

“Clause 2

Notwithstanding anything contained in this Agreement, [...] (“the Lead Manager”) on behalf of the Managers may by notice to the Issuer [and the Guarantor] terminate this Agreement at any time before the time on the Closing Date when payment would otherwise be due under this Agreement to the Issuer in respect of the Securities if, in the opinion of the Lead Manager, there shall have been such a change in national or international financial, political or economic conditions or currency exchange rates or exchange controls as would in their view be likely to prejudice materially the success of the offering and distribution of the Securities or dealings in the Securities in the secondary market and, upon notice being given, the parties to this Agreement shall (except for the liability of the Issuer [and the Guarantor] in relation to expenses as provided in clause [...] and except for any liability arising before or in relation to such termination) be released and discharged from their respective obligations under this Agreement.”

II. Examples of Force Majeure Clauses in the Contractual Documentation of International Central Securities Depositories, Payment Systems Operators and Clearing Houses³⁵

A. Clearstream³⁶

Force majeure includes externality, unpredictability and unavailability with regard to the events that led to the damages. Article 48(2) of the General Terms and Conditions contains precise provisions on the cases where liability is excluded on grounds of force majeure. This provision states that: “*Clearstream shall not be liable for any action taken, or any failure to take any action required to be taken which fulfils its obligations under the General Terms and Conditions, in the event and to the extent that the taking of such action or such failure arises out of or is caused by events beyond Clearstream’s reasonable control, including, without limitation, war, insurrection, riots, civil or military conflict, sabotage, labour unrest, strike, lock-out, fire, water damage, acts of God, accident, explosion, mechanical breakdown, computer or systems failure, failure of equipment, failure or malfunction of communications media, or interruption of power supplies; the failure to perform, for any reason, of the counterparty or of such counterparty’s depository, custodian or financial institution; reversal order, law, judicial process, decree, regulation, order to other action of any government, governmental body (including any court or tribunal or central bank or military authority), or self-regulatory organisation.*”

B. Euroclear³⁷

The criteria with which it is determined whether a party may be exonerated from liability on grounds of force majeure include externality, unpredictability and unavailability with regard to the events that led to the damages. Section 12(c) of the General Business Conditions sets forth the force majeure provision, providing in rather broad terms that: “*Euroclear shall not be liable for any action taken or any failure to take any action required to be taken under the Terms and Condition (including without limitation the failure to receive or deliver securities or to receive or make payment), in the event and to the extent that the taking of such action or such failure arises out of or is caused by war, insurrection, riot, civil commotion, act of God, accident, fire, water damage, explosion, mechanical breakdown, computer or system failure or other failure of equipment, failure or malfunctioning of any communications media for whatever reason (whether or not such media are made available to participants by Euroclear), interruption (whether partial or total) of power supplies or other utility or service, strike or other stoppage (whether partial or total) of labour, any law, decree, regulation or order of any government or governmental body (including any court or tribunal), or any other cause (whether similar or dissimilar to any of the foregoing) whatsoever beyond its reasonable control.*” Under Section 12(c) Euroclear shall

³⁵ This is without prejudice to any recent contractual developments, which would not be known by the EFMLG

³⁶ www.clearstream.com

³⁷ www.euroclear.com

have no liability for the acts or omissions of (or the bankruptcy or insolvency of) and other depository, sub-custodian, clearance system or clearance system subcustodian.

C. Clearnet³⁸:

- 1) General Rules (Chapter 7: Event of default-liability-force majeure; Section 1.7.4: Liability of Clearnet-force majeure) contain the following:

“Article 1.7.4.3

Clearnet shall be liable for damage arising from non-compliance with its delivery or payment obligation under Transactions it has entered into with Clearing Members unless such non-compliance is the result of a force majeure event.

Article 1.7.4.4

Force majeure is to be given its construction under French law, that is to say extraordinary events independent of the Parties’ will that cannot be foreseen or avoided by them even with due diligence, being beyond their control preventing the Parties to comply with their obligations undertaken in these Rules or in the Admission Agreement.

Disasters, such as hurricane, earthquake, international conflicts, strokes of lightning and war, are, inter alia to be considered as such events.

If circumstances as referred to in the previous paragraph occur or are in danger of occurring, Clearnet or Clearing Members, as the case may be, will take such measures as may be reasonably demanded of them in order to limit as much as possible the detrimental consequences for the other party resulting from these circumstances. (...)”

- 2) Local provisions for Dutch clearing members (Chapter 5: Derivatives clearing; Section 5: Liability of clearing organisation-force majeure; Article 27: Liability-force majeure):

“Without prejudice to the meaning of force majeure as provided for in Section 1.7.4. of the Common Provisions (see above), Clearnet shall be deemed to be subject to temporary force majeure if, as a result of any unforeseen circumstance, breakdown or non-functioning of any equipment used by Clearnet, Clearnet is unable to, or does not, promptly and fully discharge its obligations under these Rules. In these circumstances, Clearnet may suspend clearing, tendering, exercise of Options, deliveries and payments and take whatever measures it deems necessary or appropriate (including postponing successively the issue of daily reports, Settlement Time and Commencement Time, any Expiration Date and any Final Tender Date, and ordering settlement on the basis of Article 26), but this shall not release Dutch Clearing Members from any of their obligations towards Clearnet. Clearnet shall not be liable to

³⁸ www.lchclearnet.com

the Dutch Clearing Members for any loss or damage that they may suffer as a result of the temporary force majeure or any measures taken by Clearnet in this connection (Article 27.1).”

D. S.W.I.F.T. corporate rules ³⁹

General terms and conditions of the S.W.I.F.T by-laws contained in Chapter 2 of the S.W.I.F.T User Handbook entitled *Corporate rules* - Clause 12:

“The Company shall not be responsible for any loss or damage caused by failure to carry out, or delay of, messages resulting from technical failure, unless otherwise provided in the User Handbook, or force majeure. Force majeure shall include acts of authorities including P.T.T. authorities, strike or industrial dispute, political disturbance, catastrophes in nature, fire, war, epidemics and all other circumstances which prevent the Company against its will from carrying out its activities. Moreover, the Company shall not be responsible for any loss or damage caused by the performance of non-authorized transmission orders unless the prejudiced party proves that the Company could not reasonably assume the validity of those orders. The Company shall be entitled to make use of any reputable third party with regard to the transmission of messages, at the risk of the ordering User.”

³⁹ www.swift.com

Annex 3: THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP

Mr. Sáinz de Vicuña, Antonio	Chairman, ECB
Ms. Alonso Jimenez, Nuria	Banco Bilbao Vizcaya Argentaria
Mr. Balocco, Emilio	San Paolo IMI
Mr. Bennett, Richard	HSBC Holdings
Mr. Bloom, David T.	
Dr. Bosch, Ulrich	Deutsche Bank
Mr. Bossin, Jean-Michel	Société Générale
Mr. Fiset, Pierre	
Ms. Butragueño, Natalia	BSCH
Mr. Daunizeau, Jean Michel	Crédit Agricole
Dr. Nizard, Frédéric	
Mr. Ferreira Malaquias, Pedro	Vasconcelos, Sá Carneiro, Fontes & Associados (on behalf of Euribor Portuguese banks)
Mr. Garlet, Poul	Nordea Bank Denmark
Ms. Gillen, Marie-Paule	Kredietbank Luxembourg
Mr. Maladorno, Antonio	Unicredito Italiano
Mr. Myhrman, Olof	SEB
Mr. Nierop, Erwin	ECB
Dr. Parche, Ulrich	HypoVereinsbank
Dr. Poggemann, Klaus	WestLB
Mr. Ross-Stewart, Charles	UBS Warburg
Mr. Sheridan, Bryan	AIB

Ms. Simon-Thomas, Eva	ABN Amro Bank
Mr. Rogerson, Paul	
Dr. Than, Jürgen	Dresdner Bank
Mr. Tillian, Frank	Bank Austria
Dr. Tsibanoulis, Dimitris	Tsibanoulis & partners (on behalf of Euribor Greek banks)
Mr. de Vauplane, Hubert	BNP Paribas
Ms. Viitala, Merja	Nordea Bank Finland
Mr. Vloemans, Dirk	Fortis
Mr. Blokbergen, Cornelius	ING Groep
Mr. Löber, Klaus	Secretary, ECB

**THE SUB-GROUP OF THE EFMLG
ON FORCE MAJEURE AND FINANCIAL MARKETS**

The preparation of this report has been carried out by a Sub-Group of the EFMLG on force majeure with the following composition:

Mr. Bloom, David T.	HSBC Holdings
Dr. Bosch, Ulrich	Deutsche Bank
Mr. de Vauplane, Hubert	BNP Paribas
Dr. Tsibanoulis, Dimitris	Tsibanoulis & partners (on behalf of Euribor Greek banks)
Mr. Kerjean, Stéphane	ECB