

Issues to consider in relation to COVID-19 impact on Romanian financing arrangements

The impact of COVID-19 measures taken by more and more governments across the world on commercial relationships in general may also have an effect on the financing arrangements that borrowers have in place or are in the process of negotiating.

What delays should be expected, either in the calendars until financial close or throughout the performance of on-going financing arrangements? When and to what extent do borrowers need to inform lenders about COVID-19 risks? Could borrowers be entitled to relief or remedy periods or could they request changes to their financing terms? The following article addresses these questions insofar as they affect financings into Romania.

For parties who are currently involved in the negotiation of new financing arrangements, any quarantine or business interruption measures taken at a state or an institutional level (whether they affect the principals or their respective advisors) might place a strain on the agreed timeline for financial closing. Consequently, we are currently advising our clients to:

- factor into their financing calendar any financing approvals that depend on the decision of a board or committee, which must physically assemble in order to take the decision (both at the lender and obligor levels), particularly if the meeting is to take place in one of the geographical areas currently placed under quarantine.
- make alternative arrangements for live meetings, including the virtual signing of documents (and we note that most Romanian law governed finance documents may be signed in counterparts with the exception of real estate mortgages).
- in the case of international parties, pre-emptively issue powers of attorney to their local representatives or advisers for the signing or delivery of those documents that must be executed or delivered in a live meeting.
- in the case of borrowers, consider carefully which of their commercial arrangements would be affected by a delay in reaching a financial close and what rights they have under those arrangements, and – if needed – approach their respective counterparties to negotiate extensions.
- consider if any contingency planning is available (or pre-agree alternatives or extensions) in case courts, registrars or other public institutions are closed.

In the case of on-going financing arrangements, borrowers should look into the following matters and how they might affect their financing arrangements:

- key suppliers and service providers that might be affected by supply chain disruption or business interruptions resulting from COVID-19 measures. Borrowers should seek to gauge the impact that such suppliers and service providers might have on their cash flow and operational streams if the risks materialise. The clauses of all insurance policies against these risks should also be examined in detail to determine the compensation available;
- the borrowers' own supply and service provision undertakings (and corresponding deadlines), which should be reviewed to identify the contractual rights available to them and any risks due to delays in performance and any penalties;
- close monitoring of counterparty performance and any notices of force majeure or hardship received from

commercial counterparties (particularly from key counterparties) and informing the lenders of such notices, where required;

- a general sense of being mindful of any requirements to notify material events affecting either themselves or their counterparties, and of any representations with respect to their budgets or financials that are due to be repeated in the upcoming period and that might be inadvertently breached due to foreseen cash-flow variations. Similarly, budget or financial model update undertakings should be kept in mind;
- whether the aggregate effect of COVID-19 will lead (or is likely to lead) to various defaults such as delays in payments, delays in the development schedule or breaches of financial covenants;
- even if none of their undertakings and representations are currently triggered by COVID-19 measures (particularly if such provisions are very narrowly limited to key counterparties or conditional upon high materiality thresholds), borrowers might nonetheless consider a higher level of transparency towards their lenders if they have any suspicion that the impact of COVID-19 measures on their business or project is likely to escalate with time;
- provisions of facility agreements dealing with extraordinary circumstances, including the terms of any force majeure, hardship or material adverse change provisions, and whether any remedies are available to borrowers affected by COVID-19 measures under the relevant contract or in the law. We note that facility agreements (particularly LMA-based) would typically not include provisions directly dealing with force majeure or hardship. While these defences might be available to borrowers by law, it is increasingly common in the Romanian market for lenders to require express waivers in this respect.

As far as lenders are concerned, we would advise our clients that:

- if they suspect an upcoming default (or borrowers report that the COVID-19 measures might trigger certain defaults), the lenders could use their rights to request additional information from their borrowers and should consider what flexibility they have for adaptation of the financing terms (if necessary to the borrower);
- they should carefully observe their confidentiality undertakings since any information disclosed by the borrower on the impact of COVID-19 measures on its business is likely to qualify as confidential.

For more information contact your regular CMS advisor or local CMS experts: Ana Radnev, Nona-Cernov Vivirschi and Adina Nanescu.