

Checklist

# Force Majeure in Derivatives Contracts

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# Force Majeure in Derivatives Contracts

Contributed by GuyLaine Charles of [Charles Law PLLC](#)

Determining whether a party under an International Swaps and Derivatives Association (ISDA) [Master Agreement](#) is entitled to claim it is subject to a Termination Event (as defined in the agreement) in the form of a force majeure is more complicated than one might expect. One problem is that the definition of force majeure in the 2002 ISDA Master Agreement is a “force majeure or act of state.”

Below we provide a step-by-step checklist of the questions necessary to determine whether a party's inability to perform qualifies as a Force Majeure under an ISDA Master Agreement.

## 1992 ISDA Master Agreement

The standard form 1992 ISDA Master Agreement does not include Force Majeure as a [Termination Event](#), therefore parties should consider the following:

(a) Does the Schedule to the 1992 ISDA Master Agreement include (i) an Impossibility (or similar) provision, (ii) the 2002 ISDA Master Agreement Force Majeure provision, or (iii) the incorporation by reference of the ISDA Illegality/Force Majeure Protocol; or (b) Have the parties adhered to the ISDA Illegality/Force Majeure Protocol? If the answer to all of the above is no, then the event in question will not be a Force Majeure event under the 1992 ISDA Master Agreement and the relevant party will have to rely on other rights under the agreement or at common law.

If, in the Schedule to the 1992 ISDA Master Agreement, there is an Impossibility (or similar) provision then a review of such provision will determine whether the circumstances surrounding a party's inability to perform are covered.

If, in the Schedule to the 1992 ISDA Master Agreement, the 2002 ISDA Master Agreement Force Majeure provision has been included or the parties have incorporated it by reference or have adhered to the ISDA Illegality/Force Majeure Protocol, parties should refer to section B below.

The ISDA Illegality/Force Majeure Protocol was published by ISDA in July 1, 2012 to enable parties that have entered into 1992 ISDA Master Agreements to amend the terms of their ISDA Master Agreement to reflect certain provisions of the ISDA 2002 Master Agreement, including the Force Majeure Termination Event.

## 1992 ISDA Master Agreement with Inclusion Of The 2002 ISDA Master Agreement Force Majeure Provision, Incorporation by Reference of, or Adherence to, the ISDA Illegality/Force Majeure Protocol, and 2002 ISDA Master Agreement

If (i) the Schedule to the 1992 ISDA Master Agreement includes the 2002 Force Majeure provision or incorporates by reference the ISDA Illegality/Force Majeure Protocol, (ii) the parties have adhered to the ISDA Illegality/Force Majeure Protocol; or (iii) the parties have entered into a 2002 ISDA Master Agreement, parties should consider the following:

If the Force Majeure provision has been amended, a review of the amended provision will be required to determine if the circumstances surrounding a party's inability to perform are covered.

If the Force Majeure provision has not been amended, but there is another provision, disruption fallback or remedy contained in (i) the ISDA Master Agreement, including its Schedule, (ii) a definitional booklet incorporated by reference in the relevant transaction, or (iii) the confirmation for the relevant transaction, which in each case, is applicable to the party's inability to perform, then, the event is not a Force Majeure under the ISDA Master Agreement and the relevant party will have to rely on its rights under the agreement or at common law.

If the above does not apply, then a claim of Force Majeure under the ISDA Agreement Master can be made by a party if both the first test - **Test (1) and** the second test **Test (2)** below have been met:

**Test (1)** With respect to (y) a party, or (z) in the case of a Multibranch Party (a party operating through more than one office) such party's office from which payments are made or received, either (i) the party, of the relevant office of the party, is subject to the terms of the "Party or Party's Office Force Majeure" below or (z) the party or its [credit support provider](#) (CSP) is subject to the terms of the "**Credit Support Force Majeure**".

**"Party or Party's Office Force Majeure"** means with respect to a party or in the case of a Multibranch Party, the office from which payments are made or received with respect to a transaction:

1. such party or office is prevented (or would be prevented if such payment or delivery were required on that day) from (y) performing any absolute or contingent obligation to make a payment or delivery in respect of a transaction, or (z) receiving a payment or delivery in respect of a transaction;
2. such party or office is prevented (or would be prevented if such compliance were required on that day) from complying with any other material provision of the ISDA Master Agreement with respect to the transaction; or
3. It becomes impossible or impracticable (or would become impossible or impracticable if the payment, delivery, or compliance were required on that day) for such party or office to perform payment or delivery, receive payment or delivery or comply with any other material provision of the ISDA Master Agreement with respect to the transaction.

**"Credit Support Force Majeure"** means with respect to a party or such party's CSP:

1. such party or such party's CSP is prevented (or would be prevented from, if such payment or delivery were required on that day) from (y) performing any absolute or contingent obligation to make a payment or delivery which the party or its CSP has under any credit support document relating to a Transaction, or (z) receiving a payment or delivery under such credit support document;
2. such party or such party's CSP is prevented from (or would be prevented from, if such compliance were required on that day), complying with any other material provision of the credit support document; or
3. It becomes impossible or impracticable (or would become impossible or impracticable if the payment, delivery, or compliance with any other material provision of the credit support document were required on that day) for such party or its CSP to perform any absolute or contingent obligation to make a payment or delivery, receive a payment or delivery or comply with any other material provision of the credit support document.

**Test (2)** The event in question is beyond such party's control, such party's specific office's control or such party's CSP's control, as the case may be, and such party, such office or such CSP could not, after using all reasonable efforts (which does not require the party to incur a loss other than immaterial, incidental expenses) overcome its inability to make or receive a payment, impossibility or impracticability.

To invoke a Force Majeure a party must demonstrate that it, its relevant office or its CSP is subject to one of the events in Test 1 and such event is beyond the relevant entity's control, as stated in Test (2). While certain events may seem like they would undoubtedly give rises to a party's ability to declare that it is entitled to designate a Force Majeure and close-out the affected transactions under an ISDA Master Agreement, the 2002 ISDA Master Agreement Force Majeure provision is highly prescriptive and must be carefully reviewed to determine whether indeed a party's inability to perform is considered a Force Majeure thereunder.