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## COVID-19's Impact on Financing in Ukraine

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While the pandemic itself may not necessarily constitute an event of default, force majeure or trigger the operation of a material adverse change clause, there may be other events of default that could arise as a result of the COVID-19 epidemic.

Monitor, inform and negotiate – this is what we recommend under the circumstances to all businesses that are receiving or providing external financing. Those who are about to enter into this process should pay special attention to the changing conditions for disbursements and the scope of events of defaults. Importantly, practical considerations should always play a real role, irrespective of the legal situation.

### ***Does COVID-19 pandemic serve as grounds for the lender to stop drawdowns or declare an event of default under the loan agreement?***

The pandemic does not in itself constitute grounds for stopping drawdowns under existing loan agreements or for declaring an event of default under most loan agreements. What matters is whether the pandemic would have a significant impact on the business of the borrower, the borrower's group or other obligors and its ability to perform its obligations under the loan agreement. It is also important to consider how significant and permanent this impact is. Even if there are no immediate implications, the prospects of any implications would likely be taken into consideration.

It is important whether the determination of impact is based on a subjective test of the lender and the extent that reasonability and likelihood are involved in such test. All of this would usually be verified through relevant provisions in the loan documentation. It is easy to check these in any LMA standard finance agreement – usually employed for cross-border financings and governed by English law – where these issues are dealt with in a MAC clause. In short, considering the terms on such agreements, there is a certain degree of likelihood that such a global event may have material adverse effects on a single borrower, and a lender may try to rely on this clause.

The situation is different with loan agreements entered into with Ukrainian banks governed by Ukrainian law. Standards of loan documentation differ from bank to bank and such terms can take various forms and wordings, and could be included in different sections of an agreement. Hence, one needs to check each and every clause in a loan agreement to understand whether there are any provisions giving the lender the right to stop drawdowns or to declare an event of default under existing circumstances. These would usually be found in loan agreements with Ukrainian subsidiaries of international banking groups, while there is a 50/50 chance for them to appear in agreements with local Ukrainian banks. If such specific provisions are absent in an agreement, a lender is not provided with this right under Ukrainian law.

The practical side, however, is such that while the lender controls the drawdown, the ability of the borrower to force the lender to provide the funds is limited, irrespective of whether any provisions are contained in the loan documentation. The main leverage that the borrower would have is the bank's reputational risk and potential-damages compensation risk – the damages that may be caused by the lender's non-funding, which the borrower may claim. The exact wording of the MAC clause or other provisions dealing with this (and their specific facts and impact on the borrower) matters, and should be considered on a case-by-case basis to determine the risks *vis-à-vis* the positions of the borrower and lender.

## ***Is COVID-19 pandemic a force majeure event excusing borrower liability for non-performance?***

The pandemic does not constitute a force majeure event as such. From the legal perspective of Ukraine (and most other jurisdictions), to constitute force majeure, an event must be approved by an authorised body and a clear causal link must exist between the event and a borrower's non-performance. Only then can an event be called force majeure and be used to excuse liability.

To answer this question, a borrower needs to do basic checks, which include the following determination:

- whether or not loan documentation contains any specific provisions on *force majeure* and what governing law applies to the agreement: We note that LMA standard loan agreements do not contain traditional *force majeure* provisions. Even though under Ukrainian law the COVID-19 situation may constitute a *force majeure* event, the borrower in this financing would not have a remedy on the basis of *force majeure*, since under English law (as under NY law) it is contractual matter only. While there are other defenses under English and NY law (based on concepts of frustration or implacability), such defences are rarely applied because of the need to undergo numerous and difficult tests. Under Ukrainian law, even though the loan documentation may not contain *force majeure* provisions, a borrower may rely on *force majeure* by virtue of the law and can claim an excuse from liability for any non-performance as a result and for the duration of the *force majeure* event. Note also that *force majeure* only excuses the liability for non-performance, but is not a release from the obligation of performance. While the borrower can claim release from payment of penalties and default interest, the borrower is still obliged to repay the debt. Moreover, a lender would still have the right to accelerate the loan and claim full repayment, subject to inflation and 3 per cent per annum for the period of indebtedness. Such payments are not seen under Ukrainian law (as supported by court practice) as a type of liability, but as compensation to a lender for devaluation of the cost of funds utilised by the borrower.
- whether there is a definition of *force majeure* event and whether specific events are covered: If there are provisions referring to *force majeure*, but there is no definition of *force majeure* in a loan agreement governed by English or NY law, there is a risk that relevant provisions would be unenforceable on the basis that the parties have not agreed upon essential terms. In relation to Ukrainian law-governed loan agreements, even if there is no definition, the parties refer to the definition provided by law, which was recently amended to include pandemic as a possible event. Where there is a definition, it would be used to determine whether pandemic is a *force majeure* event. Although not specifically mentioned, it could fall within a broader description of events.

In addition, a *force majeure* event should not only be considered a right to be released from the liability. It can be any additional actions that a borrower may need to take to comply with its obligations, such as to notify the lender of a *force majeure* event.

## ***What other defaults may be triggered by COVID-19?***

While the pandemic may not be an event of default, there may be other defaults triggered in connection with it. Given the situation, numerous governments have already taken various preventive measures such as moratoriums on loan repayments, etc. Using its authority granted by law, the National Bank of Ukraine could introduce certain currency control restrictions (and those already in place), such as mandatory sale of foreign currency or limiting cross-border payments, including early repayment of loans. Such measures could fall under convertibility or transferability defaults usually contained in cross-border financings. Other acts and actions taken by state bodies affecting the operation of certain industries (e.g. the ban of air passenger or intercity transportation) can also constitute a default under loan documentation (both in cross-border and local financings). Finally, cross-default is a provisions worth checking. Where the borrower may still be in compliance with the loan agreement, the borrower may incur outstanding financial indebtedness under other obligations, which could also trigger an event of default under a loan agreement.

## Recommendations

The SARS-CoV-2 pandemic is clearly an unprecedented global issue. Assuming that it will pass without any major consequences is tempting, but at this stage is quite unreasonable. Under the circumstances, mutual cooperation is vital. To help each other move forward, it is crucial for lenders and borrowers to be on top of issues: to ensure a timely and thorough monitoring of operations and events in the business of the borrower (and its group) and verify how they qualify against the terms and conditions of a specific loan agreement. On this basis, a determination should be made on the impact on financing, the ability to perform those event and, accordingly, if any actions need to be taken. Transparent communication and providing lenders with relevant information will help parties prevent problems before they arise and prove too difficult to solve. While staying in touch and keeping the counterparties in the loop are advisable at all times, they are absolutely crucial now. Our recommendation remains the same: monitor, inform and negotiate.

For more information on how to protect your financing agreements in Ukraine during the current crisis, contact your regular CMS advisor or local experts: [Ihor Olekhov](#) and [Kateryna Chechulina](#).