EFMLG – Force Majeure Termination Provision Proposal
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Set forth below, is a proposal for a force majeure termination provision. As you may be aware, since our last meeting ISDA has finalised a standard Force Majeure Amendment which parties may adopt on a bilateral basis to amend their ISDA Master Agreements. ISDA has published the Amendment on its website (www.isda.org) under Publications/Master Agreements. I understand that ISDA is also commencing work on publication of a new form of Master Agreement which will include similar/identical force majeure provisions.

I Scope

A Force Majeure and Illegality

(i) Force Majeure: Provision to include force majeure events which prevent or make impossible or impracticable a party's ability to make or receive a payment or delivery under an affected transaction. The force majeure event must be beyond the reasonable control of the affected party. Force majeure is not to be defined in the contract and, therefore, it will have the meaning under the law governing the applicable contract. This is the approach adopted by the Financial Markets Lawyers Group ("FMLG")/The Foreign Exchange Committee ("FXC") and ISDA.

(ii) Illegality: Provision to include events which make it unlawful for a party to make or receive a payment or delivery under an affected transaction. Illegality is not to be defined in the contract and, therefore, will have the meaning under applicable law (e.g., the law governing the applicable contract or the place of performance of a payment or delivery obligation under an affected transaction). This is the approach adopted by the FMLG/FXC and ISDA.

B Products

It would be desirable for the same force majeure/illegality termination provision to apply across all traded markets to allow for termination of related transactions across markets which are affected by the same force majeure/illegality event. Consideration to be given as to whether or not modifications would be desirable for particular markets/products (e.g., scope, waiting period or remedy). The FMLG/FXC adopted a hybrid approach for FX and currency options in publishing a force majeure provision with respect to all payments and receipts under the ICOM, IFEMA and FEOMA master agreements as well as co-publishing the '98 FX and Currency Option Definitions ("'98 Definitions") which contain more specific force majeure/illegality events and remedies which parties may agree to incorporate into specific transactions. ISDA has adopted a similar approach by publishing a Force Majeure Amendment which may be incorporated into ISDA Master Agreements as well as product specific definitional booklets which contain additional force majeure events which parties may agree to apply to specific transactions.

II Waiting Periods

This is the period from the occurrence of a force majeure or illegality event to when such force majeure or illegality shall constitute a termination event under the applicable master agreement. It is desirable for any such waiting period to be uniform across industry standard documentation so that similar products traded under different master agreements will be capable of being terminated within the same time frame. FMLG/FXC adopted a 3 Business Day waiting period for FX and currency options unless otherwise agreed by the parties pursuant to an applicable provision of the '98 Definitions. ISDA adopted 3 and 8

Business Day waiting periods for Illegality and Force Majeure, respectively, for all ISDA transactions unless otherwise bargained for by the parties pursuant to the provisions of an applicable ISDA definitional booklet.

III Deferral/Termination of Affected Transactions

After the expiry of the applicable waiting period, both parties to have the right to terminate all or less than all transactions affected by a force majeure or illegality event. Cherry picking of transactions to be terminated to be avoided by giving both parties to right to terminate. If an affected transaction is not terminated, all obligations thereunder will effectively be deferred until the force majeure/illegality event ceases. During such deferral period, the recipient of any deferred payment or delivery should be compensated for such delay by the other party.

IV Valuations

On termination, what should be the valuation method for terminated transactions? Should it be on the non-affected party's side of the market, mid-market or other? As force majeure/illegality tend to be no-fault events, valuation on termination should be as market neutral as possible. FMLG/FXC adopted the non-Affected Party's side of the bid-offer where there is only one Affected Party and mid-market where there are two Affected Parties. ISDA adopted a mid-market approach without taking into account the credit standing of either party to the affected transaction.

V Structural Approach

We discussed at our last meeting that it would be desirable to develop a standard force majeure termination provision to be included in master agreements commonly used in the euro markets. Once available, the provision may be added into new versions of master agreements, published in the form of an amendment for parties to adopt on a bilateral basis or to be adopted on a multilateral basis pursuant to a protocol process. The FMLG has adopted the bilateral amendment approach. ISDA has adopted a bilateral amendment approach as well and has commenced the development of a new master agreement to include force majeure and illegality provisions. The principal reason why ISDA did not adopt the protocol approach was that it was proposing a series of complex and substantive amendments and it was considered by many ISDA member firms that the protocol process was too rigid (must accept or reject each amendment in its entirety without modification) for this purpose.

Should the EFMLG be making a broad best practice proposal as to the nature of a force majeure termination provision or should it be developing specific language to be incorporated in the numerous underlying forms of master agreements utilised commonly in the euro markets?