Loan Agreements in CEE/CIS: Force Majeure and Payment Moratoria

June 2020

Start >

Contents

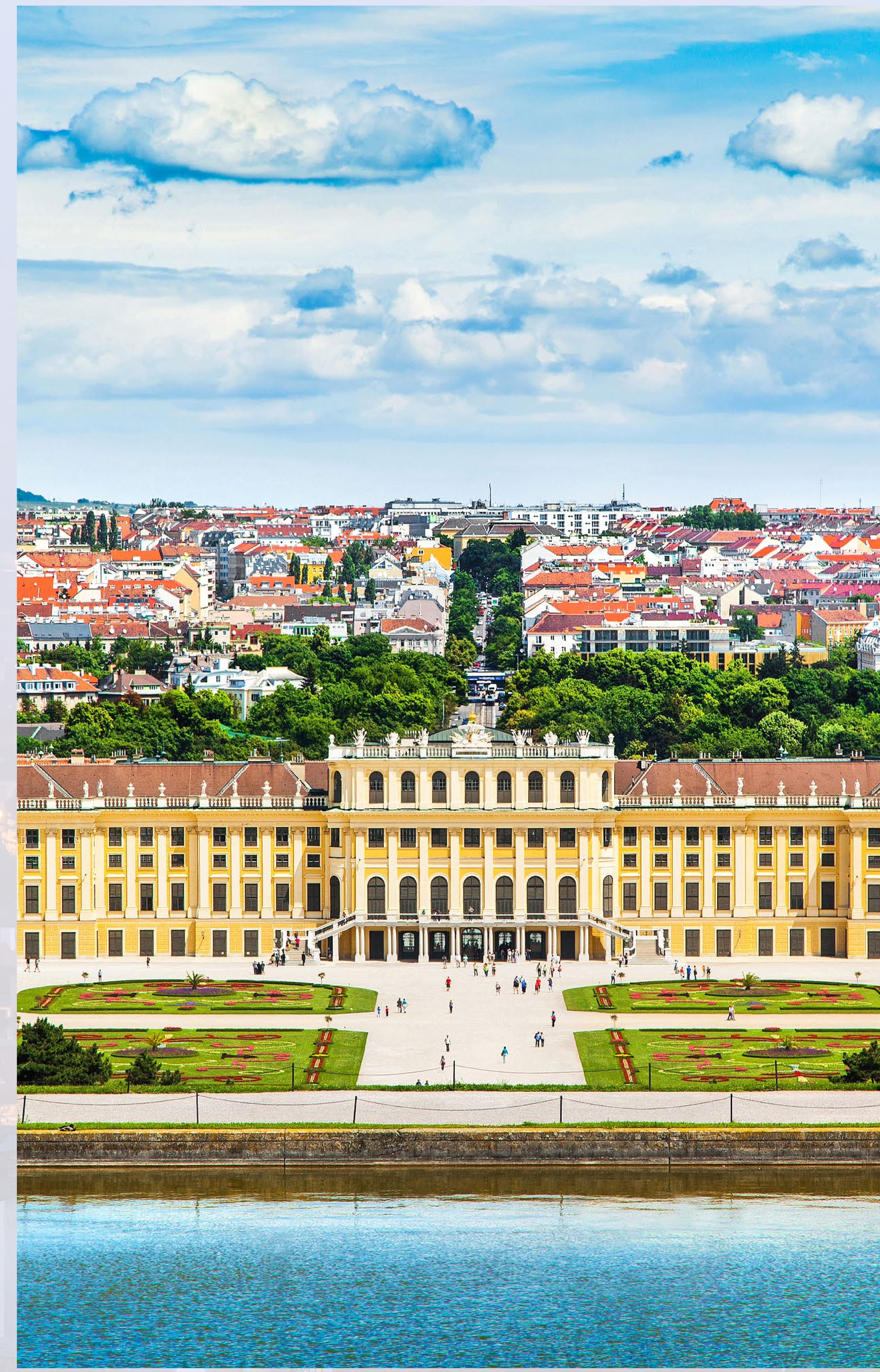
Austria

The market standard of loan agreements in the Austrian market is not typically to exempt the borrower from payment in a force majeure event. This is more seen in other types of agreements. Force majeure is not specifically defined under Austrian law, but there is case law that can help with the interpretation. For example, in 2005, the Austrian Supreme Court ruled that the outbreak of SARS constituted force majeure. Many agreements in Austria contain force majeure clauses, but these can be drafted in many ways. It is difficult to state in general whether the pandemic could exempt the parties from performance obligations; rather, a case-by-case analysis of the contractual arrangements is required.

Both LMA-style loan documentation and the usual in-house loan agreements in Austria typically contain MAC or MAE provisions. These provisions tend to be heavily negotiated and the precise wording will, therefore, need to be carefully analysed to establish whether a MAC or MAE could be declared. Given the global nature of the COVID-19 pandemic, it could be difficult for lenders to maintain without challenge that this event of default occurred, unless they argue it occurred in all other comparable financings to which they are party. In any case, the lender's rights under such MAC or MAE provisions are limited by law and such provisions could be invalidated by the courts if they could not be objectively justified.

In addition, on 3 April 2002 Austria implemented a three-month statutory standstill on principal and interest payments becoming due and payable between 1 April 2020 and 30 June 2020, applicable to consumer loan agreements and loan agreements with microenterprises. Given this legislation, lenders are not entitled to exercise any event of default, termination event or acceleration event on basis of the statutory standstill or a substantial deterioration in the borrower's financial situation.

Günther Hanslik
T +43 1 40443 3550
E guenther.hanslik@cms-rrh.com



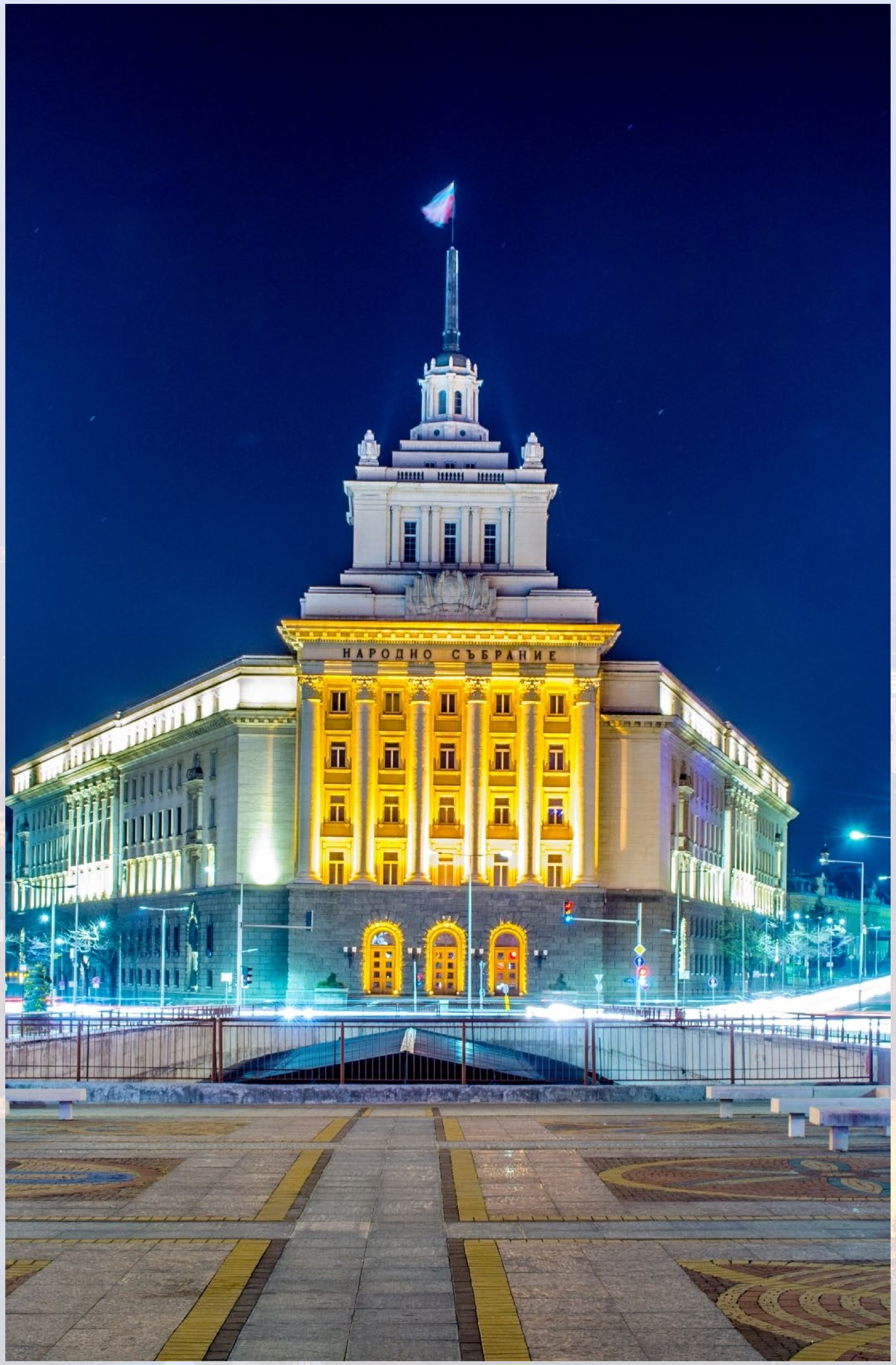
Bulgaria

Bulgaria introduced certain moratoria measures under the Measures and Actions During the State of Emergency and Overcoming its Consequences Act, announced by decision of 13 March 2020 of the National Assembly (the "Emergency Measures Act"). The Act was further amended in order to extend certain moratoria measures up to 2 months after the suspension of the State of Emergency on the 13 May 2020. According to Art. 6 of the Emergency Measures Act, "[u]p to two months after the emergency is suspended, upon a delay in the payment of obligations of private-law subjects under credit agreements and other forms of financing extended by financial institutions under Art. 3 of the Credit Institutions Act, excluding subsidiaries of the credit institutions, including where the claims have been purchased by other banks, financial institutions or other persons, default interest and penalties shall not accrue, claims cannot be accelerated and the contract cannot be terminated due to failure to perform."

Further, a private (non-legislative) moratoria has been sanctioned by the Bulgarian National Bank following the publication of the EBA guidelines in this respect.

The legislative moratoria may affect the parties irrespective of their choice of English law as the governing law of the finance documents, especially if these measures are considered to represent public policy or overriding mandatory provisions, which is likely given the nature of the state of emergency regime. It is yet to be seen how legislative and non-legislative moratoria becoming effective in Bulgaria will affect the relationships between obligors and lenders, particularly in club and syndicated deals that include a mix of foreign and local obligors and lenders.

Elitsa Ivanova
T +359 2 921 99 47
E elitsa.ivanova@cms-cmno.com



Croatia

Measures aimed at alleviating the impact of Covid-19 in finance transactions in Croatia have so far been implemented on both voluntary and mandatory level. On a voluntary level, all major local banks have implemented a measure of loan rescheduling (moratorium) and enforcement stand-still for certain client groups. However, the latest intervention from Croatian legislator affected financing transactions by introducing a mandatory stand-still on all enforcement and bankruptcy proceedings during the period of so-called "special circumstances" caused by Covid-19 outbreak.

These special circumstances are defined as events which could not have been foreseen and affected, and which endanger lives, assets of higher value, significantly detriment the environment, economic activity or cause significant economic damage. Duration of special circumstances is initially envisaged to last for three months starting from the date on which the act entered into force (i.e. 1 May 2020). Croatian Government can prolong the period for another three months. Suspension of the enforcement proceedings applies to all enforcement proceedings (save for enforcement of claims related to workers' wages, support allowance and for enforcement of monetary claims in the course of criminal proceedings). Although enforcement proceedings are temporary suspended during the special circumstances period, it is possible to carry out the enforcement proceeding nonetheless if a judge, in the light of the circumstances of each individual case, finds it is necessary to urgently carry out such proceedings regardless on the existence of the special circumstances.

During the period of special circumstances, should any of the bankruptcy reasons defined by the Croatian Bankruptcy Act occur, it will not qualify as a condition for opening of the bankruptcy proceedings. The debtors, however, preserve the right to file for the bankruptcy proceedings themselves. Also, in certain exceptional cases, creditors and/or Croatian Financial Agency are allowed to request the opening of the bankruptcy proceedings during the period of special circumstances.

Jelena Nushol
T +385 1 4825614
E jelena.nushol@cmslegal.hr

Czech Republic

The legislation introducing the loan moratorium measures has been passed in the Czech Republic. The measures have been implemented by the Act No. 177/2020 Coll., on Certain Measures regarding the Repayment of Loans during the COVID-19 pandemic (the "**New Legislation**"). The New Legislation is effective from 17 April 2020.

The moratorium (suspension of payments) introduced by the New Legislation applies primarily to repayments of the principal and is available for both commercial and consumer loans granted and utilised before 26 March 2020, although certain exceptions apply to loans secured by a mortgage and loans for housing purposes, which do not need to be utilised before 26 March 2020. Interest remains payable during the moratorium.

The moratorium is voluntary and applies only if the borrower chooses to opt in by sending a notice to the lender in which the borrower must state that it chooses to be protected by the moratorium due to the negative economic impact of the COVID-19 pandemic on it, and must choose whether the moratorium will apply to it until: (i) 31 July 2020; or (ii) 31 October 2020. The moratorium will then be effective from the first day of the month following the month in which the notice is delivered to the lender.

The New Legislation provides a number of exclusions from the moratorium's applicability, e.g. the moratorium is not available to: (i) loans under which the borrower was, as of 26 March 2020, in arrears for more than 30 days; (ii) loans granted for trading with financial instruments; (iii) financial instruments and related instruments; (iv) revolving/overdraft loans; (v) operating leases; and (vi) financial guarantees.

The New Legislation does not explicitly deal with the situation that the loan is granted by a foreign entity and governed by foreign law. However, according to the official reasoning set out in the New Legislation, it is intended that the New Legislation will follow a territorial principle, i.e. that it will apply to any loans granted in the Czech Republic irrespective of the governing law and regardless of whether the lender is a Czech or foreign entity.

Pavla Křečková
T +420 296 798 877
E pavla.kreckova@cms-cmno.com

Hungary

On 19 March, the Hungarian Government introduced a statutory moratorium which allows all borrowers to suspend repayments of loans disbursed by lenders in Hungary until the end of 2020. The moratorium applies to principal and interest payments, as well as fees.

Even if the facility agreement is governed by English law, the moratorium will apply if the lender was bank based in Hungary, the loan was disbursed to a Hungarian bank account and the borrower granted security over assets located in Hungary. Recent statements by the National Bank of Hungary suggest that the moratorium does not apply if the lender bank is based outside Hungary.

Erika Papp
T +36 1 483 4857
E erika.papp@cms-cmno.com

Poland

Poland has not yet introduced any ban or moratorium regarding financing transactions following the COVID-19 outbreak. However, there are some general rules/instruments in Polish law tackling extraordinary circumstances and supporting the just performance of legal rights that might affect transactions, including a Polish law element. We briefly summarise the main ones that could apply.

Abuse of rights

In accordance with Art. 5 of the Civil Code, a right cannot be exercised in a manner which would contradict its socioeconomic purpose or the principles of community life. Such act or omission by the person entitled will not be considered the exercise of that right and will not be protected. This provision forms one of the principles of Polish law, namely the protection against the abuse of rights. The abuse of rights in the context of contractual relationships may be invoked where, e.g. one party's demand for the performance of its rights being a right to receive performance from another party. In the past courts ruled that the provision may be used to: (i) rebut a claim for the payment of penalties; (ii) rebut a claim for the payment of interest; (iii) establish that in some circumstances the acceleration of a facility agreement may be qualified as an abuse of rights. The scope of application is very broad, however the courts narrow it down in assessing particular situations and usually refer to specific provisions regulating given legal relationships, as claims made solely on the basis of this article are generally prone to fail.

Extraordinary change clause (Rebus sic stantibus)

Art. 3571 of the Civil Code states that, if following an extraordinary change of circumstances, a performance (of an obligation, be it contractual or other) would be faced with excessive difficulties or threaten one of the parties with substantial loss, which the parties did not foresee when concluding the contract, a court may, after considering the interests of the parties, define the method of performing the relevant obligations and the degree of the performance, and even decide to terminate the contract, in accordance with the principles of community life (the Polish equivalent of a common sense approach). When terminating the contract, the court may decide on a settlement of accounts guided by the principles specified in the preceding sentence. Although this provision is designed to correspond to contracts in which the reciprocity of performances is more easily adjusted or reversed, such as sale/delivery contracts, it may still be a basis for borrowers/lenders suing other parties to loan agreements. It is important to underline the court's role in this type of dispute: courts look for very solid grounds that would lead to the application of this provision, the proceedings are usually long, and they rarely lead to the full satisfaction of claims. On the other hand, some case law specifically mentions 'epidemics' as extraordinary in this respect and we are yet to see how this pandemic will be tackled by the discussed rule, noting that the extraordinary character of events is just one of the conditions necessary for the application of this provision.

Michał Mężykowski
T +48 22 520 8307
E michal.mezykowski@cms-cmno.com

Romania

On 30 March 2020, the Romanian Government issued an emergency ordinance introducing a deferral of loan payments (including principal, interest and fees) for between one and nine months at the borrowers' discretion. The ordinance applies to individuals and companies alike and provides certain very limited eligibility criteria for borrowers, the control of which is left to the creditor banks being approached with deferral requests.

The ordinance provides that, until 15 June 2020, eligible borrowers could submit a deferral request to their lenders, with the lenders being bound to respond within 15 days from a borrower's request. While the ordinance seems to suggest that the only restructuring option available is that of an automatic extension of the repayment schedule by a period equal in length to the requested moratorium period, the parties to ongoing financing might also consider alternative rescheduling solutions that, e.g. would not lead to an extension of final maturity dates (and we have already seen parties agreeing upon such solutions in practice).

While it is questionable that such law was intended to apply to foreign law-governed agreements, there are arguments to consider that its provisions are of public order and therefore capable of overriding duly made arrangements with Romanian borrowers, particularly if the lenders are Romanian banks or local branches of foreign banks (which are explicitly included in the scope of the emergency ordinance). In practice, we have already seen several corporate borrowers submitting deferral requests under English law facility agreements with syndicates including both local and foreign lenders. Our current advice to lenders, foreign and Romanian alike, is to consider the commercial merits of such requests and engage in good faith negotiations with their borrowers to find mutually acceptable restructuring options.

Ana Radnev
T +40 21 407 3862
E ana.radnev@cms-cmno.com

Russia

To mitigate the impact of COVID-19 on the Russian economy, several prevention and supporting measures have been introduced, including a loan repayment moratorium, bankruptcy moratorium and deferral of lease payments for companies working in the sectors mostly affected by COVID-19 as well as SMEs. Lenders and borrowers who qualify for any of the above measures should also, in addition to the issues outlined above, discuss whether any of such measures may invoke any events of default or otherwise affect the borrower's performance under their English law loan agreements, e.g. in real estate finance transactions the borrower's financial condition may strongly depend on a cash flow from rent collection, which may be disrupted by deferral of lease payments.

Konstantin Baranov
T +7 985 764 58 45
E konstantin.baranov@cmslegal.ru

Serbia

Every contract is different and it may be affected in different ways, just like the businesses involved. The relevant documentation should thus be considered carefully to determine how the loan might be affected. In addition, the regulator in Serbia is very active in getting lenders and borrowers to reach an agreement by which they would overcome their current problems due to COVID-19. Once the payment standstill is ended (currently the end of June 2020, unless extended due to extension of the state of emergency), we can expect to enter a period of massive restructurings of existing loan agreements backed up with guarantees from the Serbian government, which enabled an easier procedure for state-issued guarantees for businesses which are affected by COVID-19.

Milica Popović
T +382 20 416070
E milica.popovic@cms-rrh.com

Slovakia

"Force majeure" provisions are starting to be included in underlying security documents to ensure that the party in charge of registrations (typically the pledgor) does not default for not registering the pledge/mortgage in time, as some registration authorities may be closed, e.g. the Central Depository maintaining the register of share pledges was closed for two weeks recently and is now working in restricted hours, or some formalities may not be observed, e.g. apostilles were unavailable in the UK until further notice, from 1 April 2020.

Regarding COVID-19 measures, until 31 May 2020 the enforcement of security and public auctions were not legally possible. In addition, the loan moratorium effective as of 9 April 2020 on consumer loans, mortgage loans and loans for SMEs and entrepreneurs who are individual persons should be considered. The loan moratorium is not automatic; the borrower has to apply for it, whereby the payment extension is nine months for banks/branches of foreign banks and three months (with a possible further three months) for other affected lenders. Foreign lenders are generally affected only if the loan agreement is governed by Slovak law.

As of 12 May 2020, the debtor is entitled to apply for a bankruptcy moratorium that has various statutory effects, including protection from creditor bankruptcy applications, the suspension of enforcement proceedings, the possibility of preferential payment of receivables directly related to business maintenance or security securing new financing or similar performances not effective in any eventual bankruptcy proceedings.

Zuzana Nikodémová
T +421 2221 115 25
E zuzana.nikodemova@cms-cmno.com

Ukraine

The Ukrainian authorities have adopted a range of COVID-19 protective measures in the finance sector which may also impact English law-governed transactions. One example is a prohibition on increasing interest rates under loan agreements during the quarantine period.

We believe such prohibition is unlikely to apply to English law-governed loan agreements. In the absence of guidance from the National Bank of Ukraine (the NBU) or the courts, however, it is difficult to predict how such prohibition will be interpreted in practice. For example, Ukrainian banks may take a more conservative view and interpret the prohibition to increase interest rates so as also to cover cross-border loans. Given that cross-border loans to Ukrainian borrowers are subject to notification to the NBU, and payments under those are controlled by the Ukrainian banks of the Ukrainian borrowers, such interpretation may pose a risk. Thus, it is recommended that the parties double-check with the Ukrainian bank servicing the payments under a loan agreement that it would not refuse to accept an update to the NBU database on increasing the interest rate or servicing increased interest rate payments on the basis of the prohibition on increasing interest rates.

The Ukrainian parliament has also introduced a ban on the export of certain goods, e.g. medical equipment and buckwheat, which may result in the inability of the obligors to perform their obligations under transactions on financing the export of such goods. EoDs may be triggered by a tightening of Ukrainian currency control regulations due to deterioration of the economic situation (although NBU reassures that no additional restrictions are planned). The Ukrainian Chamber of Commerce and Industry has confirmed that COVID-19 related restrictions may trigger application of force majeure provided, however, that there is a clear causal link between a default and a restriction and the underlying agreement provides for epidemics, health related state of emergency or other governmental restrictions as a force majeure event.

Ihor Olekhov
T +380 44 391 3377
E ihor.olekhov@cms-cmno.com

Our CEE/CIS finance team

» In the region for more than 30 years

» **18** offices more than any other law firm in CEE

» English law centre of excellence in the region

100+
banking and finance lawyers in CEE

» Advising on groundbreaking and innovative deals across all types of finance transactions and banking regulation

TOP RANKED BY LEADING LEGAL DIRECTORIES

» Supporting lenders and borrowers on Covid-19 related implications in the region

Further information, including a list of our offices, can be found at **cms.law**

English law centre of excellence in CEE/CIS - your key contacts

In addition to local law capabilities across CEE/CIS, we have extensive experience advising on English law finance transactions in the region. Benefitting from our 30 years presence in CEE, and with English law qualified lawyers on the ground in the region, we offer a unique combination of local and international expertise and are hence well positioned to advise you on English law and local implications on your finance transactions in this region. To discuss any issues on your transactions and projects in the CEE/CIS, do not hesitate to contact any of us:

Elitsa Ivanova
Partner, Finance CEE/CIS
T +359 2 921 99 47
E elitsa.ivanova@cms-cmno.com

Ana Radnev
Partner, Finance CEE/CIS
T +40 21 407 3862
E ana.radnev@cms-cmno.com

Paul Stallebrass
Partner, Finance CEE/CIS
T +420 296 798 805
E paul.stallebrass@cms-cmno.com

Elena Tchoubykina
Counsel, Finance CEE/CIS
T +7 495 786 4000
E elena.tchoubykina@cmslegal.ru

Eszter Török
Senior Counsel, Finance CEE/CIS
T +36 1 505 4938
E eszter.torok@cms-cmno.com