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CORONAVIRUS (COVID-19) ISSUES RELATING TO LOAN FINANCINGS

The Coronavirus (Covid-19) outbreak is causing disruption to businesses across sectors and jurisdictions. In this briefing we offer some practical tips for lenders and borrowers in loan financings to consider.

Business days

Payment dates in a finance document typically fall on Business Days. A common definition of "Business Day" would refer to days on which banks are open for general business and exclude Saturdays, Sundays and (in some cases) public holidays in relevant jurisdictions. In the context of Covid-19, some countries have already announced additional public holidays and this could occur (or recur) in any jurisdiction as the situation evolves.

Parties may wish to consider the impact of such *ad hoc* holidays on their obligations in their loan financings, particularly their obligations to disburse or make payments or serve notices. In addition to reviewing how the term "Business Day" is defined in documentation, parties may also wish to look at the operative provisions to ascertain whether a disbursement or payment date would, in light of any additional public holidays, fall on the preceding or succeeding Business Day of the original disbursement or payment date, in order to avoid any breach.

Notice periods or grace periods in finance documents would also typically be defined by reference to Business Days. Parties may wish to consider if more time may be available for a party to discharge an obligation or remedy a default as a result of any additional public holidays.

Regular reporting

Borrowers may wish to review the deadlines by which they are obliged to deliver financial statements, valuation reports or technical advisers' certificates (if applicable) under their finance documents. In some jurisdictions, professional advisers may not be able to carry out as usual the necessary audit work, survey and other on-site due diligence work given the interruptions caused by Covid-19 (such as travel restrictions) and this would impact on borrowers' contractual performance of their information undertakings.

Where a borrower is listed on any stock exchange, it may be worth checking whether the stock exchange has put into place any emergency measures to deal with the difficulties faced by the borrower in publishing annual results and dispatching annual reports by the deadlines in accordance with the applicable listing rules. Whilst these measures do not bind lenders in loan documentation, parties may wish to consider whether it is appropriate to temporarily resort to an alternative information reporting regime similar to the emergency measures (if any) adopted by the stock exchange on which the borrower is listed.

Lenders and borrowers should take note of these practical implications not only for their legacy transactions, but also on any new financings. Whilst the typical deadlines for the

delivery of financial statements, valuation reports or technical advisers' certificates are set by reference to a specified amount of time after the end of any financial reporting period (e.g. 120 days after the last day of each financial year), parties may wish to consider whether it would be desirable in the current circumstances to provide for flexibility of such timing so as to avoid the need to amend or waive such requirement in the near future or going forward.

Financial covenants and rating requirements

Lenders and borrowers may wish to assess the impact of Covid-19 on the borrowers' ability to comply with their financial covenants and (if applicable) any rating requirements. It is not uncommon that grace periods are not available for breaches of financial covenants or rating requirements in loan financings. In such cases, borrowers may wish to assess the likelihood of a breach ahead of time in order to have the requisite waiver in place prior to a breach occurring, so as to avoid the risk of triggering cross-defaults elsewhere.

Events of default (EOD)

The extent to which the impact of Covid-19 might give rise to an event of default under a loan financing depends on the description of the events of default in the loan documentation which vary across forms, products, markets and jurisdictions. For example, suspension of business could be an EOD but whether or not an actual suspension would trigger this EOD depends on:

- how the EOD is actually worded, e.g. (i) whether it applies to the business of the borrower, any other obligor or the group (taken as a whole) (ii) whether it applies to the relevant business(es) in whole or in part and (iii) whether there is any grace period or exception to suspension; and
- the extent of the actual suspension.

Force majeure and other contractual interfaces

It may be worth checking if loan documentation contains as events of default (i) the occurrence of a force majeure event over a certain time period under other contracts (e.g. supply agreements, construction contracts or concession agreements) or (ii) the suspension of performance by any contracting counterparty to the obligors under other contracts. Such events of default are more commonly found in documentation for development financings or project financings. Project financings might also be sensitive to debt service defaults if time is extended for a force majeure event under an underlying project document (e.g. a power purchase agreement in a power project) but there is no contingency to cover the consequential delay to revenues.

Parties should be mindful of the contractual interfaces between their different contracts and the potential impact that the loan financings may have as a result.

MAC – material adverse change

It is fairly common for loan financings to contain an event of default on material adverse change, often referred to as the "MAC" clause. The purpose of a MAC clause is to catch risks that cannot be anticipated prior to signing and hence have not been described as specific representations, covenants or events of default.

The ability to use a MAC clause in the context of Covid-19 largely depends upon the actual wording of the clause, which will need to be analysed carefully. There are many varieties of MAC clauses, some of which would be triggered if the circumstances "might"

have a material adverse effect whereas others would only be triggered if an event "will" occur (a higher test to satisfy). Some MAC clauses grant lenders sole authority to determine whether or not a MAC has occurred whereas others contemplate an objective test. Given the wide variety of MAC clauses in the loan markets, prior to making a MAC claim, it would be worth consulting one's legal advisers to seek their view.

The question of whether a MAC has occurred is a question of fact ultimately determinable by the courts or arbitration as appropriate. Given the lack of precedent case law on this subject, there is some unpredictability to consider here and so it is generally accepted that the barrier for successfully using the MAC clause is high. Lenders should be mindful of their potential liability for a "wrong call" if they used a MAC clause to accelerate or enforce security where it later determined by a court that no MAC had occurred.

Consents and waivers

Parties may wish to avoid committing a default or letting an event of default arise by (a) anticipating well in advance what the potential defaults could be and (b) applying ahead of time a waiver or consent to extend deadlines under the relevant finance documents.

In syndicated financings, the process for applying for a waiver or consent is more complex than in bilateral financings. Parties should check (i) the level of lenders' consent for a particular matter, i.e. whether the matter requires consent from majority lenders, super-majority lenders or all lenders, (ii) any 'snooze-you-lose' time-barrier provisions; and (iii) in the event that the requisite lenders' consent cannot be obtained in time, whether any grace period is available.

Borrowers may consider that keeping their lenders abreast of how the Covid-19 outbreak is impacting the borrowers' businesses and contractual performance from time to time beneficial in many aspects. Borrowers may also want to ensure that sufficient details of the practical implications be clearly specified in any waiver or consent application documents. Such information would assist lenders in coming to a view and help the lenders explain the situation to their other internal departments (e.g. credit department) whose sign-off is required for any waiver or consent application. Borrowers should also assess, and be prepared for, the possibility that a waiver or consent from lenders may not be obtained in time, noting that the resulting default could potentially trigger cross-defaults under other contracts. Whether or not a cross-defaults would be triggered under other contracts turns on the terms of those other contracts, which borrowers may want to review and assess if any waiver should be sought under other contracts in advance to pre-empt the domino effect of cross-default.

Lenders and agents may expect that more consent and waiver applications may be submitted given the evolving situation and should be prepared to deal with these as and when they appear. In syndicated financings, lenders and agents may wish to be mindful of any "snooze-you-lose" provisions which might exclude a lender that does not respond within a specified time period from the computation of requisite lenders. If a lender has a strong view on a particular matter which is the subject of the relevant consent and waiver application, the lender needs to take note of any deadline within which it must make its response.

Obligation to notify the occurrence of default

Borrowers may wish to be reminded that they may have a contractual obligation under their loan financings to notify the agent/lenders of the occurrence of a default even if the grace period is still running.

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