

Dear clients,

in connection with the continuously emerging negative impacts related to the spread of the coronavirus and the dangerous contagious COVID-19 disease, we would like to send you some of our remarks on the possible consequences of the current situation on the obligations arising from loan agreements governed by Slovak law. Following our experience, the information below apply mainly to obligations from such loan agreements, where one or more banks or other institutional creditors are acting on the side of the lender.

Of course, the information provided below cannot replace a comprehensive legal assessment of a specific relationship; such assessment and its outcome always depend on the individual circumstances of a particular case (terms of the specific contract etc.). Therefore, in case you need assistance in a specific case, do not hesitate to contact us.

#### 1. Relevant provisions of loan agreements

Due to adverse consequences of the situation caused by the coronavirus on the economic performance of the borrowers, several types of provisions typically found in loan agreements may be breached by the borrowers:

##### *a) Material adverse change on the part of the borrower*

Negative impacts of the coronavirus and related governmental measures in the business activity and economic performance can cause the so-called material adverse change on the part of the borrower. In relation to the coronavirus, the definition of a material adverse change consisting of the change (i) in income, assets, business activities, operation or financial (or other) situation of the borrower and/or (ii) in the ability to fulfil its obligations under the loan agreement of other financial documents may be fulfilled.

##### *b) Breach of financial covenants by the borrower*

The worsening of the economic situation of the borrower may probably also lead to the inability of the borrower to comply with the so-called financial covenants, the purpose of which is to measure the economic performance or condition of the borrower at a specified date, typically quarterly. In particular, negative impacts on income and hence on EBITDA indicator may be expected.

### *c) Other provisions of loan agreements*

Due to the negative impact of the coronavirus, other provisions of loan agreements may be breached, in particular due to (i) default with payment obligations (i.e. non-payment of the loan, its instalment, interest or agreed upon charges), (ii) breach of obligations towards other persons (*Cross default*) (e.g. breach of the payment obligations of the borrower towards other lenders), (iii) bankruptcy/crisis occurring at the side of the borrower, (iv) bankruptcy, restructuring or enforcement proceeding being initiated against the borrower, or (v) the borrower being in breach of its representations and guarantees.

## 2. Consequences of events of default

Each of the abovementioned events usually causes or may cause (after expiration of a remedy period) an event of default which generally entitles the lender mainly to stop further provision of financing, accelerate the loan, claim contractual penalties, take steps towards exercise of security, etc. Specific terms and conditions are always stipulated in the individual loan agreements.

In case an event of default occurs or threatens to occur, the borrower is obliged to notify the lender on such event without delay. It is generally recommended to fulfil such information obligation without delay and to enter into negotiations with the lender in order to resolve the event of default in such manner, so that the consequences of a breach of an agreement are as minimal for the borrower as possible.

## 3. Possibilities of the borrower to defend itself

Loan agreements usually transfer all risks that may be relevant for the performance of the loan on the borrower. Liberation from liability for damages due to a force majeure event (Section 374 of the Slovak Commercial Code) is therefore not directly applicable in relation to the exercise of the rights of the lender arising from breach of a loan agreement.

It is also theoretically possible to consider, in a particular case, whether the legal regulation on liberation from liability for damages in the event of a force majeure (Section 374 of the Slovak Commercial Code) may be analogically applied to the given situation. In such case it is possible to argue that if the borrower breached the loan agreement as a result of the emergency situation connected to coronavirus (which has the nature of force majeure) and for this reason the loan has been accelerated by the lender, the borrower is not able to repay the loan early again as a result of the emergency situation connected to the coronavirus (force majeure event).

Thus, if the borrower repays the loan later (after this obstacle has disappeared and the economic situation has improved), it can be argued that it could not have been done earlier due to a force majeure event, and thus the borrower relieves itself of liability at least in the extent of the default interest accrued on the unpaid loan over that period. The interest on late payment generally constitutes appurtenances to a monetary claim and not a separate claim for damages. However, it is also the case that the interest on late payment usually serves to compensate for any damages incurred as a result of the delay in the performance of the monetary debt. It can therefore be argued by the borrower that the legal regulation regarding force majeure events may be applied to the interest on late payment *per analogiam*.

In general, the conduct of a lender during the duration of the emergency situation connected to the coronavirus will also need to be assessed in terms of its compliance with good morals and fair business conduct rules. These are situations, where actions of the lender, despite being formally in line with the loan agreement, would appear to be manifestly inappropriate, illogical or leading to the economic destruction of the borrower, who would otherwise, after the removal of the temporary obstacle, be able to fully restore its economic activity and properly repay its debts.

Such conduct of the lender could be considered in extreme cases as contrary to good morals and/or principles of fair business conduct. The terms of good morals and fair business conduct are not defined by law, and therefore offer relatively wide application possibilities as well as wide range for judicial discretion. Exercise of a right that is contrary to the fair business conduct principle does not enjoy legal protection (Section 265 of the Slovak Commercial Code) and a legal act that is by its content or purpose contrary to good morals is absolutely invalid (Section 39 of the Slovak Civil Code).

Within their loan agreements, the contracting parties may stipulate most issues in a manner different from the law or the market standard. Therefore, it is always necessary to assess the relevant loan agreement directly and not to follow only the general rules resulting from the applicable legislation.

We are available to answer any questions.

Sincerely,

BBH advokátska kancelária, s.r.o.