



EUROPEAN CENTRAL BANK

**DIRECTORATE GENERAL – LEGAL SERVICES**

**FORCE MAJEURE**

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**Confidential**

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## 1. Member States

### 1.1 Belgium

1. Force majeure is sometimes mentioned in the Belgian civil code (e.g. art. 1147 and 1148) as discharging a contracting party from any liability in case of non-performance due to force majeure but there is no general regime of force majeure in Belgian legislation, nor any statutory definition of this concept.

2. The concept of force majeure has only been developed by court jurisprudence with additional explanations and elaborations by the French and Belgian legal doctrine. Force majeure is only one of the recognised exoneration causes in the field of civil liability (contractual liability and torts) which also include, in certain cases, "invincible error", "state of necessity", "constraint", "statutory order", "Act of God", or causes interrupting the causality link between the fault of the relevant debtor and the damage, like the fault of the victim or the fault of a third party.

3. There are no standard definitions of "force majeure" in Belgian domestic market documentation used for financial transactions. Yet there are definitions used in the NBB legal documentation (e.g. monetary policy transactions, ELLIPS terms and conditions, etc.)

4. The various existing contractual definitions laid down in contracts or in terms and conditions aim generally at specifying the concept of force majeure by giving several (non limitative) examples and, sometimes, they might also add cases of force majeure which otherwise would not have been regarded as true force majeure by courts because of the non-fulfilment of its features (unpredictability, insurmountable character, absence of any fault from the debtor). The contracting parties may indeed derogate from the classical concept of force majeure as defined by courts and legal authors.

## 1.2 Denmark

1. There is a statutory concept of *force majeure* in Article 24 of the Act on sale of goods. The concept deals with purchase of generic goods and has a quite broad wording. The applicability of the Article requires that the obstacles making it impossible to deliver have an extraordinary character. The assessment of whether or not this requirement is fulfilled depends on if such obstacles now and again can be expected, if the risk that they will is something that can be calculated with and if it normally should be taking into account when entering into a contract. The character of the agreement and the position of the parties, thus, play a role.

2. Given the broad definition in the Act, court jurisprudence has developed delimiting the concept. Most cases were, however, dealt with in the first half of this century (1920-50). A special Danish angle is that general labour conflicts are seen as covered by the Article.

3. The Bankers association has developed (or organised the establishment of) Danish standard documentation for financial transactions, where the concept of *force majeure* developed in the market is copied into. As similar wording is, by the way, used in at least some of the credit institutions' standard terms and conditions. These market developed definitions are within the boundaries of the above mentioned Article 24, but more explicitly mentioning examples of when *force majeure* can be said to be present.

4. The market standard is a reflection of the court jurisprudence.

## 1.3 Germany

1. In principle, under German law, liability for damages (which must be distinguished from the question of performance and/or price risk, i.e. the question as to whether performance and/or payment is actually still required) as a consequence of “disruptions of contractual performance” arises **only in the case of culpability** – Section 276 of the German Civil Code (Bürgerliches Gesetzbuch); however, elements of stricter liability do exist (which bring the German liability system closer to the English legal system):

- (1) “objective measure” of due diligence and
- (2) liability of any person employed by the debtor in the performance of his obligations as well as
- (3) reversal of the burden of proof (Section 282 of the German Civil Code).

Liability for damages may therefore be precluded

- because of the culpability of an “assistant” who is not deemed to be a “person employed by the debtor in the performance of his obligations”, so that the debtor is only liable for its own culpability (*culpa in eligendo* and/or *vigilando*) – (e.g. see Article I.15 of the Deutsche Bundesbank’s General Business Conditions (culpability with respect to the execution of instructions of a general “infrastructural business”, such as the Post Office, the railways and transport companies, or another credit institution or correspondent)) or because
- because (by way of exception) the debtor (including its bodies and staff) **is not culpable itself**, which can only hold true in two cases, namely cases where the damage is due:
  - (1) to a “**chance/accidental**” event which the debtor could not prevent in spite of due diligence (see Section 287, second sentence, as well as Sections 350 and 848 of the German Civil Code for the legal definition of “chance/accidental” event) or
  - (2) “**force majeure**” (= a **special kind of “chance/accidental” event**) (see Sections 203, 651j and 701, paragraph 3 of the German Civil Code).

2. Some existing definitions of force majeure are as follows:

Palandt, 54<sup>th</sup> edition, commentary on Section 203, following BGHZ 81, 355: “... *an event which could not be anticipated and prevented by taking the greatest care which could reasonably be expected to be taken... corresponds to the concept of circumstances beyond anybody’s control*” (so-called “subjective theory”)

Palandt, 54<sup>th</sup> edition, commentary on Section 651j, following BGHZ 100, 185: “*an event which (i) is of external origin, (ii) not foreseeable, (iii) cannot be avoided even if the greatest care is taken that can reasonably be expected, e.g. war, the risk of war, riots, highly unstable political relationships, natural disasters, technical disasters such as nuclear reactor accidents, epidemics and strikes of utility and transport companies, the Post Office, telecommunications service providers, airport and customs services, but not strikes in the own company*” (so-called “objective theory”).

General Business Conditions of the Deutsche Bundesbank, Section 1.12: “...**force majeure, riots, war and natural disasters or other events beyond (the Bank’s) control** (e.g. strikes, lock-outs, traffic disruptions)”.

3. German law provides for the concept of *force majeure*, but there is no legal definition. When the German Civil Code was drafted, both the (broader) subjective and the (narrower) objective approaches were familiar, with the courts tending in the field of liability rather to follow the objective approach,

even though it is not disputed that there is no liability for chance/accidental events which are not due to *force majeure*.

4. In addition, it should be noted that in accordance with the general legal environment mentioned above, there is for example no definition of *force majeure* in most German standard market documentation (e.g. the 'Rahmenvertrag für Finanztermingeschäfte'. It might be interesting that, contrary to that, the European Master Agreement sponsored by the European Banking Federation has a clause on 'Change of Circumstances' (cf. Article 6(2)<sup>1</sup>).

## 1.4 Greece

1. The Greek civil code (AK) treats initial and subsequent non-performance in the same way, unlike the German civil code (sections 306-308). The key edifice upon which the whole system of contractual liability is built up is who is to blame for the non-performance. If the debtor is liable for the impossibility, he has to pay damages. If the creditor is liable, the debtor is freed and has a right to demand performance.<sup>2</sup> If neither party is responsible for the impossibility of performance, both are freed from obligation (Articles 336, 363, 380 AK). For initial impossibility or illegality the debtor is freed if he proves that he did not know either without fault (363, 365 AK). An important qualification occurs for debts described by class, for which the debtor is liable, unless the whole class (genus) is destroyed.

2. For events that are beyond the control of a reasonable average counterparty, there can be no liability and performance is excused. Traditionally, such events beyond the control of a reasonable average counterparty are i) natural disasters, ii) violent acts, iii) measures taken by government or supervisory authorities, iv) strikes, v) malfunction of electricity supply.

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<sup>1</sup> (a) Change of Circumstances. The occurrence of any of the following events or circumstances in respect of a party shall constitute a change of circumstances ("Change of Circumstances"):

(i) Tax Event. As a result of any change in law or in the application or official interpretation thereof occurring after the date on which a Transaction is entered into, or as a result of a Corporate Restructuring of either party not falling under subsection 1(a)(vii), the party would, on or before the next due date relating to such Transaction, (A) be required to pay additional amounts pursuant to Section 4(1) with regard to a payment which it is obliged to make, other than a payment of interest pursuant to Section 3(5), or (B) receive a payment, other than a payment of interest pursuant to Section 3(5), from which an amount is required to be deducted for or on account of a tax or duty and no additional amount is required to be paid in respect of such tax or duty under Section 4(1), other than by reason of Section 4(1)(c);

(ii) Illegality, Impossibility. 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 circumstance beyond the party's reasonable control affecting the operations of the party;

(iii) Credit Event upon Restructuring. If the party is subject to a Corporate Restructuring, the creditworthiness of the Successor Entity is materially weaker than that of the party immediately before the Corporate Restructuring.

<sup>2</sup> Christodoulou, in: Kerameus/Kozyris, Introduction to Greek law, 2d ed., 1993, at p. 81.

3. Altered circumstances is a doctrine that both courts and legal scholars have developed if an unforeseeable event renders the performance exceptionally hard to fulfill morally or economically. Article 388 AK applies to two-sided contracts. The courts have the right to amend the provisions of the contract in order to adjust the contractual relationship to the changed circumstances.

4. Under Greek law exoneration clauses excluding liability for non-performance due to gross negligence or intent are null and void. The same applies for liability out of negligence if the creditor is employed by the debtor or the liability results out of the performance of an enterprise for which an official authorization has been given.

5. Under torts, culpability is also the rule for liability. Fault is the attitude of a person who willfully or negligently has committed an unlawful act or omission. The general clause is that whoever causes damage "unlawfully and culpably" to another, he is bound to repair the damage caused (914 AK).

6. Strict liability is the exception in two cases. Damages caused by non-domestic animals (924 AK) and liability of the employer for culpable unlawful actions committed by employees (922 AK).

## 1.5 Spain

1. There is no general definition of force majeure in Spanish civil law. It is referred to in provision of the Civil Code but no general definition is given. Authors assume that Article 1105 of the Spanish civil Code contains the notion of force majeure, although without calling it that name.

Article 1105 reads (free translation) " ... [N]obody shall be held responsible for those events which were not foreseeable or, if foreseeable, could not have been avoided".

2. Some provisions do however contain a list of events which could be considered to fall under the notion of force majeure. Thus, Article 1575 which regulated the reduction in rent for rented farmland lists as unforeseeable fire, war, plague of "langoustes", flooding, earthquake or any other event which could not be foreseen"

## 1.6 France

1. Non-performance is a failure by a party to perform any of its obligations under a contract, including defective performance or late performance. The non-performing party (the 'debtor') is then contractually liable to the aggrieved party (the 'creditor'). However, in the event of force majeure, the

debtor is exempted from any liability to the creditor, notwithstanding the non-performance of its obligations.

When the impediment is temporary, the excuse only has effect for such period, having regard to the effect of the impediment on the performance of the contract. Normally the contract is suspended until the moment the impediment / force majeure ceases.<sup>3</sup>

2. With respect to contractual obligations, Article 1148 of the Civil Code states that: “*No damages shall be due in the event that, due to force majeure or fortuitous event, the debtor was impeded from [performing its obligation]*”. Article 1147 states that the event shall be extraneous to the debtor. On the basis of these provisions, French courts require three criteria to be met for granting to a debtor the excuse of force majeure: the event must be extraneous, unforeseeable and irresistible<sup>4</sup>:

- Extraneous:

The debtor of an obligation is responsible for persons it employs and things under its custody, because it is deemed to have control upon them. A company could therefore not invoke the failure of his employees (e.g. back office employees shooting around) or machinery (e.g. computer breakdown) to be exonerated in the event of non-performance of its obligations: such malfunctioning is not extraneous.

It is usually required that the event has no relation with the debtor. For instance, “*fait du Prince*”: a public/administrative authority adopts a new rule that makes the fulfillment of an existing obligation only possible by a breach of the law, thus impossible. This is a general concept: the administrative authority can be any kind of body that has the power to regulate the field of activity in which the contract is taken (national or local public authorities, professional regulatory bodies, etc.). In that respect, rules or decisions adopted by the authorities regulating the financial markets (*Commission des opérations de bourse, Conseil des marchés financiers, Conseil des établissements de crédit et des entreprises d’investissement...*) may be considered as “*faits du Prince*” when they make impossible the performance of the obligation by the debtor. However, this criterion is applied in a pragmatic manner, i.e. the event cannot be due to the debtor’s behavior. For instance, a withdrawal of the debtor’s banking license would not be considered as a *fait du Prince* if it constitutes a sanction imposed due to the debtor’s behavior.

The same solution is given to strike. Strike is usually considered as a case of force majeure when provoked by a governmental decision, and/or being of general application. When the cause of a strike is internal, it cannot be considered as force majeure.

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<sup>3</sup> Traditional case-law (Req. 12 December 1922, DP 1924.1.186; Civ. 1ère, 24 February 1981, D. 1982.479).

<sup>4</sup> The application of force majeure by courts may fluctuate, in particular between evaluation *in concreto* and *in abstracto* of the circumstances, but the recent tendency is to consider irresistibility as the most important/sole criterion.



- Unforeseeable

The event must not have been foreseen/foreseeable by the parties at the time of conclusion of the contract. Most of the time, courts apply this criterion with reference to actual circumstances (*in concreto*): it could not reasonably be expected from the party to have taken the impediment into account or to have avoided or overcome it or its consequences (e.g. a bank robbery is not unforeseeable for a bank).

- Irresistible

The impediment makes the performance of the obligation completely impossible, and there is no alternative way to honor the contract. However, there are different ways of applying this criterion since the *Cour de Cassation* sometimes requires an evaluation *in concreto* (i.e. with reference to the actual circumstances of the case: situation of the creditor, weather, place...), and sometimes *in abstracto* (i.e. with reference to a normal person exercising reasonable care).

A case of the *Cour de Cassation* (highest civil court in France) dated 9 March 1994<sup>5</sup> (confirmed by several following cases) provides that even when the event was foreseeable, the debtor shall be excused if this prediction would not have attenuated the consequences of the event. In other words, irresistibility has become the main attribute of force majeure. If there is a complete impossibility to perform the obligation, the debtor will be excused, even if the event was foreseeable. The *Cour de Cassation* now assesses the behavior of the party with respect to this event: if the debtor has taken in advance all the reasonable measures to avoid the consequences of the event, the Court considers that irresistibility in itself suffices for constituting force majeure.

Irresistibility makes the difference between the force majeure and the Common Law concept of hardship, which allows a party to invoke the change of the circumstances to be excused from performing its obligation under the initially agreed conditions. Under French Law, the debtor who wants to be excused on the basis of force majeure must prove that, as a consequence of the impediment, it has become totally impossible for him to perform its obligation. Courts are extremely strict about this condition: a debtor shall never be excused if the performance was only made much more costly for him due to the occurrence of the impediment. The debtor must honor its commitment, whatever the cost to be born by it.

3. It has to be highlighted that, with respect to contractual liability, the above-mentioned regime of force majeure does not have a mandatory nature (*ordre public*). Content and consequences of force majeure may be freely defined and agreed by the parties to a contract.

On the one hand, the debtor may agree to be liable for impediments that would normally be covered by the excuse of force majeure. This means that the debtor promises to the creditor to indemnify it for any loss due to the occurrence of certain events determined in the contract. It is an 'insurance' granted

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<sup>5</sup> Cour de Cassation, 1ère Chambre civile, 9 March.1994. See also Chambre commerciale 1 January 1997.

by the debtor to the creditor. On the other hand, the debtor may be excused in the event of certain impediments beyond the scope of the traditional definition of force majeure. It is a classical liability exemption clause.

To the extent that these contractual exemption/insurance clauses do not completely change the underlying reasons for the contract, courts will recognize them as valid and enforceable.

4. As stated above, force majeure is of general application under French Law, therefore also in the field of financial market transactions. There are no specific mandatory rules in this field.

French Bankers' Association's Master Agreement for Foreign Exchange and Derivatives Transactions (*Convention cadre relative aux opérations de marché à terme*) contains, in addition to default termination clauses, specific provisions providing each party with the possibility to terminate transactions by reason of change in circumstances.<sup>6</sup>

The Master Agreement for Repurchase Transactions drafted by the French Association of Banks' Treasurers contains the same provisions (see Article 10.2 of the Agreement).

These provisions provide for a conventional regime of force majeure in the event of *fait du Prince*. This regime consists in the suspension of performance of obligations under the affected Transactions for a period of 30 days during which the parties have to attempt to find a mutually satisfactory solution for making such transactions legal, or avoid such deduction or withholding as may have been inspired by the Common Law concept of hardship. Instead of submitting the parties to the regime of force majeure applied by courts, this conventional regime establishes a specific event of termination of contract(s) on the basis of events that are traditionally considered by French courts either as relating to

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<sup>6</sup> Article 7.2 of the aforementioned Master Agreement sets out:

**"7.2 TERMINATION BY REASON OF CHANGE IN CIRCUMSTANCES**

(Taken from the official English translation of the Master Agreement)

7.2.1. Each of the following events shall constitute a Change in Circumstances for a party (the 'Affected Party'):

7.2.1.1 The entry into force of a new law or regulation, the amendment of any law or any other provision of mandatory effect or any change in the judicial or administrative interpretation of any such provision which results in a Transaction being illegal for such Party, or which results in a deduction or withholding on account of tax on an amount receivable from the other Party under such Transaction; or

7.2.1.2 any merger or demerger affecting such Party or any transfer of assets effected by the latter which results in a substantial deterioration of its business, its assets or its financial condition.

7.2.2 On the occurrence of a Change in Circumstances mentioned in Article 7.2.1.1 (...) the Parties shall suspend performance of their payment and Delivery obligations under the affected Transactions, and shall attempt in good faith for a period of 30 days to find a mutually satisfactory solution for making such transactions legal, or avoid such deduction or withholding. If at the expiration of such period, no mutually acceptable solution can be found, each of the Parties (in the event of illegality) or the Party receiving an amount less than that provided (in the event of deduction or withholding on an amount paid by the other Party) shall have the right to terminate the Transactions affected by the Change in Circumstances. (...)

7.2.3 In the event of the occurrence of a Change in Circumstances mentioned in Article 7.2.1.2, all Transactions shall be deemed to be affected. The other Party (the 'Non-Affected Party') shall be entitled, by notice given to the Affected Party, to suspend performance of payment and Delivery obligations and to terminate all the outstanding Transactions between the Parties, irrespective of their place of conclusion or performance."

force majeure (*fait du Prince*) or to hardship (change in the fiscal treatment of the outstanding operations).

## 1.7 Ireland

1. The legal concept of force majeure known under Irish law is based on the common law doctrine of frustration developed by the English courts early this century.

2. While the doctrine of frustration has been articulated in various manners by the Irish and other common law courts, the doctrine essentially operates to discharge a contract where the object or foundation of the contract is 'frustrated' by the occurrence of an event or circumstance beyond the reasonable control of the parties. It has been variously stated that the event or circumstance must destroy the underlying reason for performing the contract or must deprive a contracting party of the benefit of its bargain. Courts have often emphasised that the supervening event could not have been guarded against in the provisions of the contract. In other cases it has been emphasised that the event must have been unforeseeable, or must not have been within the contemplation of the parties at the time of contracting. It is generally agreed that a contract will not be frustrated simply because increased costs make it impossible for a party to perform without incurring serious financial losses.

3. Closely related to, and often stated to form part of, the doctrine of frustration is the doctrine of impossibility, which excuses performance in the event of the unexpected destruction of the subject-matter of the contract.

4. Typical force majeure provisions used in contractual documentation may excuse non-performance in the event that a party is unable to perform its obligations as a result of any event or circumstances beyond the control or beyond the reasonable control of the party, including without limitation some of the following specified events: Acts of God (e.g., fires, floods, etc.); acts of war, insurrection or revolution; civil or military disturbances; riots; sabotage; epidemics; interruptions, loss or malfunctions of utilities, computer (hardware or software) or communications service; accidents; strikes, work stoppages, labour disputes or industrial action; the inability of clearing or settlement systems to settle transactions; acts of governmental authorities such as the imposition of currency restrictions. Force majeure provisions might contain a carve-out with respect to events caused by the negligence or gross negligence of the defaulting party and/or a commitment to resume performance as soon as practicable under the circumstances.

## 1.8 Italy

1. The art. 1218 of the Italian Civil Code, concerning the liability of debtor, assesses that the defaulting debtor is bound to pay a recompense for damages otherwise he is able to prove that the default or the delay is due to the impossibility of the payment or of the supply because of an event outside his control and for which he has no responsibility. So, it's possible to say that a definition of force majeure is clearly in the law.

2. a) Doctrine use to distinguish between *caso fortuito* and *forza maggiore*, the first being unforeseeable circumstance or fortuitous event, the second more strictly force majeure. The last one can be defined as an event due to natural or human reasons unavoidable in any way. The two expressions usually go together to express the idea of the absence of fault.

b) The case law listed, among others, the following circumstances of Force Majeure:

human reasons: act of an authority (c.d. *factum principis*); national strike (of transports, for instance, although the hypothesis of strike of the employee of the debtor is still controversial); act of the creditor; act of third persons (like robbery or theft, if unavoidable)

natural reasons: earthquake; flooding etc.

3. The concept of Force Majeure does not seem very used in domestic market legislation and when it is used it is not provided a definition of it<sup>7</sup>. For sure the current definition in Italian legislation, as specified by case law, should apply (see points I and II ).

## 1.9 Luxembourg

1. Art. 1148 of the Code civil states that no damages should be paid when, due to force majeure or unforeseeable circumstances ("*cas fortuit*"), the debtor could not give or do what he had to, or has done what he was not allowed to do.

Art. 1929 of the Code civil provides that the depository can never be held responsible for accidents due to force majeure [...].

Art. 1934 of the Code civil compels the depository who has received damages for the loss of the thing due to force majeure to refund what he has received.

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<sup>7</sup> See Delibera CONSOB No. 11255, Annexe 1, chap.1, sect.VI and VII.

2. These elements are not contained in the law but have been developed by the Courts in the case law. In this context, the force majeure is defined as a specific event, unpredictable, irresistible and inevitable<sup>8</sup>.

The same definition is applicable to the banking sector. The Court has declared that a bank was not responsible because of force majeure when the operation had to be done immediately (cheque immediately payable but with a counterfeited signature)<sup>9</sup>. On the contrary, in an operation which did not need to be executed immediately - and therefore giving the bank a possibility to carefully check all the elements - the bank could not waive its responsibility on the ground of force majeure for an order counterfeited<sup>10</sup>.

3. As the Luxembourg Code civil is very similar to the French one, legal counsels and judges may use the French interpretation of the concept when necessary and relevant.

4. In the financial sector, it is common to refer to the concept of force majeure. The concept is often merely quoted, implicitly referring to the interpretation given in case law. It is also possible to find a definition consisting of the enumeration of the characteristics developed by the case law as described under I B (1) above possibly followed by examples.

Art. 10 of regulation of 17 February 1971 relating to the circulation of securities<sup>11</sup> refers to force majeure in case of partial or total loss or destruction of an amount of securities of similar nature. The depositories have to take all the necessary and possible steps to recover the securities. Depending on an assessment of the circumstances, depositors might not be held responsible.

## 1.10 The Netherlands

1. Articles 6:74 to 77 of the Dutch Civil Code are of a regulatory nature (i.e. they are not mandatory and parties can reach different arrangements inter se provided that they stay within the limits set out hereunder in # 6).

2. The neutral term for all situations of failure to perform is called “*niet nakoming*”. The failure which gives the aggrieved party a remedy is called “*tekortkoming in de nakoming*”. Non performance is not imputable (“*niet toerekenbaar*”) to the non performing party if this does not result from any wrongful act on his part, nor if it cannot reasonably be imputed to him. Force majeure is also held to exist if an

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<sup>8</sup> Cour 25 March 1892, Pasicrisie 4, p. 38; Cour 2 March 1917, Pasicrisie 10, p. 247.

<sup>9</sup> Cour de cass. 10 March 1983, Pasicrisie 25, p. 406.

<sup>10</sup> Court d'appel 14 July 1993, Pasicrisie 29, p. 257.

<sup>11</sup> Mémorial A 12, 25 February 1971, p. 255.

obligor cannot be held liable for non performance by the rules of law or by legal act, agreement or according to prevailing opinion in society or in the particular trade (Article 6:75 Civil Code). The term “prevailing opinion” is developed in case law and it covers a wide variety of situations arising in various specific contracts. If an obligor, for example, lacks the financial ability or the required competences to perform obligations freely entered into, this is not seen as force majeure<sup>12</sup>.

3. Non performance of contractual obligations does not need to be impossible in an absolute sense; it is sufficient that performance cannot be demanded within the bounds of reasonableness. According to the Dutch Civil Code a contractual party is excused from performing his contractual obligations if performance has become impossible in fact or in law. The impossibility or impediment is one which the obligor could not be expected to have taken into account. Under Dutch law it is furthermore clear that the said impossibility to perform must have occurred outside of the control of the obligor.

4. In cases of force majeure the obligor is not in default and the aggrieved party may not claim damages (Article 6:74, paragraph 1 Civil Code). Non performance of contractual obligations that is not imputable to an obligor can lead to the dissolution of the agreement. If the obligor derives any benefits from a force majeure situation, and at the same time the creditor suffers any loss, this is deemed to be a case of unjust enrichment; these benefits have to be returned to the aggrieved party (Article 6:78 Civil Code)<sup>13</sup>.

5. According to Article 6:76 Civil Code the above rules apply mutatis mutandis if a party uses a third party in the execution of contractual obligations. The use of inappropriate or faulty equipment or means of communication by a contractual party is also imputable to him, unless he cannot be held liable for it by the rules of law or by legal act, agreement or according to prevailing opinion in society or in the particular trade (Article 6:78 Civil Code).

6. It has already been stressed that the above-mentioned rules are of a regulatory nature. Just as contractual parties can agree to increase the liability of one of them for certain situations (e.g. by granting a guarantee), so-called exoneration clauses limiting liability, and increasing the definition of force majeure, are also possible and acceptable. Under Dutch law exoneration clauses excluding liability for non performance due to gross negligence or intent are null and void. Liability for consequential damages is, however, widely excluded. There is seminal case law on the question what can, and cannot, be included in exoneration clauses. The Supreme Court has consistently held that this question must be answered according to the criterion of reasonableness and fairness.<sup>14</sup> In applying this criterion, judges consider the following issues: i) the seriousness/degree of the fault leading to non

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<sup>12</sup> Vermogensrecht volgens het nieuwe Burgerlijk Wetboek, A.S. Hartkamp, 1998, page 263. Supreme Court 24 October 1997, NJ 1998, 69 Spruijt/Tigchelaar case.

<sup>13</sup> An example of unjust enrichment is case Giliam/Zeinstra, Supreme Court 13 September 1996, NJ 1996, 732.

<sup>14</sup> Supreme Court 19 May 1967, NJ 1967, 261 case Saladin/HBU and Supreme Court 20 February 1976, NJ 1976, 486 case Van der Laan/Top.

performance, ii) the interests and the nature of the contract involved, iii) the relationship and professional nature of the contractual parties involved, and iv) whether parties understood the contents of the exoneration clause in question. It is clear that exoneration clauses encompassing wide limitations of liability are more easily accepted in agreements if they are entered into by professional (e.g. financial market) parties.

7. The general conditions widely used by commercial banks<sup>15</sup> contains a section (# 31) which holds that in addition to not being held liable for non performance by the rules of law or by legal act, agreement or according to prevailing opinion in society or in the particular trade, a bank is not liable for failures/defects due to i) natural disasters, ii) violent acts, iii) measures taken by government or supervisory authorities, iv) labour disturbances, v) malfunction of electricity supply or vi) of communications equipment or connections. Section 2 of the general bank conditions requires a bank to exercise due care and to take the interests of counterparties into account as far as possible. Section 10 holds that, without prejudice to section 31, a bank vouches for the correct execution of (properly documented) payment orders channeled via the RTGS. Section 7,3 of De Nederlandsche Bank's general conditions contains an exclusion of liability that is identical to that set out in section 31 of the general conditions of Dutch commercial banks.

8. Professional financial market parties, of course, regularly include force majeure and limitation of liability clauses in their documentation used for financial transactions. There seem to be no standard definitions, though the example of section 31 of the general conditions of Dutch commercial banks is widely used as a basis for drafting the said clauses. Applying the criterion set out in the case law mentioned in footnote 3, these clauses are legally valid; after all the contractual parties are all professional financial market parties.

## **1.11 Austria**

1. A force majeure concept as such does not exist in Austria. There is no provision in Austrian civil law which explicitly addresses cases of force majeure.

2. The following provisions are relevant in this context:

As regards the indemnity of losses (Schadenersatzrecht) Article 1311 of the Austrian Civil Code (ACC) has to be mentioned. This provision determines that an accidental damage is to be imputed to the person in the sphere of whom it has occurred. However, has a person caused an accidental damage,

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<sup>15</sup> These general conditions have been drawn up by the Association of Dutch Banks (NVB). They apply to professional and non-professional counterparties of banks, see Bank en Aansprakelijkheid, R.P.J.L. Tjittes and M.A. Blom, 1996.

such person has to compensate any loss (casus mixtus; e.g. someone stores a painting outside a house - causa remota = liability – and the picture is damaged due to rainfall – causa promixta = accident). The Austrian case law regarding this provision is very casuistic and also the doctrine does not provide for a uniform concept. The clearest concept that has been developed by the courts is the principle of the violation of a protective law (Schutzgesetzverletzung). This principle says that an unlawful violation of a protective law has occurred if a standard person (Normperson) exercising due diligence could have reached the aim of the protective law (Erreichung des Ziels des Schutzgesetzes).

As regards warranties (Gewährleistungsrecht), Articles 1447 and 880 of the ACC are relevant. According to Article 1447, if a property (Sache) is completely destroyed by accident all liabilities, including the liability to compensate the value, are terminated. According to Article 880 a contract is deemed not to have been conducted if the property is withdrawn from the market (aus dem Verkehr ziehen). Here too, the Austrian case law regarding this provision is very casuistic and also the doctrine does not provide for a uniform concept.

## 1.12 Portugal

1. In Portugal, like in other Roman-Germanic law systems, the concept of *force majeure* bears outstanding legal implications. Whilst there is no legal definition of the concept, it is recognised by law that events or circumstances beyond the control or beyond the reasonable control of the parties could either contribute to (i) a change of the contractual provisions, to (ii) termination of the contract or to (iii) discharge from liability in case of non-performance of the contractual obligations. *Force majeure* is thus a fact that is beyond control or reasonable control of both parties (subjective element) and is irresistible and unavoidable even though the parties had taken all reasonable measures to ensure the fulfilment of the contractual program (objective element).

2. The precise definition of which facts or circumstances bear the nature of *force majeure* is a matter of case law decided on a case by case basis by the courts.

Whenever *force majeure* events come into existence, the Portuguese Civil Code foresees two possible solutions:

- Termination of the contract or its modification on grounds of abnormal change of circumstances under which the parties had taken the decision of coming into contract (Article 437(1) of the Portuguese Civil Code),
- Extinction of the obligation in cases of effective, absolute and definitive impossibility of performance (Article 790(1) of the Portuguese Civil Code).

The first solution requires the fulfilment of a number of conditions:



- There would have to be an **abnormal change of circumstances** under which the parties had taken the contracting decision. This condition covers both subjective (beyond control or reasonable control of both parties) and objective changes (irresistible and unavoidable).
- There would have to be a **damage** caused to one of the parties in such a way that the obligation to perform would infringe the principle of **good faith**, thus creating a material imbalance in the contractual relationship.

However, the possibility open by Article 437(1) of the Portuguese Civil Code of termination of contract or modification on grounds of abnormal change of circumstances cannot be invoked if the contract were actually signed to cover certain unforeseeable events or when it bears the nature of a contingent contract. Nonetheless, the principle of good faith could still be invoked if *force majeure* events would supersede any contractual provisions even in the case of contracts signed to cover certain unforeseeable events or contingent contracts.

The second solution (extinction of the obligation) is also based in certain presuppositions:

- As a consequence of the *force majeure* event, performance of the obligation becomes impossible in reality. There is not a case of a material contractual imbalance, which could be solved by termination or change of contract (Article 437(1) of the Portuguese Civil Code), but a real case of effective and absolute impossibility of performance by the debtor himself or by a third party on its behalf (Articles 790(1) and 791 of the Portuguese Civil Code).
- In addition, the impossibility of performance should be final thus not allowing performance at a later stage (Article 792(2) of the Portuguese Civil Code).

3. In conclusion, if performance were possible by a third party or by the debtor at a later stage, the *force majeure* event would not have as effect the discharge of the debtor's liability in case of non-performance and the extinction of its obligation vis-à-vis the creditor. Notwithstanding, the provisions of Article 437(1) of the Portuguese Civil Code could apply if the *force majeure* event had created a contractual imbalance contrary to the principle of good faith.

## 1.13 Finland

1. The leading principles of Finnish contract law are those of “freedom of contract” and “*pacta sunt servanda*”. The contract must be carried out as agreed, unless special reasons exist which can be invoked by a party to the contract in order to be released from obligations of the contract.

There are five main categories of release from contractual obligations under Finnish law:

Release by mutual agreement; termination of a long-term contract in accordance with its express terms and conditions; cancellation of the contract by one party in the event of material breach of the

obligations under the contract by the other; release or adjustment of unconscionable, unreasonable or harsh terms of a contract by a court of law and *force majeure*.

Finland has no general codified statute governing contracts. There are a number of special laws governing special kinds of contracts. Almost all these laws have their own definitions for *force majeure* (for example the definition in Law on credit transfers is based on Article 9 of the EC Directive on cross border credit transfers) These definitions deviate slightly from each other, but one could try to describe force majeure of Finnish law as follows:

A claim for performance of a contract cannot be presented if the performance is prevented or made unreasonably difficult by war, rebellion, internal political or armed movements, requisition or confiscation of property by authorities for public purposes, prohibition concerning importation or exportation, natural disaster, discontinuance of general transportation or supply of energy, wide labour conflict or fire or any other unusual event with similar effect and beyond the control of the party to a contract. A claim for performance may not be presented if the sacrifices required from the party to a contract in carrying out the contract would be in apparent disproportion to the benefits coming to the other party under the contract.

Unless the performance is prevented by *force majeure* for a long period of time, the party to a contract may claim performance after the *force majeure* has ceased to exist.

Thus the characteristic feature of *force majeure* can be classified as follows:

- an event beyond the control of the parties,
- an event making performance impossible or extremely burdensome,
- an event not foreseeable by the parties at the time of concluding the contract and
- an unusual event.

This provision shall be applied a) even if there is no *force majeure* clause on the contract and b) if the contract merely refers to *force majeure* as a relief without defining or enlisting the events to be considered *force majeure*.

When performance becomes too burdensome has to be defined *in casu* on the merits of each case. One crucial element of an *in casu* evaluation is the factual effects on the performance in question. Whatever the *force majeure* is, it must have as its effect total impossibility of carrying out the contract or so essential change in the circumstances that the efforts required to execute the contract would apparently be unreasonably burdensome.

2. According to Finnish law, the parties can freely agree on the definition of *force majeure*. They may also limit the principles referred to above. The freedom to agree is, however, limited to what is considered reasonable by the courts.

3. The consequences of *force majeure* have not been clearly defined either in jurisprudence or in legal doctrine. It seems, however, to be clear that *force majeure* bars an action for specific performance and generally also an action for damages. It also seems that advance payments made by a party can be recovered, but this may depend on usage and on the circumstances of the case in general. The parties may agree on different principles on this respect. A clear and straightforward rule on consequences is impossible to give.

Neither Finnish law nor jurisprudence contains clear rules on the obligation of the party to inform the other party of *force majeure* and its effects. So the consequences of, and the extent of liability for, the neglect to inform the other party of *force majeure* is also an unanswered question.

It is clear that when a “reasonable” period of time has elapsed after the *force majeure*-reason has prevented the performance, both parties are released from their obligations and the contract loses its binding effect.

If *force majeure* prevents the performance for a short period of time only, the contract must be carried out as soon thereafter as possible. For damages in these kind of situations there is no established practice or statutory system under Finnish law. The main principle seems to be that both parties shall suffer their own costs and damage.

The party can invoke its subcontractor’s *force majeure* on condition that the performance under the subcontract could not be replaced by similar performance by another subcontractor or the party itself.

4. The party invoking *force majeure* has to prove at least the following:

- that the *force majeure* reason existed as defined above,
- that this reason and its effects made the performance of that party impossible at the time of performance, which impossibility continued to exist for so long a period of time that performance after the end of said reason could not any more have been reasonable demanded.

The other party may present counter-evidence as to the

- foreseeability of the *force majeure*,
- the more or less usual occurrence of the event claimed to constitute *force majeure*,
- availability of other suppliers etc.

## 1.14 Sweden

1. Statutory concept:

"Force majeure" is not a defined statutory term under Swedish law. However, the concept of "force majeure" is recognised and, as such, in general considered to refer to such circumstances that could

exempt a party from the requirement to perform its obligations under an agreement. Such circumstances could also exempt a part from liability to pay damages due to late or non-conform performance. In relation to financial transactions, the statutory provisions of interest are embodied in the Swedish Sale of Goods Act enacted in 1991.

According to Section 23 of the Sale of Goods Act, the Buyer may require performance unless there is an impediment that he could not overcome or performance would require sacrifices that would not be reasonable having regard to the Buyer's interest in the Seller's performance. Further, according to Sections 27 and 40 of the same Act, the Buyer is entitled to damages unless the Seller proves that the delay or non-conformity was due to an impediment beyond his control which he could not reasonably be expected to have taken into account at the time of the conclusion of the contract and the consequences of which he could not reasonably have avoided or overcome. (Compare Article 79 (1) of the "United Nations Convention on Contracts for the International Sale of Goods (CISG), ratified by Sweden in 1987.) If someone engaged by the Seller caused the delay or non-conformity, the Seller is liable for damages unless the party whom he has engaged would be exempted according to the previously mentioned provision. Thus, to be exempted from liability due to a supplier's delay or non-conformity, both the supplier and the Seller must be exempted. (Compare Article 79 (2) of the CISG).

It is difficult to describe exactly which specified circumstances that will be treated as "force majeure-circumstances" under Swedish law. The former Swedish Sale of Goods Act from 1905 explicitly mentioned war and importation prohibition. From the preparatory work to the Sale of Goods Act now in force (Government bill 1988/89:76), it is evident that, provided all the other prerequisites of the provisions are fulfilled, these circumstances could be encompassed by the new act as well. Other circumstances that, according to the preparatory work, could be encompassed are natural catastrophes, accidents, such as fires or explosions, and labour disputes.

As to case law, the existing case law concerning force majeure refers to the provisions under the Sale of Goods Act from 1905, and the existing cases primarily refers to the time of the first and the second world wars. Please see further under item 3 below.

## 2. Standard definitions:

The desire to more explicitly describe the circumstances that would exempt the parties in a transaction or relationship to fulfil their respective obligations, agreements very often include "force majeure clauses". An illustrative example of such a clause is found in the "General Terms and Conditions for Trading in Financial Instruments" issued by the Swedish Securities Dealers Association in 1999<sup>16</sup>.

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<sup>16</sup> *"Limitation of the Bank's Liability*

### 3. Standard definitions and court jurisprudence:

According to the Swedish Sale of Goods Act (Section 3), the Act does not apply insofar as something else follows from the agreement, practice developed between the parties or from generally adopted trade practice or usage that must be considered binding between the parties. Thus, the parties are free to agree upon force majeure clauses and the courts will uphold such clauses.

Due to the fact that the present Sale of Goods Act has been in force for a quite limited period of time, there exists not yet any case law dealing with the provisions relating to force majeure. Further, since the parties, as already mentioned, normally include "force majeure clauses" in their agreements, they rarely rely upon the statutory provisions in this respect. Therefore, case law concerning the "force majeure provisions" in the Sale of Goods Act from 1905 is also limited and refers, primarily, to the situation after the first and second world wars.

## **1.15 United Kingdom (England and Wales)**

1. The legal concept of force majeure known to the common law world is based on the doctrine of frustration developed by the English courts early this century.

2. While the doctrine of frustration has been articulated in various manners by common law courts, the doctrine essentially operates to discharge a contract where the object or foundation of the contract is

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*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. The reservation in respect of strikes, blockades, boycotts and lockouts shall apply even if the bank itself takes such measures or is the subject of such measures. 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, and nor shall the bank be liable for loss or damage caused by contractors selected by the bank with due care or those who have been recommended by the customer. Nor shall the bank be liable for any damage that occurs to the customer or any other party on account of restrictions upon disposal that may be applied against the bank in respect of financial instruments. Under no circumstances shall the bank be liable for indirect damage.*

*Where, as a result of a circumstance as specified above in the first paragraph, an impediment exists for the bank to either wholly or partially perform a purchase or sales order in respect of financial instruments, fulfilment shall be suspended until such time as the impediment no longer exists. Where the bank as a result of such circumstance is prevented from making or receiving payment/delivery, the bank and the customer respectively shall not be obliged to pay interest.*

*That which is stated above shall apply unless otherwise prescribed in the Act (SFS 1998:1479) on Registration of Financial Instruments.*

'frustrated' by the occurrence of an event or circumstance beyond the reasonable control of the parties. It has been variously stated that the event or circumstance must destroy the underlying reason for performing the contract or must deprive a contracting party of the benefit of its bargain. Courts have often emphasised that the supervening event could not have been guarded against in the provisions of the contract. In other cases it has been emphasised that the event must have been unforeseeable, or must not have been within the contemplation of the parties at the time of contracting. It is generally agreed that a contract will not be frustrated simply because increased costs make it impossible for a party to perform without incurring serious financial losses.

3. Closely related to, and often stated to form part of, the doctrine of frustration is the doctrine of impossibility, which excuses performance in the event of the unexpected destruction of the subject-matter of the contract.

4. Typical force majeure provisions used in contractual documentation may excuse non-performance in the event that a party is unable to perform its obligations as a result of any event or circumstances beyond the control or beyond the reasonable control of the party, including without limitation some of the following specified events: Acts of God (e.g., fires, floods, etc.); acts of war, insurrection or revolution; civil or military disturbances; riots; sabotage; epidemics; interruptions, loss or malfunctions of utilities, computer (hardware or software) or communications service; accidents; strikes, work stoppages, labour disputes or industrial action; the inability of clearing or settlement systems to settle transactions; acts of governmental authorities such as the imposition of currency restrictions. Force majeure provisions might contain a carve-out with respect to events caused by the negligence or gross negligence of the defaulting party and/or a commitment to resume performance as soon as practicable under the circumstances.

It is noteworthy that leading market standard documents such as the ISDA Master Agreement do not contain general definitions of what constitutes force majeure.

## **2. European Community**

### **1. Definitions of Force majeure in Community law:**

Directive 97/5 of Council and Parliament on cross-border credit transfers, contains a definition of force majeure (Article 9<sup>17</sup>).

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<sup>17</sup> Article 9: Situation of force majeure

Without prejudice to the provisions of Directive 91/308/EEC, 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

2. Jurisprudence of the European Court of Justice (excerpts of relevant passages):

(1) "*Recognition of a case of force majeure presupposes that the external cause relied upon has irrestible and inevitable consequences to the point of making it objectively impossible for the persons concerned to fulfil their obligations...*"

(Case 98/83, *Van Gend & Loos/Commission*)

(2) "*Apart from special features of specific areas in which it is used, the concept of force majeure essentially covers extraneous circumstances which make it impossible for the relevant action to be carried out, even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties which are independent of the will of the person concerned and appear inevitable even if all due care is taken*"

(Case 70/86, *Commission/Greece*)

(3) "*The concept of force majeure must be understood as referring to 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. That concept must be considered in relation to the provisions of each regulation in which the term appears."*

(Case 145/85, *Denkavit/Belgium*)

(4) "*7. The first part of the second question asks whether the loss of the licence constitutes a case of force majeure within the meaning of article 18 of regulation no 1373/70 of the Commission.*

*8. 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. Any interpretation of the concept of force majeure employed in the regulation in issue must therefore take account of the special nature of the relationships at public law existing between the importers and the national administration, as well as of the objectives of that regulation. It is apparent from these objectives, as well as from the actual provisions of the regulations in question, that the concept of force majeure is not limited to cases of absolute impossibility .*

*9. The public interest, which requires as accurate a forecast as possible of import trends in each member state and justifies the deposit of security against the grant of authorisation to import, must be reconciled to the necessity of not hampering trade between states by too rigid obligations, a necessity*

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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.

*which also derives from the public interest. The threat of forfeiture of security is intended to encourage the fulfilment of the obligation to import by importers enjoying the authorisation and thus to ensure the accurate forecasting of import trends required by the general interest mentioned above. It follows that, in principle, an importer who has exercised all reasonable care is released from the obligation to import when external circumstances render it impossible for him to complete the importation within the period of validity.*

*10. The answer to the first part of the second question should therefore be that the loss of such an import licence constitutes a case of force majeure within the meaning of article 18 of regulation no 1373/70 when such loss occurs despite the fact that the titular holder of the licence has taken all the precautions which could reasonably be expected of a prudent and diligent trader.”*

(Case 158/73, *Kampffmeyer v. Einfuhr und Vorratsstelle für Getreide* [1974] ECR 101 at p. 110)

### **3. New York**

1. In view of the widespread usage of New York law in European OTC swaps and derivatives markets, it is worth noting that the doctrines of frustration and impossibility known to English and Irish law have also been adopted by the New York courts.

2. Under New York law, a statutory concept of force majeure known as commercial impracticability has also been developed for commercial transactions, which for this purpose may include certain financial transactions undertaken in European fx and derivatives markets (i.e., transactions involving the exchange of currency, such as foreign exchange spot transactions and cross-currency swaps, but not interest rate swaps or loan/debt transactions). The statutory concept of commercial impracticability excuses performance where performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. The statutory concept of commercial impracticability has been interpreted by the American courts in a manner that is not dissimilar to the common law doctrine of frustration.

3. Typical force majeure clauses used in financial market documentation are often similar to those used in the London markets. It is noteworthy that leading market standard documents such as the ISDA Master Agreement do not contain general definitions of what constitutes force majeure. The Federal Reserve Bank of New York's Financial Market Lawyers Group is currently in the process of considering the development of standardised contractual provisions relating to force majeure issues particularly relevant to foreign exchange and derivatives transactions.