DRAFT
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EFMLG

<u>Force Majeure Discussion Paper/Questionnaire</u>

1. INTRODUCTION

Many standard-form master trading agreements in the European financial markets ("Master Agreements") do not address force majeure events (as such events are defined under applicable law or in respect of which parties frequently seek to make special contractual provision) ("Force Majeure"), that make it impossible or impracticable to perform obligations under the Master Agreements.

The EFMLG is to consider whether or not to make a general recommendation regarding termination and close-out netting of transactions affected by Force Majeure under Master Agreements.

2. MATTERS FOR CONSIDERATION

2.1 Scope of Force Majeure

- *Should the scope of Force Majeure triggering termination and close-out netting be the same across different product types or should it vary by product type?*

Consideration should be given as to whether a uniform definition of Force Majeure should apply across different products/financial markets or whether the characteristics of different products/financial markets should dictate different definitions of Force Majeure.

Note that the Financial Markets Lawyers Group ("FMLG")/The Foreign Exchange Committee ("FXC") have adopted a hybrid approach for foreign exchange and currency options under ICOM, IFEMA and FEOMA in publishing a uniform force majeure provision with respect to all payments and receipts under these master agreements as well as co-publishing the 1998 FX and Currency Option Definitions which contain product/financial market specific force majeure events which parties may agree to incorporate into specific transaction types. ISDA has adopted a similar approach in its draft Force Majeure provisions which may be incorporated into ISDA Master Agreements as well as its product specific definitional booklets which contain additional force majeure events which parties may agree to apply to specific transactions.

2.2 Waiting Periods

- *How long should an Affected Party be given to attempt to circumvent/cure a Force Majeure?*

Detailed consideration should be given to an appropriate time frame. The FMLG/FXC has recommended that a period of three Business Days (or days that would have been Business Days but for the Force Majeure) apply to foreign exchange transactions. ISDA's draft Force Majeure Termination Event envisages eight Local Business Days (or days which would have been Local Business Days but for the occurrence of a Force Majeure) would apply to all ISDA transactions. While it is desirable for waiting periods of this nature to be uniform across standard industry documentation, EFMLG should consider whether there is a need to vary the waiting period in respect of a particular type of product (e.g. repos and stock lending).

2.3 Valuations

- *Should affected transactions be valued at mid-market or at the other side of the market from the affected party? Should it be compulsory to close out all affected transactions or should the parties have the ability to allow certain affected transactions to remain in place?*

Consideration should be given to whether mid-market approach is, in general, appropriate in a Force Majeure context or whether an alternative valuation method may apply. Consideration should also be given to allowing parties to elect which approach will apply. Note that the FMLG/FXC recommend that the valuation should be on the other side of the market from the affected party where there is one affected party and mid-market where there are two affected parties. ISDA is proposing a mid-market approach without consideration of the credit-standing of the parties to the affected transactions.

The current Master Agreements typically provide that all transactions affected by certain Termination Events should be closed out. Consideration should be given to allowing the parties to elect that certain affected transactions will continue notwithstanding the Force Majeure. Note that the FMLG/FXC has recommended and ISDA proposes to give both parties the right to terminate all or less than all affected transactions.

2.4 Multibranch Issues

- *In a multibranch context, when should the Force Majeure Termination Event be triggered?*

Consideration should be given as to whether a Force Majeure Termination Event would be triggered if the booking branch alone is affected. Note that both FMLG/FXC has recommended and ISDA proposes that it would.

- *If a branch is unable to discharge its obligations under a Master Agreement, should the head office be required to do so?*

FMLG/FXC silent on the issue. ISDA proposes to address the issue in Users Guide and let parties address the issue as they see fit.

2.5 Structural Approach to Force Majeure

- *Should Force Majeure be addressed in the Master Agreement architecture?*

  Alternatively, include discussion of the issue in the relevant Users Guide/Guidance Notes and leave parties to address as they see fit.

- *If so, how should the Force Majeure be built into the Master Agreement architecture?*

  As a standard termination provision in the Master Agreements ("Force Majeure Termination Event") which would promote a standardized treatment of the issues across the industry.

  The Force Majeure Termination Event could be a provision for the parties to elect as applicable in Annex/Schedule to a Master Agreement.

  A force majeure annex or set of definitions could be developed to centralize the Force Majeure related provisions contained in other annexes/definitions booklets.

  Note that the FMLG/FXC have adopted the first approach in ICOM, IFEMA and FEOMA and ISDA's draft Force Majeure provisions do as well.

- *How may counterparties incorporate a Force Majeure Termination Event into their Transactions?*

  In a revised Master Agreement issued by the relevant sponsoring organisation.

  In a standard bilateral amendment to each Master Agreement published by the relevant sponsoring organisation.

  Via a multilateral amendment process organised by the relevant sponsoring organisation (e.g., a protocol process).

  Via a multilateral amendment process organised in respect of more than one standard Master Agreement by an appropriate pan-market international organisation.