



EUROPEAN CENTRAL BANK

DIRECTORATE GENERAL – LEGAL SERVICES

SK ☎: 8582

## **FORCE MAJEURE AND COMMUNITY LAW:**

### **COMPUTER BREAKDOWNS AND STRIKES**

At the last EFMLG meeting, it was agreed to split the issue of “force majeure” into three specific strands and to pursue those topics separately: (i) computer breakdowns and strikes; (ii) termination and close-out of trades under master agreements where there is no default; and (iii) the multibranch issue (political ring fencing) and its treatment under various national laws.

The first Annex, attached to this cover note, focuses on the application of force majeure to the specific cases of “*computer breakdowns*” and “*strikes*” in the Community law context. These two topics are treated separately, due their respective specific (and different) legal environments.

As a background information, this document includes a preliminary overview of how the notion of force majeure is presented in the Community legislation (especially in the financial sector) and construed by ECJ caselaw. This overview is intended to provide EFMLG with some further elements for reflection, as a first step to further consideration with regard to the possible convergence of national legislation and/or market practices, with respect to computer breakdowns and strikes as possible cases of force majeure.

Community legislation and case law tend to illustrate that a “*computer/network breakdown*” and a “*strike*” hardly qualify as force majeure events per se, unless they meet a number of specific requirements. However, in the absence of Community harmonisation of this notion, it is up to national laws/courts and national practices to provide solutions depending on the specific circumstances of the case, notably in terms of coverage, liability/damage regime, legislative/contractual solutions, industry standards, insurance or back-up arrangements. The second Annex to this cover note provides an overview of force majeure provisions, which can be found notably in standard market documentation.

**In relation to *computer breakdowns*, the EFMLG is invited to consider how to further pursue this issue. Computer breakdowns ultimately amount to an allocation of risks, which can be agreed by contract. The group may in particular consider (i) whether a convergence of contractual practices is possible and warranted, and (ii) whether the EFMLG could issue a market recommendation in this regard. This would also require an identification of the specific situations/risks, which should be considered relation to the financial sector. The group is also asked to consider whether the existing legislation gives raise to sufficient concern for a recommendation to be issued to Member States to harmonise national laws.**

**With regard to *labour strikes*, these touch on public law and eventually even constitutional law principles, and a harmonisation of contractual provisions may not suffice. EFMLG is invited to consider (i) whether to pursue this topic on the basis of a questionnaire concerning the national legal environment and (ii) whether a recommendation to Member States to harmonise national laws might be considered.**

COMMUNITY LAW AND FORCE MAJEURE

**INTRODUCTION**

The notion of force majeure is not harmonised at the European level. However, it is settled ECJ case-law that “*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*”<sup>1</sup>. 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*”<sup>2</sup>.

In an Opinion delivered on 16 March 2000, Advocate General Jacobs defined the Community legal environment of the notion of force majeure as follows:

*"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"*<sup>3</sup>.

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<sup>1</sup> Case C-263/97 First City Trading and Others [1998] ECR I-5537, paragraph 38

<sup>2</sup> Schwarzwaldmilch v Einfuhr- und Vorratstelle, ECJ case 4/68[1968], ECR377, p385. See also ECJ case 158/73 *Kampffmeyer v. Einfuhr- und Vorratsstelle für Getreide*

<sup>3</sup> Opinion of Advocate General Jacobs delivered on 16 March 2000, case C-236/99, Commission v. Kingdom of Belgium (items 16 and 17)

## I. FORCE MAJEURE AND COMMUNITY LEGISLATION

### 1. General comments

A quick overview of the Community legislation during the last 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 field of Community customs and social policies, refer to the notion of force majeure<sup>4</sup>. This concept also appears relatively frequently in the “liberalisation” directives adopted during the last years, notably in order to define the scope of the “universal service provision” in the sectors concerned. For instance, 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*”<sup>5</sup>.

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 “*catastrophic network breakdown or in cases of force majeure*”. This issue is further developed in the specific chapter of this note devoted to “computer breakdowns”. By contrast, a strike seems to be more scarcely considered as a possible event of “force majeure” in Community legislation, although the ECJ caselaw does not expressly exclude such an hypothesis (see further the chapter devoted to this issue).

The concept of force majeure has also emerged in new areas of Community law (such as personal data protection<sup>6</sup>, electronic data interchange<sup>7</sup>, or the use of computerized systems<sup>8</sup>) 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).

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<sup>4</sup> See for instance, the Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave, EC OJ L 145, 19 June 1996, pp4 – 9: “*Whereas the present agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of force majeure (...)*”, the Council Regulation (EC) n° 118/97 of 2 December 1996 (...) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, which provides that: “*Without prejudice to any provisions of the legislation of a Member State (...), the period (...) may, in cases of force majeure, be extended by the competent institution(...)*” or Article 13 of the Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, EC OJ L 216 , 20 August 1994, pp 12-20, (“*Work by adolescents in the event of force majeure*”)

<sup>5</sup> 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, EC OJ L15, 21 January 1998, p14-25 (Article 5)

<sup>6</sup> 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, EC OJ L 281, 23 November 1995, p31- 50

<sup>7</sup> See Commission Recommendation of 19 October 1994 relating to the legal aspects of electronic data interchange, 94/820/EC, EC OJ L 338, 28 December 1994, p 98 -117

<sup>8</sup> 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, EC OJ L 194, 23 July 1997, pp5-6

As mentioned above, the content given to this notion in Community legislation reveals important dissimilarities, dependent on 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 interpretation of the ECJ. In other texts, some concrete examples of events of force majeure are expressly mentioned. They vary, however, considerably from one sector to another. The example of the telecommunications sector may illustrate that the scope of this notion tends to be limited when referred to the Community legislator.

The “force majeure” provision in the Community texts often aims at exempting the service provider from any liability in certain exceptional circumstances. For instance, 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 body 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*”<sup>9</sup>.

In another field, the Commission recommendation of 19 October 1994 relating to the legal aspects of electronic data interchange contains some provisions on the liability of the parties conducting transactions by the use of electronic data interchange (EDI)<sup>10</sup>. A non-exhaustive exception to liability is made in the case of “force majeure” in this recommendation. The Commission stresses that “*the concept of force majeure included in this Article is in line with the concept developed by the **United Nations Convention on Contracts for the International Sale of Goods or Vienna Convention of 11 April 1980**, and, in the absence of uniform national law on this point, provides a definition which the parties may expand, if they wish, by citing various situations in which liability may be exempted*”. In this respect, it must be noted that the Vienna Convention does not expressly refer to the notion of “force majeure” but provides a possibility of exemption, according to which a party “*is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not be reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences*”<sup>11</sup>.

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<sup>9</sup> See recital 55 of the 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, EC OJ L 281, 23 November 1995, p31- 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), EC OJ L 194 , 10 July 1998, pp16-24 :*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”*

<sup>10</sup> Article 11 (“Liability”) of the Commission Recommendation of 19 October 1994 relating to the legal aspects of electronic data interchange (mentioned above)

<sup>11</sup> See notably article 79.1 of the Convention

## 2. Community legislation in the financial sector

The notion of “force majeure” can also be found in the Community legislation related to the financial sector, notably in the directive on cross-border transfers and, as between central banks, in the ECB Guideline on TARGET. It is also present in insurance legislation, although from a different perspective.

### 2.1 Export credit insurance

The directive on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover provides in its Annex concerning common principles for export credit insurance that: “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”<sup>12</sup>.

### 2.2 Directive on cross-border credit transfers

The directive on cross-border credit transfers<sup>13</sup> 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, those caused by force majeure.

The definition of force majeure in the cross-border credit directive is based on Article 4(6) of Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours<sup>14</sup>, 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”. This wording is in line with ECJ case law related to the notion of “force majeure”<sup>15</sup>: It was notably ruled that: “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”.

In this respect, it must be noted that Article 9 (“Situation of force majeure”) of the directive on cross-border transfers 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

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<sup>12</sup> 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, EC OJ L 148 , 19 May 1998, p22-32 (Article 22 “Force majeure”)

<sup>13</sup> Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, EC OJ L43, 14 February 1997, p25-31

<sup>14</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, EC OJ L 158 , 23 June 1990, pp59-64

<sup>15</sup> ECJ case C-338/89, *Danske Slagterier v Landbrugsministeriet* (see below)

*person pleading force majeure, the consequences of which would have been unavoidable despite all efforts to the contrary, which are relevant to its provisions<sup>16</sup>”.*

### 2.3 *Legal Acts of the ECB: TARGET Guideline*

Article 8 of the ECB Guideline of 26 April 2001 on a Trans-European Automated Real-time Gross Settlement Express Transfer system (Target)<sup>17</sup> contains a specific provision on force majeure events as between central banks of the ESCB, in which “*equipment failure*” and “*strikes or labour disputes*” are considered:

*“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 errorhandling 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”.*

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<sup>16</sup> The Commission Recommendation of 14 February 1990 on transparency of banking conditions relating to cross-border financial transactions, 90/109/EEC, EC OJ L67, 15 March 1990, p39-43, also provides that: “*In the absence of instructions to be contrary and except in cases of force majeure, each intermediary institution should deal with a transfer order within two working days of receipt of the funds specified in the order or should give notification of its refusal to execute the order or of any foreseeable delay to the institution issuing the order and, where different, to the transferor’s institution*”

<sup>17</sup> ECB/2001/3, EC OJ L140, 24 May 2001, p72-86

## II. NETWORK/COMPUTER BREAKDOWNS AND FORCE MAJEURE

The defining characteristics of a situation, in which *force majeure* rules would apply can be summed up by invoking the three main principles that are recognized by national legislation and/or case law in all Member States. These are the external nature of the obstacle to the fulfillment of an obligation, the impossibility on behalf of the party in default to foresee said obstacle and the condition that the obstacle shall not have been able to avoid by applying the caution reasonably expected from the party in default.

As regards Community legislation, the recognition of a “computer breakdown” or more globally a “network breakdown” as a possible case of force majeure, seems only to be envisaged in the context of the “liberalisation” directives in the telecommunication sector, with a view to ensuring the constant availability of the universal service. For instance, the Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines provides that: “A *telecommunication organisation may take the following measures in order to safeguard the security of network operations during the period when an emergency situation prevails: the interruption of the service, the limitation of service features, the denial of access to the service. An emergency situation in this context means **an exceptional case of force majeure, such as extreme weather, flood, lightning or fire, industrial action or lockouts, war, military operations, or civil disorder***<sup>18</sup>”.

It should however be noted that some amendments to this directive have been introduced in 1997<sup>19</sup>, notably to restrict the scope of the notion of “force majeure” to the following circumstances: “*extreme weather*”, “*earthquakes*”, “*flood*”, “*lightning*” or “*fire*”. The notions of “*industrial action*” and “*lockouts*” have then been withdrawn from this -non-exhaustive- list.

In another telecommunication directive of 1998<sup>20</sup>, it is provided that: “*Member States shall take all necessary steps to ensure that the availability of fixed public telephone networks and of fixed public telephone services is **maintained in the event of catastrophic network breakdown or in cases of force majeure, such as extreme weather, earthquake, flood, lightning or fire.** In the event of the circumstances referred to in the first subparagraph, the bodies concerned shall make every endeavour to maintain the highest level of service (...)*”.

The same kind of provision appears in the directive of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of

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<sup>18</sup> Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, EC OJ L 165, 19 June 1992, pp27-36

<sup>19</sup> Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, EC OJ L295, 29 October 1997, p23-34

<sup>20</sup> Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, EC OJ L 101 , 1<sup>st</sup> April 1998, p24-47



the principles of Open Network Provision (ONP)<sup>21</sup>: “*Security of network operations: Member States shall take all necessary steps to ensure that the availability of public telecommunications networks and publicly available telecommunications services is maintained in the event of catastrophic network breakdown or in exceptional cases of force majeure, such as extreme weather, earthquakes, flood, lightning or fire*”.

The wording used in the telecommunications directives seems to indicate that a “*catastrophic network breakdown*” could not be considered as such as a case of force majeure. Moreover, the purpose of these provisions is not to exempt the operator from any liability in case of non-performance of the service. On the contrary, they appear to be designed to ensure the highest level of service despite, or during, these extreme and exceptional events.

### III. STRIKES AND FORCE MAJEURE

The right of strike is a fundamental right in the different EU Member States and this principle often constitutes an integral part of the national Constitution. The conditions attached to the exercise of this right are a matter of national law. In this respect, it must be noted that Article 1376 of the Treaty expressly excludes any possible action at the Community level with respect to the right to strike.

Recently, the Charter of the Fundamental Rights of the European Union<sup>22</sup>, has recalled the importance attached by Member States to “*the right of collective bargaining and action*”. Article 28 of the Charter notably stipulates that: “*Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action*”.

As described, Community legislation scarcely considers a strike in a private company or a public institution as a possible event of force majeure, which would exempt the company or the institution from liability in case of failure to perform an activity<sup>23</sup>. A few years ago, the ECJ has had the opportunity to examine whether a strike of employees (notably in a bank) may constitute an event of force majeure<sup>24</sup>. In this case, ECJ had to examine whether a Member State could plead force majeure in order to escape from the obligations to pay interest, where, as a result of a strike of bank employees, its financial contributions to the budget of the Communities were not entered in due time. The ECJ considered that the conditions were not met in this case to regard a general strike as an event of force majeure, as this event was known in advance or at least foreseeable and the delay in the entry of the financial contributions in question could have been avoided. The ECJ recalled its constant case law, according to which “*apart from special features of specific areas in which it is used, the concept of force majeure essentially covers extraneous*

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<sup>21</sup> Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), EC OJ L 1997, 26 July 1997, pp32-52

<sup>22</sup> Charter solemnly proclaimed by Community institutions on 7 December 2000 in Nice, EC OJ of 18 December 2000, C364/1

<sup>23</sup> It is to be noted, however, that the ECB TARGET Guideline entails such a concept

<sup>24</sup> ECJ, 17 September 1987, European Commission/Greece, case 70/86

*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”<sup>25</sup>.*

In another case<sup>26</sup>, dealing with interruption of supplies owing to a strike, the ECJ refused to qualify it as a force majeure event, 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.

It may however be questioned, in the light of the case described above, whether a “wild” strike, without prior notice, may, under specific circumstances, be regarded as an event of force majeure, insofar as the event would be unforeseeable.

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<sup>25</sup> See also the judgement of 12 July 1984 in case 209/83, Valsabbia/Commission, 1984, ECR 3089

<sup>26</sup> Danske Slagterier v Landbrugsministeriet (see above)

**FORCE MAJEURE AND STANDARD MARKET DOCUMENTATION**

Master Agreements usually include some provisions related to force majeure events. The SWIFT general terms and conditions also include a force majeure clause. Some working groups currently work at the international level on the elaboration of uniform definition for such clauses (and notably the CRMPG Global Documentation Steering Committee). The present document provides a few examples of such clauses or draft uniform clauses.

**European Master Agreement (EMA): termination due to illegality or impossibility**

Under the EMA, if (a) as a result of any change in law or practice (i.e., the application or official interpretation of any law) or (b) if the parties so specify, as a result of an impossibility event (i.e., any catastrophe, armed conflict, act of terrorism, riot or any other circumstance beyond the party's reasonable control affecting the operations of the party), it becomes or is likely to become unlawful or impossible for a party 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, either party may terminate the transactions affected by such illegality or impossibility (see EMA General Provisions §§ 6(2)(a)(ii), 6(2)(b)). There is no corresponding provision under the GMRA for this termination event due to illegality or impossibility event under the EMA.

Unlike the ISDA (see below), the EMA further provides that a party will not be obliged to perform any obligations through any of its offices other than the booking office if performance through the booking office is unlawful or impossible as a result of any change of law, catastrophe, armed conflict, act of terrorism, riot or other circumstance beyond the party's reasonable control (see EMA General Provisions § 9).

**ISDA**

The ISDA Master Agreement contains an "illegality" termination event (see ISDA § 5(b)(i)), and ISDA is currently developing updated "illegality" and new force majeure provisions. Some market participants favour the introduction of a force majeure clause into the GMRA, although some oppose the introduction of a force majeure clause in repo agreements for the reason that force majeure events mainly affect counterparties in emerging markets, and they would prefer to be able to close-out against counterparties in such circumstances. It may be that the ISDA formula will be closely examined by market participants with a view to standardising across all market agreements. In this regard, the CRMPG Global

Documentation Steering Committee<sup>27</sup> is working on the development of such a market standard proposal (See below). It is noted that the EMA's impossibility termination event is only applicable if so specified by the parties.

### **SWIFT corporate rules**

The general terms and conditions of the By-laws of S.W.I.F.T (contained in chapter 2 of the volume of the S.W.I.F.T User Handbook entitled "*Corporate rules*") also contain a rather wide in scope force majeure clause (clause 12), which includes acts of authorities, strike or industrial dispute and political disturbance:

*"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".*

### **Proposal from the CRMPG Global Documentation Steering Committee (as of 15 June 2001)**

The Global Documentation Steering Committee has prepared a uniform definition of "force majeure event" for use in financial market transactions. The following definition seeks to provide a common framework for market participants in invoking appropriate termination and similar contractual provisions upon the occurrence of such an event:

*"Force Majeure Event" shall mean, on any date, that:*

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

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<sup>27</sup> The Global Documentation Steering Committee (formed to continue the discussion begun by the Counterparty Risk Management Policy Group (CRMPG) is a group of 12 major, internationally active [both North American and European] commercial and investment banks established in 1998 to enhance counterparty credit and market risk management after the market disruptions of 1997 and 1998)

*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”.*