

COVID-19 EVENTS: KEY HIGH LEVEL CONSIDERATIONS IN REVIEWING PROJECT AGREEMENTS AND FINANCING DOCUMENTS

To Our Clients and Friends:

First, we hope you and your families are staying safe in the midst of this COVID-19 pandemic.

As you navigate through the implications of the pandemic on your business, below is a high level list of some of the key issues to consider with respect to one or more events or consequences caused by the COVID-19 pandemic (“COVID-19 Event”) in reviewing your project agreements and financing documents.

A. Impact of a COVID-19 Event under Project Agreements/Commercial Contracts (e.g., Concession Agreements, Offtake Agreements, Construction Contracts, Supply Contracts, O&M Agreements, etc.)

- 1. Relief Event/Compensation Event/Force Majeure Event** – Determine whether the COVID-19 Event would qualify as a relief event, compensation event or force majeure event under the contract, what notices are required and the extent of relief available. Consider also if there are applicable “you snooze you lose” time frames that should be adhered to and if, in order to avoid missing any deadlines, a tolling agreement should be entered into. Discuss if there are strategic reasons to prefer entering into a tolling agreement versus filing relief event, compensation event and/or force majeure event notices with the counterparty (particularly with government entities/grantors). Finally, you should be familiar with, and proactively manage upfront, any contractual obligation to mitigate the impact of the COVID-19 Event in your (or your counterparty’s) business.

Here is a 4-step checklist and flow chart on force majeure relief under US law: <https://www.gibsondunn.com/force-majeure-clauses-a-4-step-checklist-and-flowchart>; and under English law: <https://www.gibsondunn.com/english-law-force-majeure-clauses-a-4-step-checklist-flowchart>. While the cases are primarily based on US and English law, respectively, a similar analysis would generally be undertaken under the governing law of the relevant contract.

We suggest reviewing whether and how relief events, compensation events and force majeure relief can be claimed both by your entities and your contract counterparties.

2. COVID-19 Event (whether or not it qualifies as a Relief Event, Compensation Event or Force Majeure Event) Implications on:

- a. **Revenue** – Analyse how the COVID-19 Event would impact your revenue stream under the contract and under any applicable business interruption or other insurance.
- b. **Payment Obligation** – Determine how the amount and timing of your payment obligations to counterparties would be affected by the COVID-19 Event.
- c. **Schedule** – Assess the impact of the COVID-19 Event on any milestone with a specific deadline or any other time-bound undertaking (e.g., completion date, commercial operations date, delivery date); review corresponding forecasts and expectations.
- d. **Contract Enforceability** – Assess the potential implications of the COVID-19 Event on enforceability and defences available under the applicable contract law principles (e.g., impossibility, frustration, impracticability).
- e. **Ability to Perform Obligations** – Analyse whether the relevant entity will continue to be able to meet its obligations. Considerations include having an appropriate business continuity plan (i.e., Does it take into account pandemics? Are there work-from-home arrangements, back-up plans if employees get sick, alternative sites for required back-office equipment? Are you experiencing supply chain disruptions that could impact construction or operation?).
- f. **Non-Compliance Points / Liquidated Damages / Events of Default / Termination** – Analyse whether the COVID-19 Event could potentially lead to a default and trigger a termination event under the contract or result in the assessment of non-compliance points or liquidated damages.
- g. **Insurance** – Determine whether insurance would cover any or all of your losses arising from the COVID-19 Event.

B. Financing Agreements

1. Representations & Warranties^[1]

- a. **“No Default”** – Determine whether the COVID-19 Event would trigger actual or potential defaults by the borrower and/or the relevant contract counterparties under the borrower’s material contracts. On occasion, this representation may also include defaults under the financing agreements.

- b. **Insolvency/Bankruptcy/Inability to Pay Debts Generally When Due** – Consider whether the COVID-19 Event would trigger a breach of this representation, which would also depend on the laws of the jurisdiction applicable to the subject entity/ies (including any recent pronouncements, relief measures, moratoria and the like by government entities in response to the pandemic).
- c. **No Proceedings** – Consider whether the relevant entity is or would be subject to litigation, disputes, claims, and the like, both actual or threatened, as a result of the COVID-19 Event, including any disputes relating to the availability of force majeure relief and labor-related disputes.
- d. **MAC** – Check whether the COVID-19 Event would lead to a “material adverse change” usually from the latest audited financials, or depending on the formulation, have/would/is reasonably likely to have a material adverse effect on the business, financials, operations, or prospects of the company or key contract counterparties. Note that this is a rapidly evolving area of the law in various jurisdictions and so it is prudent to check with counsel.

2. Covenants

- a. **Information Covenants** – Check what notice requirements will be triggered to the granting entity, lenders, trustees, bondholders and otherwise (e.g., force majeure claims, material litigation/disputes, potential or actual defaults under commercial contracts, potential delays in milestones, events that could have a material adverse effect, etc.). If the company has bonds that are publicly listed, are any reporting obligations triggered? Are voluntary disclosures recommended? In addition, certain deliverables such as financial statements (and any related audit review) may be delayed due the impact of the COVID-19 Event on both the company and the auditors.
- b. **Financial Covenants and Ratio-based Distribution Tests** – Review the calculation of the financial ratios both as maintenance covenants and dividend blocks (particularly for projected figures), and determine whether they are likely to be breached and how any such breach can be mitigated (e.g., equity cure, prepayments, tap into revolvers or additional facility). Note that previously contemplated dividend payments may now be delayed or prohibited.
- c. **Other Covenants** – Determine whether any of the other covenants would be triggered as result of the COVID-19 Event, including with respect to acts or omissions vis-à-vis counterparties under commercial contracts (e.g., enforcing rights and remedies under material contracts, not settling claims without lender consent), obligations to meet construction deadlines, meeting requirements, operating standards, etc.

- d. **Reserve Accounts** – To the extent that the relevant entity will experience liquidity issues, consider whether it will be able to meet any reserve account requirements. Determine also whether any failure to meet such reserve account requirements would result in a default and what mitigation measures are available.
- e. **Distributions** – In addition to determining the implications of the COVID 19 Event on the distribution test, consider if dividend policies should be revisited in terms of potential liquidity needs.

3. Drawstop Events

To the extent that the facility has not yet been fully drawn, a breach of representations and warranties or covenants (as described above), or the occurrence of an event of default or potential default (as described below), may prohibit subsequent draws. The implications of the COVID-19 Event on the borrower's ability to make further borrowings and the consequences thereof on its business should be carefully reviewed.

4. Events of Default/Potential Default

The list of events of default should be reviewed to see whether any of them would be triggered by the COVID-19 Event, including by a prolonged occurrence thereof. Some examples include:

- a. **Misrepresentation and Covenant-Related Defaults** – Consider whether a breach of representations or failure to meet financial or other covenants as described above would result in a default.
- b. **Failure to Meet Certain Milestones** – If the borrower or a contract counterparty is required to achieve certain milestones by a date certain, e.g., commercial operations date or construction completion date, a delay resulting from a COVID-19 Event may trigger a default. Note that where such milestone in the financing agreement is not tied to the definition under the relevant commercial contract (e.g., concession agreement, construction contract, etc.), then the borrower would not be entitled to the same force majeure relief under the financing agreements as in the relevant commercial contract.
- c. **MAC** – In cases where the financing agreement includes a “Material Adverse Change/Effect” event of default (including through repeating representations), the formulation should be reviewed to see whether the COVID-19 Event would trigger such default.
- d. **Audit Qualification** – Determine whether the COVID-19 Event would lead to a qualification in the auditor's report, and if so, whether such qualification would trigger a default.

- e. **Payment-Related Defaults** – Consider whether liquidity issues will result in difficulty meeting payment obligations, and whether waivers or extensions related to upcoming payments are required.

There may be other issues to consider given the specifics of your business and contractual arrangements. While this alert has been drafted to cover projects in a variety of jurisdictions globally and in all cases at a high level, we would be happy to help you on specific issues with respect to your projects in the respective geographies covered hereby. Should you have any questions please feel free to contact us.

[1] Under some loan agreements, representations and warranties are repeated periodically. If these representations and warranties have already been made and do not need to be repeated, it is likely that there would be a corresponding formulation in the Covenant or Event of Default section so the same analysis would apply.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

Gibson Dunn regularly counsels clients on issues raised by this pandemic in the commercial context. For additional information, please contact the Gibson Dunn lawyer with whom you usually work or the authors:

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