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THE DRAFT COMMON FRAME OF REFERENCE (DCFR)

- A POSITION PAPER BY THE EUROPEAN FINANCIAL MARKETS LAWYERS GROUP -

I. INTRODUCTION

The European Financial Markets Lawyers Group (EFMLG) is an international group of senior lawyers acting on behalf of the major commercial banking institutions of the European Union. It is committed to provide legal support to the historical task of achieving an integrated financial market in the European Union. The EFMLG strives at examining legislative and regulatory issues and differing market practices that hinder the full development of a EU-wide single financial market, and at identifying major barriers, providing advice, recommendations, and best practices, aimed at facilitating harmonisation and convergence in the EU financial markets.

The EFMLG has followed with attention the endeavours of many to achieve a convergence of contract law in the EU, as a tool to foster interaction among European traders and economic agents. The DCFR is an ambitious project that deserves the support of the European financial industry, confronted more and more with a cross-border business model, whereby legal diversity in contract law is a barrier and is a cost. What has already been achieved by the many academics, professionals and international officers that have produced the DCFR merit praise.

The EFMLG would like to contribute to the success of the European contract law project by pointing to some particular aspects of the DCFR that are relevant for the financial services. The wide scope of the DCFR, and the relative short time to address it in the context of the complexity and variety of the national contracts laws, recommends in this instance a cautious and modest approach from the EFMLG members. In this line, the present paper has selected only some few aspects of the DCFR, and deferred for a second later review additional thoughts and suggestions. This paper focuses on the potential impact of the DCFR on financial instruments and services (i.e., loans, deposits, bonds, purchase contracts and derivatives), settlement of debt obligations, as well as certain credit risk mitigation techniques (i.e., collateral, set-off and netting, securitisation, guarantees and credit derivatives).

This EFMLG position paper relates to the revised and finalised academic DCFR which was submitted to the European Commission in December 2008. The EFMLG observes that full comments and notes that will provide essential background information will be added to this version of the DCFR. The comments and notes should also provide explanatory statements that could support the interpretation and application of the DCFR.

In the context of the debate on the review of the EU 'consumer acquis', it is not clear yet whether the European Commission will favour the adoption of a 'horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border'[1] and how this initiative would interact with the DCFR. This might require being further monitored.

II. SOME GUIDING PRINCIPLES WHEN REFERRING TO FINANCIAL SERVICES

The EFMLG believes that any regulation of the substantive law applicable to financial instruments and services should be governed by certain guiding principles:

(i) Financial services require dynamism and innovation, for which contractual parties should enjoy the necessary flexibility; limitations, overriding mandatory provisions or legal constraints to contractual freedom should be carefully assessed. In today´s global finance, European contract law should not hinder competitiveness with non-EU financial markets, especially vis-à-vis the US law;

(ii) A European contract law should be compatible with existing Community financial market regulation (e.g., the Collateral Directive[2], the Banking Directive[3], the Markets in Financial Instruments Directive (MiFID)[4], the Market Abuse Directive[5], the Prospectus Directive[6] and the Transparency Directive[7])

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1 See Commission staff working paper report on the outcome of the public consultation on the Green Paper on the review of the consumer acquis (http://ec.europa.eu/consumers/rights/cons_acquis_en.htm) and the Green Paper itself, COM (2006) 744 final, 8.2. 2007.

2 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.06.2002, p. 43).

3 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

4 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004. p. 1).

5 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L096, 12.04.2003, p. 16).

and with industry well-established practice, as represented by standard agreements used for some financial instruments traded in the financial markets as standardised commoditised products;

(iii) As a consequence, it might be necessary in some cases to carve out of general contract provisions the regime applicable to financial instruments and services (the "commercial code approach"). Such distinction is already a practice today both in Community law[8] and in national laws. We appreciate that also the DCFR already provides for some rules and exceptions which relate specifically to financial services.[9] However, considering the particularities of financial instruments and services, more special rules should be considered.

III. SPECIFIC TOPICS

1. **Change of parties** (III.-5:101, p. 205 et seqq.)

The provisions stipulated in chapter 5 of Book III will impact on the securitisation of financial assets, in particular in connection with the concept of "true sale" as this entails the replacement of the creditor. Similar implications will be given for factoring and forfeiting transactions. Chapter 5 could, in theory, also be relevant for collateral arrangements that provide for transfer of title to receivables. However, we noticed that in relation to assignments for purposes of security, the provisions of Book IX apply and have priority over the provisions of chapter 5. In May 2007 the EFMLG published a report on legal obstacles to cross-border securitisation in the EU[10], which outlines certain issues that the European industry faces in the area of assignments of receivables. The following comments also focus on securitisation.

Position: We appreciate that the DCFR allows for an assignment to take place with very limited formalities.

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6 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/*EC (*OJ L 345, 31.12.2003, p. 64).

7 Directive 2004/109/EC of the European Parliament and of the council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

8 E.g. the scope of application of the Settlement Finality Directive and the Financial Collateral Directive, is limited to financial market participants.

9 Such special rules can be found inter alia in II.-5:201(4) (no right to withdraw from financial services negotiated away from business premises if fully performed); II.-9:410(2) (no unfairness test for clauses in standard terms providing unreasonable notice periods or the parties right to unilaterally adjust terms of a contract); IV.C.-1:102 (provisions on services do not apply to the provision of collateral or the supply of financial services) and IV.D.-1:101(6) (provisions on mandate do not apply to mandate contracts pertaining to investment services).

10 The report can be downloaded form the EFMLG's website: http://www.efmlg.org/documents.htm.

In connection with the feasibility of securitisation transactions it is important, when for example a whole portfolio of claims is assigned to a special purpose vehicle (SPV) from the originator, that such assignment can take place without formalities. Furthermore, there should be rules to ensure that there is legal certainty about the validity and effectiveness of such assignment. In light of this, certain proposals of the draft terms are particularly welcome:

- III-5:104: Neither notice to the debtor nor the consent of the debtor to the assignment is required.

- III.-5.106 Future and unspecified rights: A future right to performance may be the subject of an assignment.

- III.-5:108: Assignability: effect of contractual prohibition: the contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.

Similarly, also considering securitisations of whole business lines, the DCFR provision is welcome as it permits that a number of future rights to performance may be assigned without individual specification, if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates.

Position: We propose introducing exceptions to III-5:108 in case of financial institutions. For instance, a contractual prohibition of an assignment of a right should, in order to preserve a right of set-off, prevent the assignability of such right.

In certain cases, however, it is necessary to provide for exceptions to general rules in order to cater for other requirements of safe and efficient business transactions. One example is reflected in IV.G-3:108, which limits the right to transfer rights in case of an independent personal security on first demand (e.g., a guarantee). Other examples are contractual set-off and close-out netting arrangements (see also part III.2 below), which are important cornerstones of financial transactions, It is of fundamental importance that there are no contract law rules in place that could hinder their application. In order to preserve the rights of set-off and close-out netting in a case of assignment, it would be necessary to provide for an exception from the above Section III-5:108. Contrary to what it states, it should be provided for that a contractual prohibition of the assignment of a right should, in order to preserve a right of set-off, prevent the assignability of such right. The scope of such exception should be probably limited, for example to financial institutions.

Position: Should the DCFR become the law that can be chosen by parties to govern assignment, it should be ensured that some of its provisions are not disapplied by virtue of the Rome Regulation designating other laws.

Finally, it should also be mentioned that just as in case of other parts of the DCFR it is important to ensure consistency between the text of the DCFR and existing EU legislation. In the case of Chapter 5 for example, consistency with the Rome Regulation need to be ensured.[11] Certain provisions of this regulation render the application of laws of given jurisdictions in a cross-border context. For example article 14 on voluntary assignment and contractual subrogation, article 15 on legal subrogation, article 16 on multiple liability and article 17 on set-off designate certain jurisdictions in matters covered by Book III of chapter 5. As a result, should the DCFR become the law that can be chosen by parties to govern assignment, it should be ensured that some of its provisions are not disapplied by virtue of the Rome Regulation designating other laws.

2. **Set-off and Close-out Netting** (III.-3:502,503, p. 194; III.-6:101 to III.-6:108, p. 215 et seqq.)

From the perspective of the financial markets and the formalization of the contractual relationships of market participants, contractual set-off and close-out netting agreements play a vital role in reducing the risks and enhancing efficiency in the increasingly integrated European and global financial markets. Furthermore, the enforceability of set-off and close-out netting agreements is essential in situations of winding-up or reorganisation procedures such as that resulting from the filing of a petition under Chapter 11 of the U.S. Bankruptcy Code by Lehman Brothers Holdings Inc. and the appointment of Administrators of Lehman Brothers International (Europe).

Position: We propose introducing additional definitions and model rules for close-out netting arrangements.

The terms “set-off” and “close-out netting” are sometimes used interchangeably. However, they are widely regarded as overlapping but distinctive legal concepts. In simple terms “close-out netting” is a multi-stage process by which, following an event of default or termination event, (i) all open transactions entered into between the parties of the close-out netting arrangement are terminated or accelerated, (ii) each terminated or accelerated transaction is valued; and (iii) all termination values, together with any unpaid amounts, margin or collateral, are reduced to a single net amount owed by one party to the other. This last stage, the reduction of the termination values, can be viewed. as completed set-off. But there are also other legal concepts like the compensation for damages or the flawed assets approach that might result in a single net amount.

The terms “close-out netting” or “netting” are already introduced to the existing *acquis communautaire*. The most sophisticated definition, which reflects the market standard

11 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

documentation for close-out netting agreements can be found in Article 2(1)(n) of the Collateral Directive. The issue is, however, that the definition is limited to close-out netting arrangement that form part of a financial collateral arrangement. Part 7 of Annex III to the Banking Directive uses the term "contractual netting", but renders only a very granular description of what should be achieved by such contractual netting ("which creates a single legal obligation covering all included transactions"). The term "netting" is also defined in Article 2(k) of the Finality Directive[12], but it merely describes set-off of claims and obligations resulting from transfer orders. Article 25 of the Winding-up Directive[13] uses the term "netting", but fails to define it.

Position: Parties should not be prevented from determining in standard terms what they regard as fundamental obligation or what grace period they think is reasonable. It should also be possible to provide for termination without rendering notice (automatic termination).

As mentioned above, termination clauses form an integral part of close-out netting agreements. The provisions on termination rights differentiate between failures to perform fundamental obligations and other failures. Although the term "fundamental" is further described (III.-3:502), there is still broad room for interpretation. Terminations for failure of non-fundamental obligations require rendering of notice fixing an additional grace period of "reasonable length". II.-9:410(2) provides some leeway, but is limited to certain financial services only. Parties of a close-out netting agreement should e able to define the obligations that they regard as "fundamental" and the notice period they find reasonable. We noticed that III.-3:507 recognises automatic termination, i.e. termination without rendering additional notice. However, parties of a close-out netting agreement should also be able to broaden the scope of automatic termination to cover the occurrence of other events, like the bankruptcy of the other party.

Position: The scope and the wording of Section III.-6:101(2) should be reconsidered.

We fully understand the rationale for not applying Chapter 6 in insolvencies. The conditions under which set-offs may be invoked during insolvency proceedings are usually governed by the insolvency law (and not the private law) of the state within the territory of which such proceeding is opened. This principle is also reflected in the conflict of law rule in Article 4(2)(d) of the Insolvency Regulation[14] . However, to the extent the *acquis communautaire* explicitely refers to the substantive private law of the relevant Member State – and this is the case in Article 25 of the Winding-up Directive, pursuant to which netting agreements are solely governed by the law of the contract which governs

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12 Directive 98/26/EC of the European Parliament and the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166/45, 11.6.98, p. 1).

13 Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125 , 05/05/2001, p. 15).

14 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).

such agreement - Section III.-6:101(2) should provide for an exception. It should also be reconsidered to replace the word “insolvency” with “insolvency proceedings” (as defined in the Annex).

Position: The requirements outlined in Sections III.-6:102 to 105 should not prohibit any agreement between the parties that broadens the scope of set-off or close-out netting. It should especially be clarified that set-off and close-out netting may be governed by a contract or are to be construed as “other juridical act” to which the principles outlined in Section II.-1:102 (Party autonomy) apply. Such arrangements should also be excluded from the unfairness test provided for in Section II.-9.4.

Set-off, as defined in Section III.- 6:101 (i) of the DCFR, “*is a process by which a debtor may reduce the amount owed to the creditor by an amount owed to the debtor by the creditor.*” Section III.-6:102 therefore requires “*two parties”,* which owe each other. This concept of “mutuality” is a prevailing feature in the laws of the Member States. It is, however, sometime difficult to comply with. Mutuality might, for example, not be given (i) if a trustee acts for the account of its trusts (see X.-1:102(1)), (ii) if a life insurance company trades for the account of its technical reserves or its cover pool, (iii) if an investment management company acquires financial assets for its mutual funds or hedge funds or (iv) if one of the obligations included in the set-off or netting is encumbered by a pledge, lien or security interest granted to a third party.

Parties of a set-off or close-out netting agreement usually overcome these legal uncertainties by providing that the bilateral obligations emerging from such transactions are eligible for being set-off or netted, regardless of whether the “trust”, the “segregated assets” or the “funds” to which the bank’s obligation is owed to constitutes a legal entity or “party”. It is also practice in financial markets to arrange for set-off of obligations owed between three or more parties. A good example is a cash clearing arrangement entered into with a parent company where the positive and negative balances on cash accounts maintained by the parent company and its subsidiaries are set-off on a daily basis.

Other agreements made in set-off and close-out netting arrangements affect the requirement that the obligations must be “of the same kind”. Converting payment obligations denominated in different currencies into a specified “settlement currency” is a common feature in set-off and close-out netting arrangements and we welcome Section III.-6:104 which permits such conversion. However, set-off but especially close-out netting might also apply to delivery obligations of different kinds. It is also common to agree on set-off or close-out netting including obligations that are not yet due, contingent or unascertained. Parties also waive the requirement to render notice to the other party (Section III.-6:105).

Set-off and close-out netting arrangements are usually based on market standard documentation supplied by the bank. If the requirements outlined in Section III.-6:102 to

105 reflect the standard of “good faith and fair dealing”, any deviation from them in set-off or close-out netting arrangement could render them void or not binding.

The mechanisms provided for under close-out netting agreements are important, not only for the protection of the parties to such agreements from the default of its counterparty, but to protect it from the effects of an insolvency situation of a parent company, affiliate or credit support provider of its counterparty. Consequently, our position regarding the model rules applicable to set-off and close-out netting under the DCFR is that, such rules should not affect the validity and effectiveness of set-off and of close-out netting agreements actually used in the financial markets. The importance of the effectiveness of this type of agreement is widely recognised and supported by the protection given to such agreements by general or, in certain cases, specific insolvency legislation of the Member States. Supervisory and capital adequacy rules, such as those deriving from Basle II, also regulate the effects of close-out netting agreements. In our opinion, this position would also be valid in the foreseeable development of legislation regulating financial instruments and markets as a consequence of the recent market upheaval.

3. **Unfair terms and the unfairness test** (II.-9:401, II.-9:402, p. 177 et seqq.)

Financial instruments are substantially based on standardised documentation, which make them negotiable and comparable. Banking and trading associations have developed a broad variety of market standard documentation, which are used by members for the origination of financial instruments (e.g., securities, funds or money market instruments) as well as for related financial transactions in the secondary market (purchase contracts, derivatives, repos or lending transactions). All these market standard documentation fall within the scope of contract terms “which have not been individually negotiated” and are, hence, governed by the unfairness test under Section 4. The provision on unfair terms and the unfairness test apply to financial instruments and services and are of mandatory nature (II.-9:401). The general principle that all standard terms (as defined in the Annex, p. 465) must be drafted and communicated in plain, intelligible language (II.-9:402, principle of transparency) will have an huge impact especially on structured and complex transactions.

Position: II.-9:406 should be amended in order to also exclude contracts between business parties as well as transferable securities.

There is no need to apply the unfairness test to financial services rendered to parties that qualify as “business” (as defined in the Annex). The MiFID already provides for a sufficient level of investor protection, which is better balanced and more flexible than the “all-or-nothing” approach provided under II.-9:408. Business can be expected to rely on own expertise and experience, a principle that is better reflected in the MiFID. The exemption of transferable securities (like shares, bonds or notes) is justified because they are tradable in the secondary market and it therefore cannot be excluded that they are acquired by consumers. The consequence would be that the same issue of securities could be both valid and enforceable (to the extent it was acquired by business) and void (to the extent a consumer holds securities). The exemption of transferable securities is also justified because of the investor protection under the MiFID and the specific disclosure requirements imposed by the European Prospectus Directive.

Position: The scope of exemptions provided in II.-9:410(2) should be broadened in order to also include subparagraphs (f), (l) and (q). The words “transactions in” should also be deleted in order to clarify that the terms and conditions of the transferable securities itself are not subject to the unfairness test.

The unfairness test uses the vague and ambiguous term “good faith and fair dealing” (II.-9:404, 406) for which, at least in common law jurisdictions, precedence is not given. It is appreciated that the standard is less tight as far as contracts between business is concerned (II.-9:406); however it is questionable whether in the financial market (where business acts on equal footing with similar expertise and sophistication and where documentation is based on standards jointly developed by market participants) unfairness tests are reasonable at all. It is appreciated that some clauses used in financial market standard terms are carved out from the unfairness test (II.-9:411(2)), however, the scope of exceptions should be considerably broadened, especially in order to allow banks to use exclusive jurisdiction (II.-9:410) or arbitration (II.-9:411(1)(p) clauses. Many financial instruments (like derivatives, repos or securities lending transacions) provide for determinations made by calculation agents or determining parties, which could include a party of the agreement (II.-9:410(1)(l)); they also provide that buyer under a repo, the borrower under a securities loan or the pledgee under a collateral support annex is authorise to retransfer “equivalent” securities or commodities (II.-9:410(1)(q). Derivatives transactions, especially those with longer tenors, also provide for optional termination clauses (break clauses), which entitle the bank to terminate the transaction against payment of its fair value. These optional termination rights are used to mitigate or reduce credit risks, but they could conflict with II.-9:410(1)(f).

4. **Pre-contractual information duties** (II.-3:101-109, pp. 147 et seqq.)

The information duties as stipulated in II.-3:101-109 will have an impact on the marketing of financial services and products to consumers, the documentation of financial products which are to be sold to consumers, and basically any communication with consumers relating to financial services. This applies in particular to the rules as contained in II.-3:102, 103.

Position: Financial services should be exempted from the provisions as stipulated in II.-3:101-109, at least to the extent they are regulated under MiFID.

We appreciate that the DCFR provides for specific information duties for businesses marketing assets or services to consumers or concluding contracts with consumers. As already mentioned above[15], it needs to be taken into account, however, that the MIFID already provides for a sufficient level of investor protection with regard to financial services. As compared with the information duties stipulated in the DCFR, the respective MiFID rules are much more elaborated and flexible. Thus, the MiFID inter alia provides for a sophisticated system of client classification determining the level of protection which is required for each type of client. The MiFID system of client categorization is tailored to the specific needs and practices of the financial industry. The information duties set out in the DCFR do not provide for such a concept as the DCFR simply differentiates between 'businesses' and 'consumers'.

Financial services should therefore be exempted from the provisions as stipulated in II.-3:101-109, to the extent they are regulated under MiFID. This would also be in line inter alia with IV.C.-1:102, which indicates the supply of financial services is not supposed to be covered by the DCFR.

5. <u>**Force majeure**</u> (III.-3:302 (3) (a) , p. 192, III.-7:303, p. 218, VI.-5 :302, p. 336)

Whereas the DCFR employs the term "impossibility" or "excuse", the term "force majeure" is used in every European legal system, and very frequently in financial services contracts.

<u>Position:</u> The vague term "impossibility" or "excuse" is insufficient. In general, this is a matter that would deserve a more extensive treatment in the DCFR.

Considering the complex technology of financial systems and the frequent use of force majeure clauses by financial service participants, the EFMLG devoted a number of resources to ascertain the scope of the concept throughout the several European jurisdictions, and was concerned about the differences that exist. To cater for such differences, a force majeure provision should be added in the DCFR, which aligns itself with the extensive jurisprudence of the European Court of Justice on this concept.

The EFMLG would invite the drafting groups of the DCFR to go through the EFMLG Report on Force Majeure, dated November 2003[16], and discuss the introduction in the DCFR of a homogeneous treatment of such cases, along the lines of the ECJ jurisprudence.

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15 See III. 3.

16 See Annex in this paper with the Summary of the EFMLG Report. The full EFMLG Report contains itself an annex with the comparative examination of force majeure in the EU member states.

6. **Method of payment/ Currency of payment** (III.-2:108, III.-2:109, p.186)

Rules relating to the method of payments and the currency of payment are of crucial importance for the financial industry. The DCFR provides for such rulings in III.-2:108 and III.-2:109.

Position: The EFMLG welcomes the approach of the DCFR in that it does not follow a number of current (but rather old) European civil codes which refer to settlement of debts by delivery of legal tender. In doing so, the DCFR recognises that settlement by delivery of banknotes and coins is only one possibility, that other means are usual, and that settlement in cash should not be legally imposed on creditors.

However, the DCFR (Par. 1 of III.- 2:108) is very vague: "Payment of money due may be made by any method used in the ordinary course of business". And par. 2 of the same provision refers to cheques, which today are not statistically an important instrument for scriptural payments as compared to others.

If one disregards payment by set-off, quite usual in the interbank market[17] the amounts of monetary debts are settled in the EU an estimated 98% by scriptural payments, and only the remaining up to 2% in banknotes and coins[18]. The draft provision in the DCFR should be accommodated to that reality, giving legal discharge to debts paid with finality by way of a credit to the creditor´s account.

It should start by recognising freedom of contract: monetary debts are to be settled as agreed by creditor and debtor.

Scriptural payments.

A scriptural payment is a crediting of funds to the creditor's account with a supervised credit institution (for easiness, hereinafter "bank"). In legal terms, it entails the replacement of the debt owed by the debtor to the creditor, by a debt of the creditor's bank to the creditor[19].

Position: The DCFR should contain a provision that establishes the rebuttable legal presumption that the opening of a bank account by the creditor means acceptance of payments by his debtors of owed amounts by way of a final credit to such account. The opening of a bank account means acceptance of the bank as debtor for moneys

17 E.g. at European level, the EBA's end-of-day netting payment system; at local scales, the chambers of compensation of cheques and bills of exchange.

18 Use of cash varies from country to country, from sector to sector, and may depend on the economic situation. Of course, counted in terms of number of operations, cash settlements is estimated to be higher than scriptural payments; but not in amounts, where most of B2B transactions are settled scripturally; the huge amounts traded daily in the financial markets are of course settled in scriptural money only, and processed through sophisticated payment systems.

19 When payments are done in cash, there is also a subjective novation of an obligation: the debt of the debtor is replaced by a debt of the issuing authority (central bank for banknotes, the State for coins) against the holder of the cash.

deposited with it. This is based on banks being institutions subject to prudential supervision aimed at ensuring solvency, liquidity, and deposit guarantee. The presumption is however rebuttable, by way of (i) agreement with the debtor on specific means of settlement, or (ii) by a simple statement by the creditor refusing being paid in his/her bank account.

The DCFR should also state that the creditor has a right to specify[20] the designated bank account for settlement of specific monetary debts, should he have more than one bank account.

Importantly, the DCFR should state that the final crediting of the owed amounts in the creditor's bank account discharges the monetary obligation of the debtor. Finality is meant to be the moment at which the crediting of the creditor's bank account is not revocable. The DFCR should refer to the payments laws regarding the moment where finality is granted by Law.

The crediting of the bank account of the creditor may take place by several means, which should be regulated by payments laws[21] (i.e. not by the DCFR, but it may refer to these laws). Most usual are the following:

- credit transfers: the debtor instructs his bank to transfer an amount to the creditor's account with his bank;
- direct debits: the debtor instructs his bank to admit debits in his account to reimburse the creditor's bank for amounts credited or to be credited to the creditor's account[22].

In the EU only one Civil Code, the Dutch Civil Code of 1962, admits the discharging effect of scriptural payments[23]. The remaining Civil Codes, dating from the 19th century, still use the traditional concept of money as "cash" when referring to legal tender for the discharge of monetary obligations. The DCFR should be inspired in the Dutch Civil Code provision, which admits ex-ante rebuttal by the creditor, but should adapt it to current payment systems methods and instruments as summarised above, and reveal the legal nature of payments as a subjective novation of the debtor in a debt obligation. Fostering scriptural payments by a legal provisions on discharging effect has the indirect beneficial effect of contributing to some general interests (fighting against corruption, "black economy", money laundering, tax evasion).

Cash payments.

20 E.g. in his commercial correspondence or in his invoices.

21 E.g. article 4 UCC; EU Directive 2007/64 of 13.11.2007 on payment services in the internal market; laws on cheques, bills of exchange, promissory notes.

22 E.g. Credit and Debit Cards, domiciliation of regular invoices, cheques; also new electronic devices (mobile telephones payment devices, internet online payments, etc.).

23 Section 6:114: Payments through the banking system is a valid means of discharge of a monetary debt unless the creditor has validly excluded this method of payment.

The concept of “legal tender” is a concept that EU Law does not define. An inter-institutional Task Force is currently working on having it defined for euro banknotes and coins.

<u>Position:</u> The DCFR should set the basic principles of what “legal tender” is as a means to settle monetary obligations. Some elements to be considered for such basic principles:

- The discharging effect of cash payments takes place:
  - When parties have not agreed on other payment means, and
  - When business customs have not created a customary default rule; or
  - When consumer protection legislation imposes on creditors the obligation to accept cash to settle monetary debts[24].
- “Legal tender” applies only to banknotes and coins having the specifications established by the competent monetary authority and duly issued by such monetary authorities. “Cash payments” having a discharging effect are those performed by physical transfer of “legal tender” cash to the creditor, with the following specific rules;
  - Transfer of counterfeited banknotes and coins do not discharge a debt;
  - Settlement by monetary tokens other than “legal tender” banknotes and coins requires the consent of the creditor;
  - Settlement by stolen rough non-issued banknotes do not discharge a monetary debt, unless done in good faith.
- “Cash payments” have a discharging effect of debt obligations, even if the Law, for public interest reasons[25], impose the use of scriptural payments for specific monetary debts or limit the use of cash

7. **<u>Loan Contracts</u>** (IV.-F.1:101, p. 298 et seqq.)

Credit law is an area of significant importance for the financial industry. However, whereas a major part of credit law-related provisions – both in European law and in the relevant national laws – relate to consumer credit contracts, the DCFR only focuses on business-to-business contracts in this respect. The scope of application of Part F of Book IV explicitly excludes consumer loan agreements according to IV.-F.1:101 (1) (a).

24 Some reported cases were: the intent by Italian highway toll concessionary companies to be paid the toll only with credit/debit cards, rejected by consumer authorities; or the intent by some Dutch supermarkets chains to offer a discount for payments done with credit/debit/customer cards, rejected by consumer protection authorities.

25 Anti money laundering; tax evasion; anti-terrorism financing; anti-corruption; functionality of the public administration. Use of coins to discharge monetary debts may be limited by functional reasons (E.g. Council Regulation 974/98 limits to 50 coins the amount that can be imposed on the creditor for a monetary payment).

Position: the DCFR should also incorporate rules relating to consumer loan agreements. These rules should be in coherence with the applicable European Directives.

We appreciate that the drafting groups of the DCFR did not include rules on consumer credit law because this is the subject-matter of the Consumer Credits Directive[26] which was only adopted during the concluding phase of the work on the DCFR so that there was not enough time to take account of the Directive.[27] Given that consumer credit law is an area of extraordinary practical relevance, the CFR should, however, also provide for rulings relating to consumer loan agreements. Such rules should be compatible with existing Community law.

As regards content, the existing provisions relating to loan contracts as stipulated in the DCFR partly do not reflect the common practice usually applied within the scope of the granting of loans to companies.

Position: We propose the rules on loan contracts to be adjusted such that they take into account the common practice usually applied in the financial industry. This concerns in particular the provisions relating to interest (IV.F.-1:104) as well as the provisions relating to a termination by the borrower (IV.F.1:106).

With regard to the last mentioned set of rules, it is for example problematic that it would be possible for the borrower to terminate the loan contract at any time in the event of loan contracts having a duration of more than one year and providing for a fixed interest rate, even if this is subject to giving three months notice (IV.F.1:106 (4) in conjunction with IV.F.1:106 (3)). Such a rule does not take into account the needs of the banking industry, where it is for instance common practice to take out subordinated loans to strengthen one's own regulatory capital base. In order for the subordinated capital generated by raising such loans to be recognised as regulatory capital, it is required that the subordinated loans comply with certain regulatory minimum standards in accordance with the provisions applicable under European and national law. They must for example, among other things, have a minimum term of five years[28] (or – in certain cases – two years[29]), with a prior termination by the Borrower only being possible within narrow statutory limits[30]. The possibility to terminate the loan at any time, available to the

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26 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133/66, 22.5.2008, p.1).

27 See Introduction, no. 76.

28 See article 64(3) of the Banking Directive.

29 See article 13(3) of Directive 2006/49/EC the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201).

30 Thus, according to article 64(3) of the Banking Directive, the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the credit institution, the debt shall become repayable before the agreed repayment date. If the maturity of the debt is not fixed, the loans involved shall be repayable only subject to five years' notice unless the loans are no longer considered as own funds or unless the prior consent of the competent regulatory authorities is specifically required for early repayment. The competent regulatory authorities may only grant permission for the early repayment of such loans provided the request is made at the initiative of the issuer and the solvency of the credit institution in question is not affected.

borrower, as provided for in IV.F.1:106 (4), which is even intended to be mandatory, is not compatible with this requirement. This would certainly have an impact on potential structures aimed at raising subordinated capital as defined by banking supervisory law. The possibilities to terminate a loan as provided for in IV.F.1:106 (3) and (4) should therefore at least be revised in a way such that they are no longer mandatory, but optional.

The provisions relating to interest (IV.F.-1:104) should also be adjusted such that they take into account the common practice usually applied in the credit industry. The provisions should be shaped in a way giving the parties sufficient flexibility, for example concerning the methods to calculate interest and compound interest as well as the date of interest payments. In practice, loan contracts requiring interest payments for periods of less than one year are for example also quite common – which is not reflected by the provision in IV.F.-1:104 (3). It is true that the provisions in IV.F.-1:104 may be intended to be optional; but this should also be explicitly stated.

8. <u>**Personal security**</u> (IV.G.-1:101, p. 300 et seqq.)

In general, it seems to us that the DCFR implements no substantial innovation in the (European) common legal background of personal securities. There are, however, some minor observations which should be taken into consideration.

Scope of application.

<u>Position:</u> We suggest to clarify that the provisions contained in Part G of Book IV do not apply to guarantee insurance in so far as applicable insurance law provides for different or more specific rulings.

We appreciate that the DCFR contains no provisions of an insurance-contract law nature, since this is the subject of the work by the Project Group Restatement of European Insurance Contract Law. Against this background it is reasonable, pursuant to IV.G.-1:102 (2) sentence 1, for Part G to generally not be applicable to insurance contracts. From a practical point of view, however, the provision of IV.G.-1:102 (2), which states that in the case of a guarantee insurance Part G applies “if and in so far as the insurer has issued a document containing a personal security in favour of the creditor”, nevertheless appears to be problematic. It is problematic because no clear distinction is brought into play. Thus, the guarantee insurance is an insurance contract ruled by the special provisions of insurance law that do not fall within the DCFR’s scope of application. It seems to us that the rules of guarantee as contract – like the ones related to recourse against the debtor, the debtor’s defences towards the security provider, the offer and acceptance interchange, the rules of form requirements, the time for resorting to the security, the debtor's relief for the security provider, the interpretation of the contract, the coverage of security, and so like – cannot be cumulatively applied without leading to unavoidable contradictions as to applicable insurance law.

Independent personal security on first demand.

Position: We suggest the independent personal security "on first demand" not to be treated differently from any other independent personal security as regards the security providers right to invoke defences which the security provider has against the creditor.

It seems to us that the concept of independent personal security "on first demand" as set out in IV.G.-3:104 is not entirely convincing. According to IV.G-3:104 (3), in case of a independent personal security being "on first demand" as defined in IV.G-3:104 (1) and (2), the security provider is not able to raise *its own* defences against the claim for payment made by the beneficiary whereas he is able to do so in case of a normal independent personal security. This differentiation is in effect neither supported by the existing *acquis communautaire* nor by any specific national model[31] and, in effect, it seems to be unjustified since there appear to be no logical symmetry between the independent personal security being on demand and that the beneficiary is therefore deprived of its own defences.

9. **Proprietary security rights in movable assets** (IX.-1:101, p. 369 et seqq.)

The rules of Book IX refer in part also to collateral to which the Collateral Directive applies,[32] i.e. to the extent such collateral represents security rights in movable property (see IX.-1:101 (1), p. 369). Financial collateral arrangements are widely used in the financial industry in order to minimise credit risk. The Collateral Directive has introduced a Community framework for financial collateral, within a broader European legal framework for financial institutions and insolvency proceedings. The Directive provides for rapid and non-formalistic establishment and enforcement procedures in order to encourage cross-border business and competitiveness. It is important, taking into account the needs of the financial industry, that there are no discrepancies between the DCFR and the objectives and key provisions of the Collateral Directive.

Position: In so far as the provisions as stipulated in Book IX are not yet in line with the Collateral Directive, they should be adjusted and clarified such that they take into account the objectives and key provisions of the Collateral Directive. In particular it should be

[31] See *Angel Carrasco*, The DCFR – Guarantee and Personal Security Contracts, European Review of Contract Law, 2008, p. 402.

[32] See the definition of 'financial collateral' as provided for in Article 1(4) in conjunction with Article 2 (1) of the Collateral Directive.

ensured that the creation, validity, perfection, enforceability and admissibility of a financial collateral arrangement do not depend on the performance of any formal act.

It is appreciated that the rules as contained in Book IX already reflect, to a large extent, the provisions as stipulated in the Collateral Directive. There are however, some minor deviations and ambiguities. Thus, whereas according to article 4 (2) of the Collateral Directive, any realisation by way of appropriation should be possible if such appropriation has been agreed by the parties in the security financial collateral arrangement (opt-in) and the parties have agreed on the valuation of the financial instruments, the DCFR provides for a number of further restrictions with regard to the appropriation of encumbered assets, e. g. by providing for certain publication and consent requirements with regard to third parties (see IX.-7:207 (1) c in conjunction with IX.-7:216 in conjunction with IX.-7:209 et al., pp. 407 et seqq.). Such publication and consent requirements are not in accordance with the requirements and objectives of the Collateral Directive the purpose of which is inter alia to limit the administrative burdens for parties using financial collateral. It is true, of course, that IX.-7:105 provides for a rule according to which the secured creditor is entitled to appropriate encumbered assets for the value of their market price. On the other hand, it is not clear, whether this rule generally allows for any appropriation of encumbered assets for the value of the market price if such appropriation has been agreed by the parties because IX.-7:105 explicitly states that such an appropriation is only possible where it is “allowed” – without specifying whether the term “allowed” only relates to statutory provisions or whether it also includes contractual provisions.

10. **Trusts** (X.-1:101, p. 413 et seqq.)

The DCFR appears to reflect several legal sources in order to describe a system of trust law. While the inputs are not exclusively based on the common law heritage it does manage to address, in varying degrees, many of the principles derived predominantly from the English law of trusts. Recognition of the importance of trusts here is to be welcomed and its inclusion may deliver material benefits for those jurisdictions which currently lack a legal foundation for trusts. However, where such a foundation already exists, notably under English law (also Ireland, Malta), the default position should be to retain the status quo and exclude the DCFR's trust framework. Of course, parties should be allowed to have the freedom to adopt the DCFR framework should they explicitly choose to do so.

Trusts are used extensively in the securities and financial markets and their usage is increasing. Many of the important investors and counterparties in the wholesale securities and financial markets are trustees of pensions funds. To a significant degree, the predictability and reliability of the trust device is a critical element of the contemporary system for the international allocation of capital, the protection of security entitlements and the allocation of interests in securities.

For example, the Eurobond market is used by thousands of issuers comprising companies, financial institutions and sovereign entities to raise many hundreds of billions of euros (and other currencies) each year. For such issues of debt securities, a trustee is often appointed to protect the interests of bondholders and simplify the enforcement of rights. A key feature of trusts in these markets is to preserve rights in collateral for a changing pool of beneficiaries (bondholders) from time to time. In the area of settlements, trusts are used to protect participants from the credit risk of depositaries. The major institutional trustees and custodians typically act as common depositaries for the main clearing systems (eg Euroclear and Clearstream).

Another popular use of the trust is for collateral arrangements, where the benefit of a security interest over securities is held by a trustess for a changing group of secured creditors. Trust assets are not available to the general creditors of a trustee in its insolvency. The ring-fencing of unallocated intangible client assets in the hands of intermediaries is arguably more difficult to achieve under the general principles of continental civil law and so these systems may be more directly assisted by the DCFR's inclusion of its trusts framework.

As regards the trust rules as stipulated in the DCFR, there are three chief concerns plus numerous other technical matters needing attention. The chief concerns are, firstly, the proprietary rights of beneficiaries, secondly, the ease of creating constructive trusts and, thirdly, ambiguity concerning so-called segregation of trust property.

Proprietary rights of beneficiaries.

Position: More clarity is needed on the beneficiary's proprietary interest in the trust assets.

While the trust property does not form part of the Trustee's estate (X-1:202) there is no definition of the beneficiary's rights in rem as opposed to in personam against the Trustee (X-1:205). This is a critical feature of trusts, namely, the allocation of a "legal" proprietary interest to the Trustee and a "beneficial" proprietary interest to the beneficiary.

Constructive Trusts.

Position: A non-gratuitous recipient of trust property becomes a constructive Trustee if the transfer is in breach of trust and the recipient could reasonably be expected to know that the transferor is a Trustee (X-10:401). This is likely to impact negatively on banks and the wider financial system.

Given financial institutions have "deep pockets" compared with many companies and individuals, and that much property, assets or cash liable to forming constructive trust property may be placed in bank accounts, this will either lead to a multiplication of claims against banks on the grounds of constructive trust and/or (more probably) simply increase red tape for consumers and reduce the efficiency of account opening and inter-bank payments due to the additional verifications that would be required to satisfy an objective "reasonable knowledge" test. While case-law is difficult as it imports concepts of unconscionability, bad faith, fraud or similar subjective approaches, some element of subjectivity should be required here in order to result in a constructive trust being created.

Segregation of trust property.

Position: There is some ambiguity concerning so-called segregation of trust property. This should be clarified.

Reference is rightly made to segregation of trust property (X-3:102) but this begs the question "segregated from what?" Presumably, this is from the Trustee's other assets rather than assets of third parties, in which case that could be made clearer. Does the stipulation of trust being over the unsegregated part until segregation can occur (X-3:103(2)(b)) mean that no trust can be created over undivided bulk (eg a part share in a shipment of grain)? And is no trust possible over contractual rights where there are multiple parties to the contract and those rights are to the benefit of one or more of the contracting parties (since no segregation would be possible)? The problems here overlap to a degree with the first point about the absence of clear rights in rem. If the proprietary rights of beneficiaries were improved then it might not be necessary to rely so critically on manipulating the concept of segregation.

Additional technical observations.

In addition to the three chief concerns above, there are a number of additional technical observations, some of which are set out below.

- The mechanism for defining beneficiaries in terms of ability to "dispose" of assets is too narrow (X-1:206). Trust property can simply be "held" (without disposal) by a Trustee, for example real estate occupied by beneficiaries, or may comprise income generated from assets (again, without disposal of the assets).
- There is no concept of perpetuity period. Without a concept of perpetuity period, it is theoretically possible for assets to be bound in trusts forever. This has for

centuries been regarded as contrary to the public interest in English trust law, as a consequence of which the "rule against perpetuities" has been developed.

- The obligation on the Trustee to identify and notify beneficiaries (X-4:203(1)) could be too onerous and impractical for broadly constructed discretionary trusts (unless, of course, such an obligation could be expressly excluded). Similarly the right of beneficiaries to inspect trust documents (X-6:106) has now been limited in English case-law as it is too burdensome on Trustees.
- Constitution of a trust seems to require a "binding unilateral promise" by the Settlor (i. e. the “Truster” in DCFR terminology) to transfer property to a Trustee (X-2:102), although in the English courts the principle has developed that an act which is "intended to be done will be treated as if it is done", so that the beneficiary should have an immediate interest provided the property is identifiable (see also X-3:103(2)). Moreover the method of constituting a trust by "juridical act" (X-1:203) or unilateral declaration (X-2:101(a)) raises doubts as to how a trust is to be distinguished from a gift or constituted within a contract with multiple parties.

IV. ADDITIONAL COMMENTS

I.-1:108, p. 140, Annex	Definitions. Position: In order to efficiently support the purposes of the DCFR, definitions should be harmonised with the existing *acquis communautaire*. This applies inter alia to the definitions of "business" and "consumer" which are of crucial importance but, in their current form, deviate from the relevant provisions in the existing *acquis communautaire*. It is also necessary to add new definitions (i.e., of "financial services") and provide guidance in interpretation and application of certain vague and ambiguous terms (i.e., "good faith and fair dealing", "fundamental", "legitimate", "grossly").
I.-1:110, p. 141	Computation of time. Position: The definitions of "public holiday" and "working day" is substantially in line with the terms "Banking day" or "Business Day" used in financial market documentation. However, the definitions should not prevent banks from modifying the definitions, e.g., by referring to a Payment System or a specified market place. [The definitions should also be added to the Annex].
II.-1:106 p. 139	Notices. Position: The provisions dealing with notices and the point in time they become effective is relevant for the exercise of termination rights, options or margin calls. They should also deal with situations where a party refuses or impedes acceptance of notices.
II.-1:108, p. 145	Severability. Position: Severability is not known in common law jurisdiction. The principle that severability is always given will therefore impact the documentation practises to the extent they are based on common law principles (e.g., English law).
II.-2:101, 2:103, 2:105, pp. 146, 147	Non-discrimination. Position: The provisions on non-discrimination should not prevent banks from complying with mandatory laws e.g., on capital transfer or export restrictions and international embargos or boycotts. A bank should also be able to differentiate on grounds of creditworthiness or reputational risks (e.g., gambling, table dance bars). The provisions on Exceptions (II.-2:103) and Burdon of Prove (II.-2:105) should be reconsidered.
II.-4:104(1), p. 154	Merger clauses. Position: It should be possible to agree merger clauses in standard contracts.

II.-4:204(2), 4:210, pp. 155, 157	Silence does not amount to acceptance. Position: I should be considered whether a deviation from this principle is required or justified in situations where an ongoing contractual relationship (e.g., a broker agreement) has been established.
II.-6:111, p. 164	Unidentified principles. Position: It is common practice in agency lending agreements to specify that the agent under no circumstances becomes a party to the stock loan. Although the disclosure of principle usually occurs on the business day after a stock loan was done, it cannot be excluded that (e.g., for operational reasons) the agent fails to do so. It is also not clear what “reasonable time” means in this context. The provision will, at least for English law governed documentation, impact current practice.
II.-9:105, 106, p. 175	Unilateral determination and determination by third party. Position: Unilateral determinations or determinations are common practice in the financial market, especially in the area of derivatives. Examples are determinations made by calculation agents (that determine reference prices or whether certain disruption events have occurred) or valuation agents (that validate collateral). The reasonability test provided in II.-9:105, 106 burdens these determinations with uncertainty.
II.-9:107, p. 175	Price source disruption. Position: The provision is appreciated. However, it should not prevent parties from agreeing on more sophisticated mechanisms.
III.-3:708, p. 200	Default interests. Position: The rule provided here (short-term lending rate to prime borrowers) is appreciated. However, banks should be able to provide for surcharges that account for credit spreads used in the market.
III.-5:201, 301, pp. 212, 214	Substitution of debtor and transfer of contractual position. Position: The provision on substitution will have impact on novation agreement used in the derivative market (e.g., based on the ISDA Novation Protocol). The provision should not prevent banks from continuing its current practice.
III.-6:201, p. 217	Merger of debts. Position: It should be clarified that bonds and other negotiable debts are exempted.
IV.A-1.101, pp. 222 et	Sales contracts. Position: The provisions on sales contracts, which are applicable to financial services (including the sale of shares,

seqq.	bonds and other negotiable instruments), are based on the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is not accepted in the financial market. The remedies provided for failure to pay or deliver considerably deviate from what is documentation standard, especially in the spot and derivatives market. The term “goods” might even cover foreign currency. The rules are not mandatory, but a deviation in standard contracts could fail to pass the unfairness test.
VIII.-1:201, p. 349	Definition of “goods”. Position: The definition of “goods” as stipulated in VIII.-1:201 does not fully comply with the understanding of this term as referred to in other parts of the DCFR (see, for instance, also IV.A.-1:2021 (b)). The term “goods” should be employed in a consistent manner.

ANNEX: SUMMARY OF EFMLG REPORT ON FORCE MAJEURE

European Court of Justice/Court of First Instance Law and Force Majeure

- According to the European Court of Justice (ECJ), force majeure implies non-performance 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. 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.

- Although the case law of the ECJ or the Court of First Instance (CFI) has not so far expressly acknowledged the existence of a general principle of Community law enabling force majeure to be pleaded in the absence of an express statutory basis, it is necessary to consider in a given case whether, according to the criteria established by the courts where the relevant legislation provided for the possibility of pleading force majeure, the conditions for the existence of a case of force majeure are met.

OTC Financial Market Transactions and Force Majeure

- Standard industry master trading agreements for OTC financial market transactions commonly entered into within the euro markets should contain clauses addressing the impact of force majeure events. The scope of such clauses should include force majeure events taking into consideration transaction or financial market specific considerations. The clauses should 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. It would be desirable for the same force majeure termination clause to apply across all traded markets to allow for termination of related transactions across markets which are affected by the same force majeure event. The clauses should contain a waiting period after the occurrence of a force majeure event during which affected obligations are deferred until the earlier of the cessation of the event or the expiry of the waiting period. After the expiry of the applicable waiting period, both parties should have the right to terminate all or less than all transactions affected by a force majeure event in order to avoid cherry picking of transactions to be terminated. It is also desirable for waiting periods 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.

Strikes and Force Majeure

- 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 strike, to be classified as force majeure. In most Member States it is required that the event be unforeseeable, beyond the control of the debtor, insurmountable and unavoidable even if due care is exercised. In general, it could be said that strikes do not automatically 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 events internal to the debtor such as salary demands, general working conditions, etc.) strikes, the former being more likely to fall within the notion of “force majeure”. “Wild” strikes, i.e. strikes which take place without prior notification, may also be considered under certain conditions force majeure events.

- The criteria for a force majeure clause in relation to strikes would be the following: externality, unforeseeability, unavoidability. The affected party should immediately inform the other party upon the occurrence of a Force Majeure Event. The affected party should notify the other party of the end of the Force Majeure Event within [X] Business Days after such end.

Computer Breakdowns and Force Majeure

- Due to the external character of a force majeure event, financial institutions should only be allowed to invoke a force majeure clause in the case of an externally-caused problem. On the other hand, problems related to the internal maintenance of the system/operation of computers should not excuse a party from performing its obligations, considering that each party should adopt measures to safeguard the stability and safety of its computer system. A further distinction in connection with the cause should be made regarding responsibility, i.e. to determine the origin of the failure and to assess who controls it and/or has the responsibility for it and/or could have prevented it.

- The extent of due care exercised in relation to the prevention and insurance against computer breakdown could provide an important tool for measuring the financial institution’s efforts to avoid or limit the likelihood of occurrence of such a breakdown.

- Based on market documentation standards, the criteria for elements contained in model force majeure clauses in relation to computer breakdowns would be the following: “event or circumstance”, “beyond the reasonable control of the (affected) party”/“that cannot be foreseen or avoided”; “precautions commonly adopted”/“with due diligence”/“after using all reasonable efforts”; “cannot overcome such event or circumstance”/“performance has been or would be so prevented, hindered or delayed or made unlawful or impossible”; "use all reasonable efforts to mitigate the effects of such event while it is taking place".]