



Risk, Resilience
and Reputation

Focus on Funds | Risk, Resilience and Reputation

Contractual obligations under the microscope

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Presenting today



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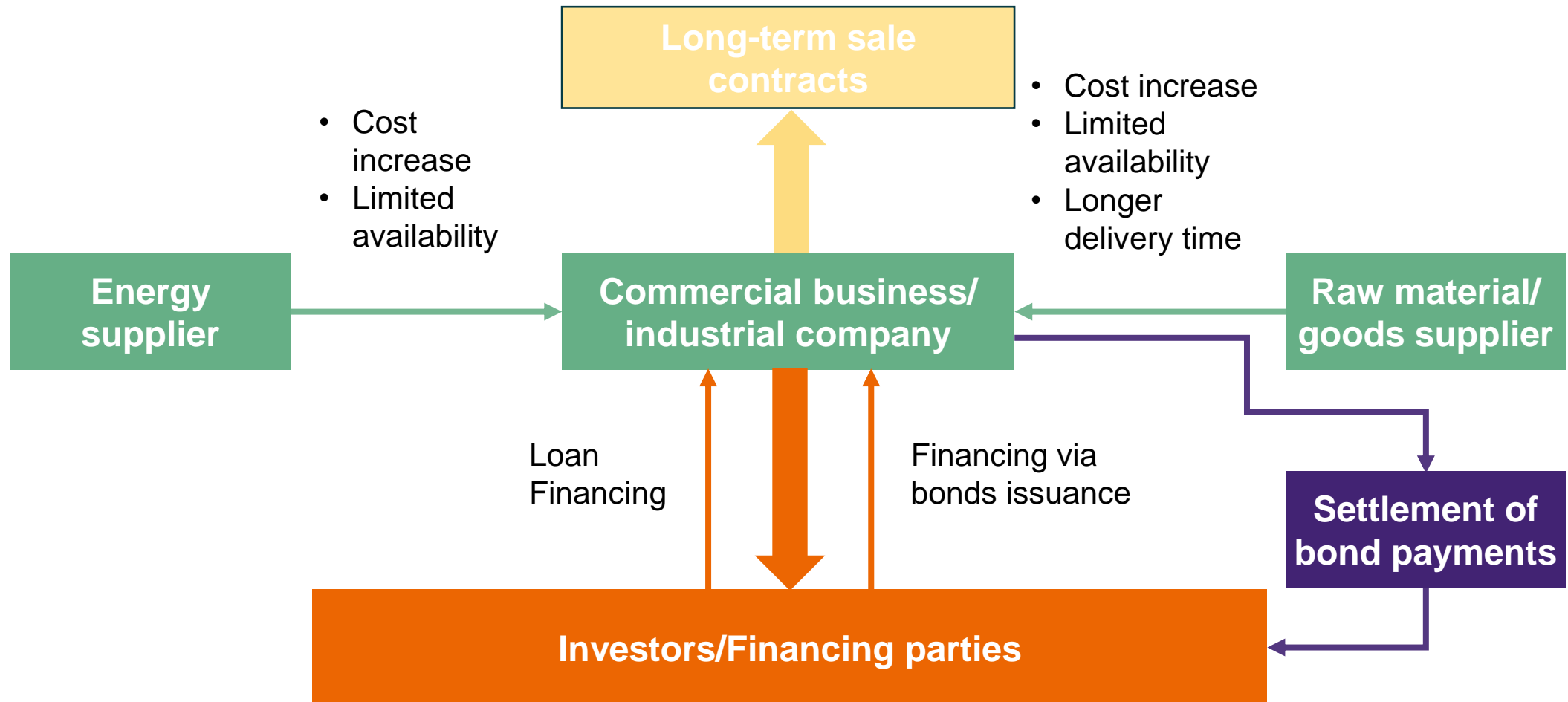


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Model scenario

Model scenario – overview chart



Model scenario – description

1: Setting the stage

- A commercial/industrial business is set up as a fund structure with refinancing via loans and bond issuance
- The commercial/industrial business is exposed to increased financial pressure (increased energy cost; supply/delivery/cost issues with raw materials/goods)



2A: Supply chain/cost situation

- The Company may wish to seek indemnities for breach of contract or terminate contracts
- Suppliers may wish to seek justification or terminate contracts



2B: Financing arrangements/bonds

Risk that payments up the financing chain will be delayed (in breach of contractual obligations):

- Investors may want to pull out
- The Fund may wish to keep its financing in place
- Fund may be limited in making payments to bond certain investors due to sanctions limitations, Fund may seek alternative arrangements or to be discharged

Scenario 2A: Supply chain/cost situation

Scenario 2A

Swiss law issues

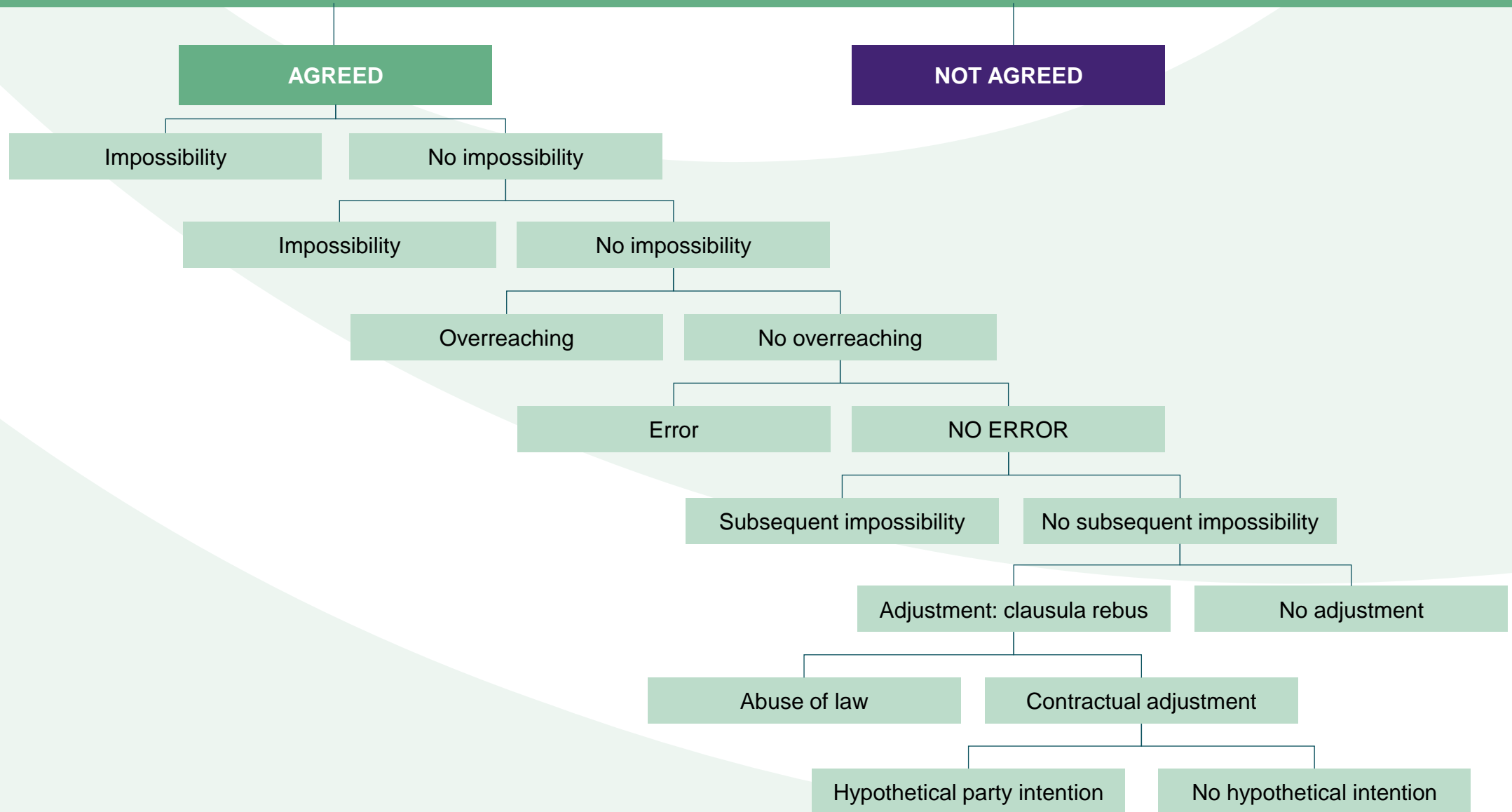
Guiding principles

- Freedom of contract
- Mutual intention of parties
 - True mutual intention
 - Objective good faith interpretation
- Pacta sunt servanda
- Damages claim if non-performance

Change of circumstances

- What was agreed (art. 1, 2, 18 CO)
- Is there initial impossibility (art. 20 CO)
- Is there overreaching (art. 21 CO)
- Is there a fundamental error (art. 24 CO)
- Is there subsequent impossibility (art. 119 CO)
- Is there an adjustment clause (by law or by contract)
- Does the contract have to be adjusted:
clausula rebus sic stantibus

SWISS LAW ISSUE CHANGE OF CIRCUMSTANCES



Impossibility

- Promised obligation is from outset impossible to perform
 - (i) objectively, for legal or factual reasons
 - (ii) subjectively, if personal performance
- Unlawful if violation of objective Swiss law
- Immoral if violation of foreign mandatory law
- Subsequent changes relevant if affecting public order and morality

Article 20 CO

A contract is void if its terms are impossible, unlawful or immoral.

However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them.

Overreaching

Three cumulative conditions

- Manifest disproportion between the promised benefits
- Aggrieved party's freedom of decision impaired at time of contract by hardship, inexperience or recklessness
- Resulting opportunity for overreaching exploited by other party

Article 21 CO

Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the person suffering damage may declare within one year that he will not honour the contract and demand restitution of any performance already made.

Error

Only regarding past facts

Exceptionally re future facts:

- Objectively essential contractual basis
- Wrong assumption that future event is certain
- Other party should have recognized this as contractual requirement

Article 23 CO

A party labouring under a fundamental error when entering into a contract is not bound by that contract.

Subsequent impossibility

- Objective or subjective impossibility
- Permanent
- Legal or actual, partial or complete
- Debtor not responsible: no attribution to his sphere of risk

Article 119 CO

An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.

In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.

This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance.

Adjustment clausula rebus

- Change in circumstances neither foreseeable nor avoidable
- Serious disruption of the equivalence of obligations
- Contract not unconditionally performed

clausula rebus

Serious disruption

- Federal Court - abuse of law:
so obvious disproportion that insistence on the claim appears to be abusive
- Some authors - gap in contract:
Important change, which clearly exceeds the usual and foreseeable changes

Brief thoughts from England and Wales

1

Primacy of the contract

- What does the contract provide?

2

Contractual remedies

- Force majeure

3

Extra contractual remedies

- Illegality
- Impossibility
- Frustration

Scenario 2B: Financing arrangements/bonds

Model scenario – description

2B: Financing arrangements/bonds

Risk that payments up the financing chain will be delayed (in breach of contractual obligations):

- Investors may want to pull out
- The Fund may wish to keep its financing in place
- Fund may be limited in making payments to bond certain investors due to sanctions limitations, Fund may seek alternative arrangements or to be discharged



1

Primacy of the contract

- What does the contract provide?

Position of the investors

Option 1: insist on performance and sue for breach if payment not made



Potential push-back from underlying business:

- Force majeure
- Frustration

Position of the investors

Option 2: withdrawing investment



Relevant contractual provisions:

- MAC clause
- Remedies for breach
- Termination rights
- Force majeure provisions

Other remedies:

- Repudiation

Impact of sanctions

Sanctions background: Council Regulation (EU) No 833/2014

EU Commission FAQs on CSDs

Art 5e:

- Can be construed as a prohibition to EU CSDs to process on-going payment transactions for/to Russian issuers / bondholders / fund investors (e.g. interest rate payments; redemptions).
- Can be construed as a prohibition to EU CSDs to process securities sales/purchase transactions from/to Russian investors.
- Transition: applicable to securities issued after 12 April 2022.

Art 5b:

- Could apply for payments out of a settlement account (including “income payments linked to non-sanctioned securities”, as per EU Commission FAQ).

Impact of sanctions

Contractual setting:

Terms and Conditions of debt securities / fund units

- Undertaking to pay
- Discharge by payment to paying agent / CSD / bondholder (according to Terms and Conditions)

Agency Arrangements with Paying Agent/Clearing System

- Undertaking to procure for timely payment

Impact of sanctions

- Force majeure
- Illegality
- Frustration

2B: The Swiss Perspective

- Swiss Ordinance on Measures in connection with the situation in the Ukraine
- Adopts the EU sanctions
- Article 18: Prohibition to issue and trade securities and financial market instruments

Delay in performance

Articles 107 – 109 CO

Set appropriate time limit for subsequent performance

- compel performance and claim damages
- forego subsequent performance and claim damages for non-performance (positive interest)
- withdraw from the contract altogether and claim damages (negative interest)



Questions?

Contact us



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