

## FUND FINANCE FRIDAY

**Force Majeure, COVID-19 and Luxembourg Fund Finance Transactions**

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The purpose of this article is to envisage whether the current COVID-19 pandemic can be considered as a *force majeure* in Luxembourg and the potential impact on Luxembourg fund finance transactions.

In this respect, a *summa diviso* needs to be established: (i) Luxembourg fund finance transactions with a Luxembourg law credit agreement, and (ii) Luxembourg fund finance transactions with a foreign law credit agreement (generally New York law or UK law).

### **1. Luxembourg fund finance transactions with Luxembourg credit agreements**

In these transactions, the main documents are the Luxembourg credit agreement, the Luxembourg pledge over undrawn commitments, and the Luxembourg bank account pledge agreement.

The *force majeure* question may be relevant because this could potentially lead to a release of the obligations of an obligor.

The first step is to determine how the *force majeure* is defined. On the basis of the principle of the freedom of contract (*liberté contractuelle*), if the parties have defined and established the conditions of a *force majeure* event in the credit agreement, then the occurrence of and the consequences of such an event will be determined in accordance with its terms.

It should be noted that, in contrast to common law jurisdictions, *force majeure* exists in law in civil law jurisdictions such as Luxembourg. As such, where the *force majeure* is not defined contractually, it would be determined in accordance with the criteria established by Luxembourg law. However, *force majeure* is not defined in the Luxembourg civil code, and the concept has been shaped by case law. Classically, there are three requirements for the legal qualification of *force majeure* under Luxembourg law: exteriority (*exteriorité*), unpreventability (*irrésistibilité*), and unpredictability (*imprévisibilité*).

Exteriority means that the relevant event is external and is not connected to the parties. A pandemic and the exceptional measures taken by the government in this context are indeed external.

Unpreventability means that there is an impossibility to perform the relevant contractual obligations. Furthermore, to be qualified as a *force majeure*, such impossibility must not be partial or temporary but total and final. The unpreventability would be a difficult condition to meet in practice, particularly in presence of a Luxembourg investment fund of a certain degree of sophistication, since it would be complicated to establish that there is totally no means (in particular, in terms of technical means and human resources) to perform the relevant obligations, but of course an analysis on a case-by-case basis must be performed.

Unpredictability means that at the time of the entering into the agreement, the event was not foreseeable. It seems that the pandemic and the governmental measures taken were indeed not foreseeable.

In a nutshell, a pandemic in itself does not qualify automatically as a *force majeure*, and an analysis on a case-by-case basis must be undertaken in light of the terms of the particular agreement. Further elements must be established in order to establish that there was an impossibility *in concreto* to perform the relevant obligations. The principle of good faith (*bonne foi*), which is implied in all agreements, will also serve as a compass for such an analysis.

## **2. Luxembourg fund finance transactions with foreign law credit agreements**

In this type of transaction there is, typically, a New York or UK law credit agreement, a Luxembourg pledge over undrawn commitment, and a Luxembourg bank account pledge.

The legal characterization is to be sought in the law governing the credit agreement. In other words, New York law or UK law would determine, regarding the particular credit agreement, whether there is a *force majeure* event and the consequences of the same.

As to Luxembourg collateral, it would follow the qualification of the foreign credit agreement to establish whether there is a default or not and to determine if enforcement of the collateral is possible.

## **3. General recommendations**

It may be reminded that Luxembourg financial collateral is generally efficient and may be, as a matter of Luxembourg law, quickly enforced in the event of default. In this respect, it would be advised for the funds to reach out to their lenders if they anticipate difficulties concerning their contractual obligations, in light of the current global context, in order to set up constructive solutions upfront.

We are all on this, and the major actors of the industry locally and internationally have shown their engagement to find innovative solutions and overcome the consequences of this COVID-19 pandemic.