



EUROPEAN CENTRAL BANK

DIRECTORATE GENERAL - LEGAL SERVICES

To the Members of the
European Financial Market Lawyers Group

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Force Majeure

1. At its first meeting, the European Financial Market Lawyers Group did identify the notion of “*force majeure*” as a topic to be further considered. The thinking behind the decision to study in-depth the concept and definitions of “*force majeure*” was based in particular on the following considerations:

The use of fifteen or more different legal systems throughout the European Union does not accord with trends in wholesale financial market practice, in which participants increasingly wish to transact across borders. For those participants, switching from one legal system to another in a way that does not correlate with their underlying business needs can operate as a brake on the smooth functioning of the European financial markets.

In the light of this, the European Financial Markets Lawyers Group looked at areas where those differences in legal systems, the continuing existence of which did not seem to represent any commercial advantage, might be smoothed away. In this context, the group identified force majeure clauses as being possibly suitable for harmonisation.

Force majeure clauses relate directly to commercial practise - they state the conditions under which the parties to a contract have agreed that the obligation under that contract no longer fall to

be performed. Just as commerce in the context of the wholesale European financial markets tends to ignore internal borders, so, too, should the contracts that form the legal side of that commerce.

2. At the meeting, the European Financial Market Lawyers Group did focus on a number of points for further consideration. It was noted that:
 - in areas of financial market activity where force majeure clauses are needed, established definitions already exist (for example the IPMA formula used in European capital markets). However, what is appropriate for one market activity may not be suitable for another;
 - established definitions do not, however, receive much attention in practice;
 - some of the established definitions have not been altered and / or updated to cater for changes in the markets, for example in relation to emerging markets where the commercial background to activity is comparatively uncertain and thus a more widely or carefully drafted wording may be appropriate;
 - a thorough and comprehensive review of practice and law in this area may reveal market risks that participants were not aware of, especially if such review tackled all areas of EU financial market activity, i.e. including currencies other than the euro and matters connected with Accession Country financial dealings;
 - any attempt to harmonise definitions needs to tackle not only current forms of drafting, but also the underlying legal doctrines in the context of which those draftings have developed.
3. As a point of departure and in line with the outcome of the first meeting of the European Financial Market Lawyers Group, the Directorate General – Legal Services of the ECB did prepare a first analysis of the underlying applicable legal doctrines of Member States of the European Union. The result of this exercise may suit the purpose to check the existing doctrines against the definitions used in the financial markets. This holds especially true as in many cases the legal definitions have not been subject yet to any review by courts.

In order to compile a comparative analysis of the legal concepts and definitions of “force majeure”, the members of the Directorate General - Legal Services of the ECB had been asked, for their respective jurisdiction of expertise, to draft an overview on

- i. whether there is a statutory concept of force majeure in the respective legal system;
- ii. whether there are concepts of force majeure developed by legal doctrine or court jurisprudence;

- iii. whether there are standard definitions on “force majeure” in domestic market documentation used for financial transactions and
- iv. how existing definitions might interrelate with court jurisprudence.

The replies given have been summarised in a tentative overview. As one can see from this overview, it has proven valuable to add also a section on the European Community law concept of force majeure as well as force majeure under New York law, respectively, taken into account the influence of these two areas of law on the market practice in Europe.

It is envisaged to complete this overview by relying on the market expertise of the members of the European Financial Market Lawyers Group. In this context it would be very helpful to add descriptions of how contractual drafting tends to be presented in national markets.

4. When analysing the diverse national situations, although the style and length of the contributions varies, it shows clearly that in most countries the legal concept of force majeure does not differ very widely (and this is not undermined by the purely terminological difference with English and Irish law, where the expression “force majeure” is reserved for contractual provisions that legitimately extend the scope of the doctrine of frustration). Generally, it can be taken for granted that in most member states, the concept of “force majeure” is defined by certain conditions such as unpredictability, the character of the obstacles being insurmountable, and the prerequisite of absent of any default from the debtor’s side.

With respect to the few examples of contractual drafting included in the summary so far, these vary from clauses drafted in a quite general way to quite exhaustive listings of examples of what is deemed to be “force majeure”. The latter might, according to the respective jurisdiction, be either conclusive or non-limitative and explanatory, as due consideration has also be given to the impact of court decisions and court jurisprudence on the application of force majeure clauses. In addition, there are some specific issues where further scrutiny might be worthwhile, in particular when examining specific situations like “strike” or “acts of government”, where there is no obvious common denominator to be found throughout the EU jurisdictions.

However, the preliminary conclusion that there is a broad basis of common understanding as of force majeure is emphasised by the standing jurisprudence of the European Court of Justice, which in a number of court cases did distil the underlying common understanding of national legal practices within the Member States joined in the European Union. Case law of the European Court of Justice has ruled that the concept consists of features such as inevitability, extraneous circumstances making it objectively impossible to fulfil an obligation, extraordinary circumstances unusual and unforeseeable, being beyond the control of the parties involved. The same case law

indicates that the features are accumulative and, therefore, the features are all to be applied in a given case. A good example is case C-338/89 (*Danske Slagterier v Landbrugsministeriet*¹), as it summarises the features in a comprehensive manner: “*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.*”

However, the European Court of Justice did state as a specific problem related to the definition of the concept of force majeure that “*since the concept of force majeure differs in content in different areas of the law and in its various spheres of application, the precise meaning of this concept has to be decided by reference to the legal context in which it is intended to operate*” (case 158/73 *Kampffmeyer v. Einfuhr- und Vorratsstelle für Getreide*).

5. Taking into consideration what is mentioned above, the European Financial Market Lawyers Group might consider the following aspects for the next step of the project of harmonising the definitions of “force majeure”:
 - What standard provisions are used in the market agreements used in the European Union? Which of the differences between them are attributable to different legal systems, and which are product-linked, i.e. attributable to different types of financial market activity?
 - To what extent do the legal systems under review accept the operation of force majeure clauses that are governed by a different legal system? Can they override the underlying national doctrines, or do the underlying national doctrines compromise the intended effect?
 - What effect does Community legislation and Community legal acts have on force majeure drafting?
 - What is the role - in the various sectors of the market and in the various countries where those markets are operating - of clauses that are similar to force majeure but not (or not always) within the scope of the relevant force majeure doctrine, in particular clauses that allow one party to alter the scope of its obligation if there is, for example, “a material adverse change in the international financial or capital markets”?
 - Do current standard draftings include wording wide enough to accommodate all foreseeable technological changes, in particular the increasing use of the internet?
 - What is the experience of the institutions connected with the members of the European Financial Markets Lawyers Group in relying on force majeure clauses?

¹ The case dealt with interruption of supplies owing to a strike; the specific case was not considered as qualifying as force majeure due to the fact that the strike had been noticed in advance and that the entity concerned had the possibility to dispose otherwise but did not use it.

- In addition, it would be very interesting to see what is being done by the Financial Market Lawyers Group of the Federal Reserve Bank in New York in this area.

It would be very much welcome if the members of the European Financial Market Lawyers Group could review the current national contributions in the summary and give comments and remarks with respect to the above mentioned topics in order to progress the project on the harmonisation of definitions of “force majeure”.