

§ 1 DEFINITION OF FORCE MAJEURE

MAIN CHARACTERISTICS:

- **Externality**

The debtor of an obligation is always responsible for persons and things he is deemed to have control upon. Consequently a Party could not invoke the failure of its employees (internal strikes) or machinery (e.g. computer breakdowns) to be released from its obligations. Such events can not be considered extraneous. Generally speaking, extraneous (or external) is an event that is beyond the control of the Party.

- **Unforeseeability**

The force majeure event must have not been foreseen/foreseeable by the Parties at the time of conclusion of the contract. This qualification has to be evaluated in relation to the concrete and actual circumstances of the case (kind of activity, level of danger, systemic importance of the Party, etc.).

- **Irresistibility**

The event makes the obligation completely impossible to be performed. Such impossibility has to be so important that even when the event was foreseeable, the Debtor shall be excused if this prediction would not have attenuated the consequences of the event. The Debtor has to take in advance all the reasonable measures to avoid the consequences of the event. Otherwise the Debtor shall never be excused if the performance was only made much more costly for him due to the occurrence of the impediment. The statement of irresistibility of an event has to depend on an evaluation in concreto (situation of the creditor, weather, place, etc.) and, at the same time, in abstracto (with reference to a “normal person” exercising reasonable care) of the circumstances. Irresistibility is the main attribute of force majeure.

OBLIGATIONS OF THE

AFFECTED PARTY:

- **Notification of the occurrence of a Force Majeure Event**

Upon the occurrence of a Force Majeure Event, the affected Party shall immediately inform the other Party without delay, and shall provide a written statement with respect to such event within 3 (three) Business Days from its occurrence to the other Party. Such written statement shall include a precise description of the Force Majeure Event and the reasons for the delay or the incapacity of implementing the obligations resulting from the Agreement. If the affected Party does not immediately inform the other Party and/or does not provide the written statement described above, such Party shall be liable for the non-execution of its obligations during the continuance of the Force Majeure Event and all consequences caused by and resulting from such Force Majeure Event.

- **Termination of the occurrence of a Force Majeure Event**
The affected Party shall notify the other Party of the end of the Force Majeure Event within 3 (three) Business Days after such end.

§ 2 STRIKES AND FORCE MAJEURE

MAIN DISTINCTION:

- **Internal Strikes [unfit to justify the non-performance]**
When the cause of a strike is internal (for example a strike motivated by salary demands or general working conditions), it cannot be considered as a Force Majeure Event because it constitutes a situation which can be resolved by the management through adequate negotiations and, normally, may be prevented or, at least, foreseen. This means that the event must not be dependant upon the Debtor's conduct (the Force Majeure Event is not the result of an event internal to the Debtor).
- **External Strikes [fit to justify the non-performance]**
An external strike can exempt a Party from liability when it affects third parties whose activities are strictly connected with the non-performing Party's activity and fit to paralyse it, provided that the Debtor has done all in his/her possibility to avoid to be affected or, at least, has done his/her best to minimise the effects of such event. In any case the external strike has to match the features characterising Force Majeure Events (see above).

§ 3 COMPUTER BREAKDOWNS AND FORCE MAJEURE

- *A computer breakdown can not be qualified *stricto sensu* as a "Force Majeure Event" such as, for instance, extreme weather, earthquake, flood, lightning or fire. However, it does not exclude the possibility that such an event may meet the criteria established sub paragraph 1, according to the concrete circumstances of the case.*

MAIN DISTINCTION:

- **Internal Breakdowns [unfit to justify the non-performance]**
*All the problems related to the internal maintenance of the system-operation of computers – both in terms of software and hardware – can not justify a Party from not performing his/her obligation. Both Parties have to adopt all the available measures to guaranty the stability of the computer system.
Otherwise, the non-performing Party will be responsible for the provoked damages, apart from the specific consequences of the computer breakdown (i.e. delay in fulfilment, non-fulfilment, bad performance).*

◦ **External Breakdowns [potentially fit to justify the non-performance]**

A computer breakdown could derive from circumstances which are beyond the control of the Party:

- *failure of the Interlinking and in general of the system, through which the Party connects to the Payment Systems or Securities Settlement Systems (e.g. SWIFT);*
- *failure of the Payment System, Trading System, Securities Settlement System, Central Securities Depository, etc*
- *etc.*

In such a case, the affected Party might invoke the exclusion of liability once demonstrated to have adopted all the precautionary measures in order to avoid to be affected by the external circumstances.

ANNEX I

COMPUTER BREAKDOWN – MODEL CLAUSE

- The clause is applicable to all those transactions (the term has to be interpreted in the most comprehensive meaning) which involve Financial Institutions as listed and described *sub* Article 2, letters b), c), d), e), f), g) of the SFD (98/26/EC).
- The definition of computer breakdown has to be broad enough to cover the following hypothesis: computer failure, computer malfunction, electronic network breakdown, technical failure.
- The clause has to identify with clarity which kind of computer problems may be considered “manageable” by the Financial Institutions through an adequate ordinary and preventive maintenance. *Mutatis mutandis* the clause has to describe which events may be classified as beyond the Institution’s control.
 - In the case of a computer breakdown, the Financial Institution is required to give evidence that it has adopted all the measures in order to exclude or, at least, to reduce its liability (i.e. it should be stipulated a duty of automatic transmission of all the data in danger to be affected, into a provider located elsewhere, by a certain time from the occurrence of the computer breakdown).
 - Such evidence could consist of a periodical certification issued by an accredited Entity.
 - As “circumstance beyond the control of the Party” could be considered the failure of the Interlinking and in general of the system, through which the Party connects to the Payment Systems or Securities Settlement Systems (e.g. SWIFT).
- The clause has to provide that upon the occurrence of a computer breakdown, the affected Party shall immediately inform the other Party without delay, and shall provide a written statement with respect to such event within 3 (three) Business Days from its occurrence to the other Party. Such written statement shall include a precise description of the event and the reasons for the delay or the incapacity of implementing the obligations resulting from the Agreement.
 - If the affected Party does not immediately inform the other Party and/or does not provide the written statement described above, such Party shall be liable for the non-execution of its obligations during the continuance of the event and all consequences caused by and resulting from such computer breakdown.

ANNEX II

LABOUR STRIKES AND LOCK-OUTS – MODEL CLAUSE

- The following draft model clause aims at determining liability in the event of non-performance (the term being understood to include late as well as “defective” performance), due to labour strikes and lock-outs, and is submitted to the members of the EFMLG for further discussion:
 - “XXX shall bear no liability whatsoever for any loss or damage incurred by YYY in the event of a failure to duly perform its obligations [under this agreement], resulting from a labour dispute falling outside its sphere of influence”.