

Draft

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*EFMLG Recommendation on the adoption of the measures required to ensure enforceability
of a force majeure clause to be included in the standard-form master agreements governing
financial transactions in the European Union –
Strikes as an event of “force majeure”*

Introduction

The European Financial Market Lawyers Group has undertaken the task to consider whether it would be suitable to harmonise “force majeure” clauses which are incorporated into the standardised master agreements governing financial transactions in the EU, with a view to removing legal obstacles to cross-border financial activity.

It has been noted that any harmonisation attempt will need to take into account the legal regimes in the context of which the existing force majeure provisions have been drafted.

In connection with the above, it is proposed to adopt a standard provision dealing with the specific issue of labour strikes. The enforceability of the proposed provision needs to be tested against the existing EU and national legal frameworks. The possibility of taking further action at national/EU level in order to ensure the enforceability of the proposed provision needs also to be considered.

Strikes as events of “force majeure”

The concept of “force majeure” has not been harmonised at the EU level. The ECJ has laid down certain criteria which need to be fulfilled in order for an event to qualify as an event of “force majeure”. Essentially, the concept of “force majeure” covers unforeseeable occurrences beyond the control of the person invoking “force majeure”, which are of an insurmountable character, and which cannot be avoided even if all due care has been exercised. The criteria are cumulative, in the sense that “force majeure” is deemed to occur only when all conditions are met.

There is no standard treatment of labour strikes as events of “force majeure” at the EU level. In determining whether a labour strike falls within the notion of “force majeure”, the ECJ has had recourse to the criteria mentioned above. Its ruling depends on the particular circumstances of each case.

Art. 137 para 6 EC Treaty precludes any Community action with respect to the right to strike. However, as long as the right to strike as such remains unaffected, appropriate action can be taken in order to ensure a harmonised legal treatment of strikes as events of “force majeure” in the context of financial markets.

Broadly speaking, there are no specific provisions in national laws stipulating that a strike constitutes an event of “force majeure”. The issue has been addressed by national jurisprudence and/or legal doctrine. Although discrepancies do exist among national jurisdictions, it is possible to detect common conditions which must be met in order for an event, including a labour strike, to be qualified as “force majeure”. Indeed, in most Member States it is required that the event be unpredictable, beyond the control of the debtor, insurmountable and unavoidable even if due care is exercised (implying absence of any default on behalf of the debtor). In general, it could be noted that strikes *per se* do not constitute “force majeure” events. A distinction is at times made between “external” (*i.e.* caused by factors external to the debtor) and “internal” (*i.e.* caused by internal events such as salary demands, general working conditions etc) strikes, the former being more likely to fall within the notion of “force majeure”. “Wild” strikes, namely strikes which take place without prior notification, may also be considered events of “force majeure”. In any event, the decision will depend on the specific circumstances of each case. National courts are expected to decide on the merits of each case based to a large extent on the conditions mentioned above.

The current legal framework does not seem, in the view of the members of the EFMLG, to give rise to any major concerns with regard to the enforceability of a contractual provision dealing with the issue of labour strikes as events of “force majeure”.

