



EUROPEAN CENTRAL BANK

DIRECTORATE GENERAL - LEGAL SERVICES

To the Members of the
European Financial Market Lawyers Group

18 September 2000

Contact person: Klaus Löber
Legal Counsel
ext. -7225

Force Majeure

1. The EFMLG at its second meeting in October 1999 resolved to review the comparative table on force majeure in the 15 EU jurisdictions as prepared by the ECB legal services and to provide examples of force majeure clauses in existing domestic and international standard market documentation, in response to the issues paper of 28 September 1999 in which an in-depth study into the notion of "*force majeure*" was called for. It may be recalled that the increasing number of cross-border transactions in wholesale financial market practice and a fear that differences in legal systems could cause the smooth functioning of European financial markets to be unnecessarily slowed down made the EFMLG members consider that force majeure clauses might be ripe for harmonisation.

It is now clear that definitions of force majeure have been established in all areas of financial market activity where such clauses are needed, thus suggesting that force majeure is a generally accepted notion .

In advance of the EFMLG's own analysis and discussion, it is possible to draw tentative conclusions from the comparative table compiled by the ECB, an updated copy of which is attached to this note.

2. One common denominator that can be distinguished within the different legal and financial market practices is that force majeure generally is established where the relevant conditions exhibit: unpredictability, the character of the obstacles being insurmountable, and the prerequisite of absent of any default on the part of the party seeking to be relieved from performing a contractual obligation. But the scope of force majeure does differ across the EU. In particular, some legal systems, such as those of the Netherlands and France, include strike or acts of government within their understanding of the scope force majeure.

The European Court of Justice has stated that force majeure 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 concept of force majeure must be understood as referring to unusual and unforeseeable circumstances which were beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if all due care had been exercised.”¹.

Some jurisdictions, such as Austria and Belgium, have no legal definition of the notion “force majeure”. The United Kingdom has no doctrine of force majeure at all (except where the parties to a contract replicate the effect that the doctrine has by appropriate contractual terms).

Any argument that there should be Community legislation seems doomed to failure, given that the ECJ has stated that, “[the concept’s] meaning must be determined by reference to the legal context in which it is to operate”².

3. Bankers associations tend to have developed definitions that are used in contracts across the board and that generally contain a summation of a number of situations in which force majeure would be deemed to have occurred. These lists are in most cases non-limitative and the contracting

¹ Case C-263/97: R. v. Intervention Board for Agricultural Produce, ex parte First City Trading Ltd and Others [1998] ECR I-5537, paragraph 38.

² *ibid.*, paragraph 41.

parties may often derogate from the concept of force majeure as it would be defined by courts and legal authors. The mechanisms that have already been developed by the parties involved appear quite satisfactory and leave the possibility for the contracting parties to adjust and develop the definition of “force majeure” as they wish. Further regulation on the part of the European Community or the European Financial Market Lawyers Group appears to be unnecessary and possibly even counterproductive as it would simply complicate matters beyond what is necessary for ease of trade.

4. Further harmonisation, then, by means of regulation can be thought to be unnecessary and could even in itself operate as a brake on the smooth functioning of the European financial markets. The simple fact that the concept of “force majeure” is recognised and contracting parties need or appreciate the space left to them to deviate from relevant national definitions, even if this is within the boundaries of the legal context within which parties operate, and the fact that a basic definition has been used in a number of cases by the European Court of Justice, lead to the conclusion that differences in national legal systems do not, in fact, pose a commercial disadvantage and can therefore remain as they are.

5. **Do the members of the group agree with this conclusion already, or should the full analysis be concluded, including a review of standard market provisions?**