القرض المشترك او القرض المجمع في التمويل، المركز القانوني للبنك القائد والبنك الوكيل. بنك تاين قضية ومحاكاة

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ملخص البحث:
في العقود الماضية، كان هناك نقاش حول ما يسمى القروض المشتركة ، وعلى وجه التحديد ركز الخبراء على ، اولا، طبيعة العلاقة بين ما يسمى البنك المنظم والبنك الوكيل للقرض المشترك او القرض المجمع. تسعى هذه الورقة الى العمل كمستشار لبنك مفترض بأسم Tyne، وقد تمت دعوة هذا البنك للمشاركة في قرض مشترك. سيكون التركيز على قضيتين رئيسيتين. اولا ، شرح ادوار كل من البنك القائد والبنك الوكيل للقرض. وثانيا، تأمين وحماية مصالح Bank Tyne عن طريق انشاء درع من الاحكام الاساسية التي ينبغي صياغتها في عقد القرض المشترك. لذلك، من اجل معالجة المشكلة بشكل كاف، سيتم تقسيم هذا الورقة الى عدة اجزاء على النحو التالي: اولاً ، خلفية موجزة، ثانيا، مؤلفات وانتاجات الخبراء ذات صلة في بحث القرض المشترك وعن طريق فحص وتحليل الاعمال السابقة بشأن هذه المسألة ، على سبيل المثال، آراء النقاد واحكام القانون كما حددتها السوابق العملية. ثالثا، دور البنك المنظم والنك الوكيل. رابعا ، تفصيل الاحكام الاساسية التي يجب تضمينها في عقد القرض المشترك لتأمين حماية مصالح Bank Tyne. واخيراً، استنتاج خاتمة من كل ما قيل في هذه الورقة لتكوين نصيحة قانونية عملية لتقديمها الى Bank Tyne.

الكلمات المفتاحية \ Key words:

- القرض المشترك او القرض المجمع Syndicated loan
- البنك المنظم Arranging Bank
- البنك الوكيل Agent Bank
- البنك المدير managing Bank
- حماية قانونية Legal protection
- الاحكام الاساسية Fundamental Provisions
- قرار التكليف The Mandate
- الواجب الائتماني Fiduciary Duty
- بند Clause
- التخلف عن الاداء Default

Syndicated loan in financing, the legal position of the lead bank and the agent bank. Tyne Bank a simulation case study

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Abstract:

In the last few decades there has been a debate on the so-called syndicated loans, specifically, commentators focused on, firstly, the nature of the relationship between the so-called the arranger/agent bank of the syndicate and the other participants' lenders. And secondly, the rights and duties of each party in the syndicate to determine whether a fiduciary duty is owed by the manager/agent bank to the syndicate. This paper is seeking to serve as an advisor for a Bank called Tyne, this Bank has been invited to participate in a syndicated loan. The focus of the advice will be on two major issues. Firstly, explaining the roles of both the lead Bank of the syndicate and the agent Bank of the syndicate. And secondly, securing and protecting Tyne Bank's interests by creating a shield of essential provisions that should drafted in the syndicated loan contract. Therefore, in order to address the issue adequately, this document will be divided into many parts as follow: Firstly, a brief background, secondly, a relevant literature investigating the syndicated loan by examining previous work on this issue, for example, critics views and case law. Thirdly, the role of the arranger bank and the agent bank. Fourthly, detailing the core provisions that must be included in the syndicated loan contract to secure a protection to Tyne Bank's interests. And finally, draw a conclusion by pulling and narrowing all the said in this paper to form an advice to present it to Tyne Bank.

Introduction:

In this part of this essay and before proceeding into discuss some of the milestones in the journey of the syndicated loan scheme, let us start with defining this phenomena, it seems that many commentators have agreed on a general definition, this can be seen in the work of Ross (2006) which correlates the work of Eallinger (2010) which states that a syndicated loan comprise of a group of lenders commit to lend an agreed amount of fund to one borrower under a single loan agreement. However, here a distinction between loan syndicating and loan participating must be consider as this might affect the legal position of each member of the agreement, as for syndicated loan, for many reasons, such as, high risk and large projects that no one lender is able to be commit to lend alone, therefore, a syndicated loan consists of two or a group of lenders commit to make a separate loan on a basis of a proportion to a one borrower, and this transaction must be governed and implemented under a single loan agreement. However, a participated loan, where a leading bank commit to lend the whole amount to the borrower with the exclusivity to sell a proportions of that loan to other lenders (ibid).
It could be argued that the syndicated loan scheme dated to the seventh decade of the last century. However, a tangible flourish could be found during the oil crisis of 1973 in the United States of America. As oil prices rocketed which result that banks were filled with cash deposits from countries that exporting oil and then this cash was leaked out in a form of syndicated loans to countries importing oil. Another factor contributed to the picking up of syndicated lending is the surge of the U.S leveraged buyouts in the 1980s. Also, a third factor was a major contributor to the popularity of the syndicated loan that is the growth in corporations markets, because of the easy and quick arranged loans on the one hand , and the affordable access to financing compared to other financing facilities, for instance, stocks and bonds. Furthermore, Armistrong (2003) suggests that another factor which facilitates the widespread of utilising the syndicated lending scheme, is that syndicated loans can be considered as a new class of assets, currying an unusual investment features which impressed other investors. Moreover, this evolution has been expedited by introducing the so-called credit rating on loan agencies which developed the widely popular indexes of prices and rates of return which offer a great opportunity to compare with other assets.
As for the situation in Europe, despite the fact that the European syndicated lending market has flourished a couple of decades after the U.S. market, European syndicated loan scheme grows rapidly with the adoption of the euro as accounting currency in the late of the last century. However, unlike the U.S, in Europe this prosper of syndicated lending has met many obstacles, for instance, the U.S. syndicated lending has been flourished primarily by the

institutional participation, such as, mergers and acquisitions, for example, telecom mergers. Whereas, on the other side of the Atlantic, in Europe, it could not compete with the U.S as institutional participation suffered the problem of cross border complexities which implemented in the deficiency of standardization which is necessary to provide the so-called automation that characterized the U.S syndicated loan industry. In this regard, a great effort to achieve that standardization above is can be illustrated in the alleged effective effort was more decade ago by a trio of major expert institutions in the banking industry, they were, Loan Market Association, the Association of Corporate Treasurer and key City law firms.

The role of the arranger bank and the role of the agent bank:

This part of this essay will discuss the roles of the arranger bank and the agent bank in the syndicated loan. However, it seems that there are some issues might arise when investigating these roles, such as the nature of the relationship between the members of the syndicate. For instance, the sensitive issue of the fiduciary duty that owe to the syndicate's members by the arranger/agent bank. Furthermore, this paper found out that a dilemma might be created which it is centred on the lead bank's position, as on one hand the fiduciary duty that owes to the members of the syndicate, and on the other hand the duties such as, being agent for the borrower, duty not disclose and the confidentiality that woes to the borrower.

Firstly, let us consider the role of the lead bank

Before discussing the role of the lead bank, one issue need to be clarified. Despite the fact that it was not clear that who invited Tyne Bank to participate in the loan, whether the inviter was the borrower or the lead bank, as this could affect the legal position of the participants of the syndicate. In this regard, commentators have distinguished between two categories of syndicated loan. The first category, the "participating syndicate" which simply when the borrower grant a mandate to a lead bank, and that bank commit to secure the whole amount of the loan which is very risky on one hand, but on the other hand it retains the privilege being able to sell participation portions to other lenders, the lead bank here will be a concern of critics, which implemented in the dual relationship with the borrower and the lenders. And secondly, the "true syndicate" where the borrower engages with each lender directly (Ross, 2006. P. 55).

The lead bank:

According to Warn and Elliott (2005) the lead bank is, the bank who won the mandate, it also could be called the arranger bank, the first step after the mandate been secured is to put the syndicate together by approach a potential lenders to attract them to participate in the syndicate through designing a suitable loan structure and credit proposal. On the other hand, continue the negotiation with the borrower a variety of issues such as the security of the facility, the terms and provisions of the contract and identifying the borrower's needs. However, the next parts of this paper will discuss vital aspects involved the lead bank within the syndicate.

The mandate:

It has been said that those who intended to be a lead bank needs to contest to be rewarded the so-called the "mandate". Once the mandate awarded, the process to form a syndicate starts. The syndicate is particularly created to underwrite a loan. However, when referring to syndicate, traditionally refers to two aspects firstly, the syndicate's size which means the number of members, and secondly, the syndicate set up which is reflects in the shares of the loan that granted to each participant. Critics and commentators agreed that a confusion may arise when discuss the syndicated loans, that may relates to the diversity of titles that can be given to the various roles in the syndicate. For instance, the lead bank can also be called the arranger. However, it seems that the hierarchy (portion size of the loan) might be playing the primary factor to determine the roles whether arrangers, agents and finally, participants. For example, the lead bank usually acquires the largest portion of the loan. However, in some instance, the whole loan could be sold to the participants (Dennis and Mullineaux 2000).

After winning the mandate, there are two approaches to underwrite the loan. Firstly, best efforts approach, where the lead bank accepts to secure a certain share of the proposed loan and will market the remaining portion to other lenders, according to this method, there is no guarantee from the lead bank to the borrower that the target finance will be subscribed, but will depends on the success of the marketing and subscription process. Furthermore, both the lead bank and the borrower are reserve the right to cancel the syndicate if become clear that the proposal not attractive or subscription insufficient to secure the loan.

As for the second approach, it called "firm commitment" where the lead bank legally binds to underwrite the entire loan. Commentators believe that although there is high fees due to the high risk of this approach lead banks rarely engage in such approach as in the event of failing to find subscribers to the loan, lead bank obliged to underwrite the entire amount.

The lead bank and the so-called "information asymmetries and moral hazard":

It has been said that a steady development on the role of the lead bank can be seen in the mediation position between the borrower and the other lenders in the syndicate. However, the lead bank is an investor seeking to sustain business with the borrower, but this target may be achieved at the expense of the syndicate members. For instance, the information asymmetric represents a great opportunity to obtain larger or lower portion in loans, but lead banks are unwilling to do so, this is due to the fact the lead bank seeks to preserve a positive reputation among potential lenders to ensure their engagement.

The information memorandum:

Usually, the borrower is liable and responsible for the information memorandum because simply this relates to its ownership of that document. This document is necessary to be circulated to nominated candidates who might be members of the syndicate, the liability arose when an event of misstatement, misleading or omission of a material fact occurred, against this the common law has provide a remedy by considering any breach as an event of default. However, a problem will arise here when the borrower went insolvent and the members assumed that the lead bank is liable as its role was the channel between the borrower and the syndicate members. However, the case of ***Royal Bank Trust Co. (Trinidad) Ltd. v. Pampellonne*** **[1987] 1 Lloyd's Re.218, PC** affirmed that a ministerial action does not imply that the lead bank could be treated as the borrower's pure agent (Ross, 2006, p.62). In contrast, many commentators believe that, since the information memorandum was prepared with a close engagement by the lead bank, it is suggested that a liability could be impose in the event of lack of reasonable care to secure the accuracy of the information provided. This correlates Ellinger (2010, p. 782) by looking at the case of ***Sumitomo Bank v. Banque Bruxelles Lambert*** **[1997] 1 Lloyd's Rep. 487** where the lead bank may consider liable if it marketed the loan on the grounds of misrepresentation or negligence.

However, Ross (2002) believes that the lead bank may be immune from liability in this regard, as first, the syndicate member will have to prove that it engaged in the agreement with in reliance on the information memorandum, and I may not have done so. Secondly, a syndicate member will face difficulty to overcome the so-called disclaimers and exclusion clauses that the memorandum contained which states that the lead bank is not making representations, and that accuracy should be made by each member's assessment. Moreover. This proposition supported by the Unfair Contract Terms Act 1977 as it says that there are no controls applied on commercial contracting between financial institutions, unless there are evident of false statement by the borrower with the consent of the lead bank or fraudulent by the lead bank (ibid,p. 62).

The legal status of the relationship within the syndicate:

There have been claims that the relationship that governs the syndicated loan can be described as a form of a joint venture or a partnership as this paper will show later. However, critics have discussed this matter and concluded that, there are few remarkable features which made the syndicated loan unique.

Firstly, there will be the severalty clause, which means commitments and rights of each member are separate. For example, member failed to fulfil its commitments does not release other members of their commitments. Moreover, despite that some borrowers might impose clause compelling the lead bank to make an effort in finding another lender in case of defaulting of a lending member, members are not responsible for the commitments of its colleague in the syndicate. However, there is the concept of being bound by the decision of majority or unanimous. For instance, in the event of borrower's default, rescheduling of instalments and amending the agreement.

And secondly, the sharing clause a pro rata, which means that each bank accepts to share with the other banks recoveries from the borrower with consideration to the proportion of the contribution of each lender. These recoveries such as litigation proceeds, a discriminatory repayment and recovery in a form of set-off, taking into account the proportion that each member has contributed (Ross, 2002; Ellinger, 2011; Mugasha, 2004).

Let us investigate this relationship in further details. It has been dismissed by commentators that the nature of syndicated loan could be described as a partnership. For example, the case of *Re Canada Deposit Insurance Corp. and Canadian Commercial Bank* [1993] 97 DLR (4th) 385 (SCC) where section (1) of the Partnership Act 1890 applied, and the court did not looked at sharing gross profit or return but looked instead at the situation where each bank curries on its own expenses in the syndicate. In addition, it has also suggested that it is not a joint venture, this was simply relates to describe it as a unique legal relationship employed for a single undertaking, see the case *of United Dominicans Corpn Ltd b Brian Pty Ltd* [1985] 157 CLR.1.

However, the controversial case of *Credite Francais Internationl SA v Sociedad Financiera de Comercio CA* [1985] CA 490 NYS 2d 670, where the court held that the syndicate is a joint venture was relates to the absence of the severalty clause.

From the above, unlike partnerships or joint ventures a syndicated loan seems unique, this relate to the separate independent liability of each member of the syndicate, as the severalty clause and the sharing clause affirm this proposition.

Fiduciary duty:

When investigating a syndicated loan it is a committed of sin if omitting the concept of fiduciary duty, specifically, the fiduciary duty on the lead bank to the members of the syndicate. In this regard, looking at the remarkable case of *UBAF Ltd. v. European American Banking Corp* [1984] QB 713, 728 and its extraordinary comments by Oliver and Ackner LJJ "...[t]he defendants were acting in a fiduciary capacity for all other participants. It was the defendants who received the plaintiff's money and it was the defendants who arranged for and held, on behalf of all the participants, the collateral security for the loan. If....it was within the defendant's knowledge ..... whilst they were carrying out their fiduciary duties that the security was...,inadequate, it must,.....have been their duty to inform the participants,.......continued failure to do so constitute a continuing breach of their fiduciary duty." (Ross, 2002, p. 59; Ellinger, 2011, 785).

However, Ellinger (2011) suggests a radical different approach to the UBAF case in his analysis. Firstly, the court did not hear the whole debate on the fiduciary matter. Secondly, the outstanding relationship that connects the borrowers with UBAF bank may led Ackner LJ to conclude that there is a fiduciary duty. And finally, it was unusual that UBAF was also acting as the security's trustee for the syndicate. He went further in calling to not consider the UBAF case as a blank cheque in the future court decisions in forcing fiduciary duty on lead banks. Furthermore, he supported his claim by evoking many cases from the United State showing the American courts hesitation to impose fiduciary duty on lead banks. For instances, the cases of *Banque Arabe el Internationale d'Investissement v. Maryland National Bank*, 819 F. Supp. 1282 (SDNY 1992) and the case of *Banco Espanol de Crideto v. Security Pacific National Bank*, 376 F. Supp. 36 (SDNY 1991) where the American courts dismissed any fiduciary duties on lead banks considering that the relationship between the lead bank and other lenders is in the scope of an arm's-length between commercial groups. However, to eliminate this dilemma, in the recent decades, the vast majority of syndicated loan agreements contain provisions stating clearly that the agreement is not impose fiduciary duty on any member in the syndicate. In contrast, Langley J in the case of *Samitomo Bank Ltd v. Banque Bruxelles Lambert S.A* ruled that a presence of those provisions does not mean prevention to apply the common law duties of care, and held that the lead bank was liable to owe a duty of care to the syndicate's members.

As for the agent bank's role:

It seems that there is a common sense in the lending industry that the agent bank's role is acting as the liaison office for the syndicate with the borrower. Its role centres on administration of the syndicated loan and serve as communication point between the syndicate banks and the borrower. This vital role begins with the effectiveness of signing the loan agreement which lead to the syndicate to appoint one of its members as an agent. This means that the agent bank will be involved to fulfil many duties and consequently liable to any breach of its duties. Duties such as, acting as a channel for withdraw and deposit of payments, receive the documents from the borrower which form the condition precedent and any other documents, But worth noted that as a general practice, the agent bank is not require to check the accuracy of any documents. However, it is expected to exercise a duty of skill and care with regard to monitor the borrower's situation, specifically, the event of default. Surprisingly, it is usual that the agent bank exempted from liability to the syndicate, except if it has committed a deliberate misconduct or an extreme negligence.

It could be argued that a prima facie relationship established between the agent bank and the members of the syndicate. This prima facie agency relationship evolves from the loan agreement which means usually that the agent's appointment not included in the loan agreement with the borrower. However, it has been claimed that the agent's role in the syndicated loan is slightly different from a standard agent's role in other relationships. Therefore, it is vital to investigate the agent bank's role in order to determine the nature of the relationship between the agent bank and the syndicate members.

Usually, an agency means a relationship in a legal form which implied an "authority or capacity" in one person, and this relationship can only exists when there is a consent of the principal.

To tackle this proposition and to enable the agent bank to pursue its duty without confusion, it is recommended that the agreement may contain clauses that indicate an exclusion of fiduciary duties that an agent bank owes to the members. However, despite the fact that an existing of such a clause may not sometime is efficient to exclude fiduciary relationships. For example, the case of *Customs and Excise Comrs v Pools Finance (1937) Ltd* [1952] 1 All ER 775, CA where the Court of Appeal dismissed the effectiveness of the exclusion clauses and held the essence of the transaction reflected an agency, stating that a determination of fiduciary duties could be achieved by inspecting the essence of the relationship between the members in a normal events and circumstances, this has been correlates with Wilson J theory in the case of Frame v Smith [1987] 42 DLR (4th), where it was suggested that a consideration must be given to the capability of exercising a discretion unilaterally, this unique position has offered the agent bank to establish a legal affair between the members and a third party, subsequently, affecting the members' interests.

Furthermore, a traditional loan agreement commonly provide that when the Agent practices a power to an issue that not clearly stated that the action is protected and it is in pursuance with the majority guidance. However, lack of such guidance, the agent act suitably in considering that would be binding on the syndicate. For instance, the agent's authority to declare event of default.

(b) The key provisions as a participating bank that they should seek to ensure are in the syndicated loan agreement to protect their interests as a participating bank:

The purpose of this part of this document is to investigate the fundamental provisions that parties and specifically Tyne Bank aiming to include in the agreement of the syndicated facility. Practically, lending agreements are described to be varied in details to a great extent. However, there are common features which have been employed to mitigate the credit risk that any bank faces in advancing moneys and, in the more elaborate and international facilities, other risks such as those arising from the market disruptions, and governmental actions which interferes with the performance of the borrower's obligations. This section of this essay is dedicated to investigate proposed provisions must be included in the syndicated loan agreement.

PURPOSE CLAUSES and ILLEGALITY:

It has been suggested that the common law awards lenders the so-called proprietary claim in the event of failing to fulfil the specific purpose of the loan or the borrower failed to employ the loan for the specified loan purpose, this can be demonstrated in the right to claim a traceable proceeds in the event of insolvency affected the borrower, looking at the case of *Gibert v Gonard* [1884] 54 LJ CH 439 (Pillip, 2007, p.45) where the court held that there was misapplication of the purpose of the loan. Furthermore, Ross (2002) suggests that in the event of infringement of the purpose clause that the contract contains them a default will be applied and the loan may be subject to the so-called Quistclose trust. For instance, the case of *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] AC 567 where it was held that clearly that the loan was used for another purpose which is payment of dividends. In addition, if the lender becomes aware of illegality of a facility, such as a breach of regulations, English law rejects any attempts to recovery and consider it void. To illustrate this, the case of Merchandising v Cloke [1963] 2 QB 240 where the purchasing was against the gambling legislation (ibid, p. 46)

Conditions precedent:

Traditionally, a loan agreement will include conditions precedent, or pre-availment conditions, they are a variety of requirements that the borrower must accomplished before spending any expenses to initiate the loan. Its purpose is to make sure that the interest of the lender is protected and the loan's contract is legitimate and an executable. For example, documents that presented to the lenders, such as the board's resolution approving the facility, and documents written by the authorities regarding the company.

Furthermore, Wood (2007) believes that since the condition precedent is a satisfactory requirement, violation will result a suspension of the obligation to make loan but not cancellation of the loan. For instance, the case of *Barclays Bank v Kufner* [2008] EWHC 2319 (Comm) where the case involved two loans for and a purchase of a yacht. However, the outcome was a default notice was issued under the first loan, where the claimant lender had acquired a guarantee from Mr Kufner, as security for a loan.

Representations and Warranties:

It could be said that representations are statements contributed and motivated the other party enter in a contract. As for warranties, they are assurance in a transaction, the case of *schawel v Reade* [1913] 2 Ir. Rep 81 (Fisher and Greenwood, 2007, p.145) where the plaintiff was examining the horse, and then the defendant stated that the horse sounds perfect, and would inform the plaintiff if there was something wrong, the plaintiff stopped his examination. However, after the purchase, it appears that the horse is unsuitable for the purpose of stud.

It has been claim that representations and warranties are similar to conditions precedent as they deal with the status of borrower such as the inexistence of a default or the legitimacy for engaging in the agreement. Furthermore, representation got further to include accuracy of the accounts and there no experiences of material adverse change after the draw up. Moreover, under the common law, issues such as, lack of update or omissions or changes after distributing the information memorandum will consider as a default. Moreover, the ambit may include subsidiaries and the guarantor.

To illustrate the importance of representation is to look at the case of *Smith New court securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1994] 1 WLR 1271, Court of Appeal (Burrows, Mckendrick and Edelman, 2007, p. 866) due to a fraudulent misrepresentation the claimant was persuaded to purchase some shares in a company. However, after the purchase it came to the claimant attention that the company is a casualty of fraud which results a dramatic fall in the shares price. However, the court ruled that damage should be evaluated according to the price on an open market at the time of the misrepresentation.

The voting clause:

Majority banks can be identified in a syndicate those who control at least 66.66% of the total unpaid amount of the principal in the loan (Mugasha, 1997). Looking at the case of *Redwood Master Fund v T D Bank Europe* [2002]

EWHC 2703(Ch), [2002] AII E.R. (D) 141where the court ruled in favour of the majority decision against the unhappy minority were in a worse position, the court decision was according to a clause in the syndicated contract facilitating the majority to dominate the minority by binding them. From this instance, it appears that a vulnerable minority in a syndicate without a protected voting clause may place their interest in a difficult position

Payment, Prepayment and Repayment clause:

It has been pointed out that borrower's commitments to pay interests and repay the loan has laid in the agreement. Moreover, there also be provisions to preserve the lenders' profit from reduction or fluctuating during the loan's period. To respond to this, according to the agreement, the borrower will meet expenses such as increase in interests' rate or taxes.

Payment of interest:

Interest is payable in a certain time such annually or quarterly, either in advance or later. Also it could be payable as a fix percentage or floating rate. However, the base for syndicated loan interest is the so-called prime rate which is a floating rate and this is the situation in London Eurocurrency market and Canada.

It could be argued that the law has left the market with some ambiguity with regard to a loan agreement is not equipped to force the borrower to pay interest or to consider interest is one of the contract ingredients. The case of *Canada Insurance Corp. v Canadian Commercial Bank* [1992] 3 S.C.R 558 (Mugasha, 1997, p.151) where the court dismissed the automatic integration of interest in the agreement as the interest is "not a loan or a component part of a loan". Furthermore, the court described the interest as a cost of borrowing.

The principal's repayment:

It has been said that a term loan will include payment as instalments on a specified dates, and the currency of payment. In general, syndicated loan contracts allow voluntary prepayments. However, it has been suggested that lender is better off with instalment rather than receiving the total loan in one sum at the end of the period, therefore, restrictions may be imposed, such as borrower unable to prepay until a certain tome expire or borrower obliged to give notice indicating the prepayment amount and date.

A problem arises when the borrower is in a likely insolvent or in circumstances out of control, which usually leads to refinancing.

Early Repayment:

Looking at common law, there is no proposition to early payment. However, permission could be under the agreement. Usually, in a term loan, early repayments are a concern of lenders as it leads to shorten the life of a valuable asset (the loan). Therefore, in the agreement, lenders sometimes impose additional payment if the borrower wishing to invoke prepayment, this perhaps relates to two factors. Firstly, to discourage early prepayments which reduce the life of the loan and the profits. And secondly, to compensate the lender for losing margin of the shortened period. Therefore, the majority of loan agreements include mechanism such as prepaid amounts will be treated as repayments instalments in inverse order.

Set off:

Under common law, it is a right emerging from relationship of the contract between the bank and the customer, it aims to identify the rights between them, such as parties may contracted out of its right of set-off or the perception to keep the accounts separate with exclude set off against each other, and secondly, in an international loan, set off will utilise whether cross-boarder set off permitted or not.

Set-off could take may aspects, such as liquidator of the insolvent bank purported to exercise a set-off between the borrower owed the lead bank against the borrower's account balance at the bank, the purported set-off was between the borrower and the participant, also on the borrower's default or its insolvency, or that of the participant, there were attempted set-off whereby the solvent party wanted to by-pass the lead bank and access directly an account held with the insolvent party.

In the relationship between the bank and the customer, set-off is the discharging of the reciprocal obligations, means that the customer and the bank owe each other debts on accounts held between them, so the right of set-off is generally invoked on the termination of that relationship or was there is a financial problem facing one of the parties, such as default of a borrower or insolvent of a lender. It has been said that banks are in the position to exercise set-off , simply when a customer maintains two accounts at the same branch, so in case of a default, the bank will be entitled to combine both accounts to establish the final position of the customer. Conversely, in case of the bank become insolvent, the customer is entitle to net his credit and debt position to establish how much he owes or owed by the bank, it is a utility to enable party set-off to recover the amount ahead of other claimants to the same fund Coco-Cola v Finsat International [1996].

FORCE MAJEURE AND REMEDIES:

There have been a number of disastrous incidents in the last few years that have negatively impacted the performance of loan contracts across the globe. For instance, the Icelandic volcano's eruption, the earthquake and tsunami of Japan, and the so-called global recession and financial crisis of 2008. In addition, there has been the recent unrest in the Arab world. Incidents such as the above instances arguably jeopardised the ability of the parties from fulfil their roles in the contracts.

According to Ross (2002) borrower is enjoying a privilege that not obliged to draw on a loan. However, critics concern that a lender may not enjoy this privilege and may be obliged to lend in the instance when a notice of draw down granted. Arguing that a major and unexpected alteration in the economy or a serious damage to the borrower's circumstances may halt further lending to pursue. Moreover, it might have been the agreement that contains an illegality clause, also, when an extraordinary incident which means that materially and adversely impacted the borrower's performance in meeting its obligation. For instance, where there is an event of default. In this regard, the common law provides that any lack of such specific provision companioned with such circumstances not obliged the lender to lend and the only adequate remedy is damages, to demonstrate this, see the case of *South African Territories Ltd. v. Wallington* [1898] AC 309 (HL) (ibid, p.306). However, specifically, if an unsecured loan was the case, as here, an unequal situation will be established as the borrower will obtain the fund, whereas, the lender is the vulnerable party looking for being repaid. In this, the case of *Loan Investment Corporation of Australasia v. Bonner* [1970] NZLR 724 (PC) where the Privy Council states that "[w]ithout elaboration, that in exceptional cases specific performance might be awarded in the case of an unsecured loan agreement" (ibid, p. 306). A note worth mention, is that force majeure should not confuse with frustration of contract

Frustration of contract:

It could be described when a party faces an external circumstances that could lead its action to be impractical, exhausted and impossible to accomplish the contract. According to the English law, as a remedy to frustration of contract is a termination of the contract which means that the parties are released from committing further performance. However, there are many conditions to consider a contract being frustrated. Such as, it must be unforeseen, occurred without both party's fault, and it must lead to destroy the contract's purpose. Moreover, there should be no provisions dealing with the described event, otherwise relying on frustration could be dismissed arguing that the contract has dealt with such risks. This can be demonstrated before the English courts where it is difficult for parties trying to invoke such a scheme, as many attempt have failed such as, dramatic drop in the market or global recession.

To illustrate this, looking at case of *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856 (Andrews, 2011, p. 459) where the court ruled that the supplier was able to secure similar goods from other sources to fulfil its commitments.

Frustration compared to force majeure. A difference is that English law does not deny parties to rely on FM clause with regard to an event that existed at the time the contract was concluded as long as the incident come under its terms, meanwhile, frustration is applicable where there is an unexpected unforeseen event. On the other hand, FM clause can be invoked even if the parties were expecting and taking into account the likely event when they engaged into the contract.

Covenants:

Unlike representation and warranties, covenants are dealing with actual events, it has been suggested that covenants are commitments by the borrower with regard to the future events (do or not to do), they include providing specific information on a regular basis, such as assets will not be disposed (anti-disposal covenants*) Kelly v. Central Hanover Bank & Trust Co., 11 F Supp. 497,504-5 (SDNY* 1935) (Ross, 2002, p. 314). , enter into mergers (anti-mergers covenants) and certain ratios should be maintains. Furthermore, there are other aspects of covenants, such as the so-called negative-pledge and the *pari passu* clauses, these have been claimed to be employed to implement an equal ranking of the indebtedness.

It has been said that there are legal consequences to the breach of the covenants, and these might rank equally to the warranties and representations, this relates to a consideration that covenants constitute to be part of the default clause which means that the syndicate is permitted to accelerate repayment and cancel any stand by obligation. However, a note worth mention is that due to the fact that lenders in a syndicate are reluctant to utilise the default clause as they would rather to invoke other remedies such as rescheduling or suing the borrower for damage.

Looking at environmental covenant, it could be argued that lenders are not in a position to prevent damage or rule over the wrongdoer, therefore, it unfair to suggest that lenders under duty to prevent spoilage. Looking at the European Union Commission’s white paper, it suggests that “[l]enders not exercising operational control shall not be liable” (EC, 2006). However, lenders are obliged to consider steps such as maintain contact with the environmental regulatory and imposing environmental audits to secure environmental covenants.

The default clause:

It is commonly agreed that in the instance of default the lender is able to sue for losses, or cancel the facility if it was a serious default.

In terms of a written facility, it will contain a default clause which a wide scope of events entitled the lender to treat as a default. Surprisingly, additional remedies to the general law ones can be obtain under the event of default. For example, for unsecured loan, remedies such as cancelation of any outstanding obligation and acceleration of payment and for secured loan, the lender is empowered to appoint an administrator to dispose of the assets or run the business.

Events of Default:

The events of default could be no payment of principal, a breach of the covenants, actions indicating a default, such as insolvency and many other obligations in the contract,

A note worth mention is that not necessary to automatically default when occur any incident under default clause, as it might be other requirements such as grace period. However, sometimes default cannot be declared unless there is breach, in the case of Pan Foods v. ANZ Banking Group [2000] 74 ALJR 791 (HCA) (Ross, 2002, p. 322) where the borrower was trading on losses which evidently limit the ability to repay.

Cross Default:
Critics describe the cross default clause as a crucial and could cause a major damage to all parties, that is simply relates to a default by the borrower under another contract with another lender. Also, a lender may found its debtor in an event of default even has not chosen to do so. In a syndicate, protection of lenders may be obtained by agree on which defaults are material and not material on other in indebtedness, this to define clause which trigger an event of default and its remedies.

According to Mugasha (2002) a problem may arise which is the automatic operation, as it unnecessarily may trigger other defaults. Furthermore, it could lead to a chain of insolvencies as it means that all outstanding loans are immediately payable and already the borrower is unable to pay interests or repay the principal which may result in dragging the borrower's subsidiaries and the guarantors.

Acceleration clause:
It could be argued that acceleration clauses categorised under the default provisions as long as it concerns recovery of principal and interest, usually lenders are seeking to protect their interests by making these clauses as contractual provisions, the magic of this type of clause is that, lenders are permitted to demand a full repayment or additional collateral when there is uncertainty or deterioration in the borrower's financial circumstances such as,

event of default or even missing to pay one instalment in other word insecure. For instance, the cases of *Call v. Seymour* [1884] 40 Ohio St. 670 (1884); *Harris v. Kessler* [1932] 124 Cal. App. 299, 12 P.2d 467 (Dist. Ct. App.1932) (Leaf, 1970, p. 532). Moreover, it could go further to cover other grounds such as collateral being sold by the debtor, see the case of *Parks v. Hallett & Davis Piano Co* [1916] 145 'Ga. 671, 89 S.E. 715 (ibid)

Acceleration clauses are popular in contracts concerning sales on credit and loans. However, critics believe that despite that this type of clause is useful and in favour of creditors, it triggered a default which leads to a series of accelerations therefore harming potential business relationships.

As for the common law in the event of insecurity type, with the absence of the default type acceleration, creditor is obliged to justify the utility of the acceleration clause. From here, was the establishment of the rule "[p]ure heart and the empty mind", standards of common law require the creditor to be honest and implement the good faith principal when prove that he feels insecure. However, in the case of *Graf v. Hope Bldg. Corp* [1930] 254 N.Y. 1, 6, 171 N.E. 884, 885 (ibid, p.533;Cordozo, Sainer, and Wagner, 1999, p. 244) where the debtor challenged the creditor and showed the court that insecurity feeling or a default declared was relates to other factors.

Furthermore, these clause ventures beyond demand of full payment to repossession. However, under the common law, creditor must nominate one of the remedies to enable the court to decide the type of recovery, whether to repossess or sue the debtor for the entire amount. Surprisingly, this proposition placed the creditor in a difficult situation as becoming forbidden to exercise other remedies in attempt to obtain collateral against insolvent borrower. On the other hand, the borrower is

Able to redeem by paying the due amount before the repossession, see the case of *Vaughan v. McFadyen* [1896] 110 Mich. 234, 235, 68 N.W. 135, 136 (Leaf, 1970, p. 534). However, according to the common law, the redemption is not recognised in case of repossession took place even with paying the full price of the loan.

Negative Pledge:
A basic definition is, that the borrower promises the syndicate, such as it will not award security interests to a third party or . Furthermore, they could extend to consider the borrower in breach of the clause in case of the lender shares in a security that has been granted to a third party. They are common in case the loan was unsecured or cross boarder loan. The rationale of this clause is that the

fear and concern of the lenders that the assets could be insufficient to repay the loan. A note worth mention is that negative-pledge has a deficiency against third party as its force and application are only towards the borrower.

Ross (2002) points out that there are three arenas for lenders to invoke remedies under the negative pledge clause. Firstly, secure an injunction to prevent breach of negative-pledge clause prohibit the borrower not grant security. However, this could be insufficient to secure the assets of the borrower unless the court appoint a receiver to be in charge of the assets, to illustrate this see the case of *Cf. National Australia Bank Ltd. v. Bond Brewing Holdings Ltd.* (1991] 1 VR 386, (1990) 169 CLR271(ibid, p. 317). Secondly, lenders may be able to impose a specific performance or called the equivalent security, which means equal rateable in the assets that a third party has obtained security on, but a concern is arise here, that it cannot work in retroactive effect, in case the third party took it first, the lender could lose being a priority.

And thirdly, the so-called automatic security, this clause cannot be trigger unless a breach is occurs. However, critics state that difficulties are facing such clause, which is the absence of registration of security, as it is necessary to be effective automatically, this relates to lenders are unaware of the breach at early stage in order to register according the required period.

The right of lender against third party in a breach by borrower to negative pledge:

Ross (2002) proposes three aspects may lenders able to invoke against third party. Firstly, Utilising the rule in the De Mattos v Gibson [1858] 4 De G&J 276, it could be said that a third party may be bound by an injunction from practicing rights which means that the third party might be considered as an unsecured same as the lender. Moreover, the third party must be aware of the negative pledge clause in order to be obliged by the principal. However, it seems that the courts tend to restrict the De Mattose's application for different reasons, such absence of proprietary interest and also the case relates to a small scale of property.

And secondly, the Interference with Contractual Relations, In the instance where a tort of interfering with contractual affair. Which provides that when breach of a negative pledge by taking security by a third party, lender may be invoke against that party, with a consideration to factors such as intention, causation, and knowledge.

Looking at Bjerre (1999, p. 313) analysis the case of *Knott v. Shepherdstown Manufacturing Co.,* 5 S.E. 266, 269 [W. Va. 1888] where the argument centres on whether that the negative pledge covenant could grant rights in the property or not. It has agreed that the negative pledge could be triggered as a remedy consequence of breach. But the dilemma is in case of the borrower went insolvent which result that the lenders lose repayment of the loan. Furthermore, critics and courts where hesitated to engage in a debate with regard to negative-pledge covenant and their effectiveness in establishing lien in property. However, for instance, the case of *Connecticut Co. v. New York, New Haven and Hartford RL, 107 A. 646, 652-57 (Conn. 1919).* Introduced the concept of the so-called affirmative negative-pledge where it added a further factor which is when the borrower grant security to a third party in return to a loan, in this case the negative-pledge will be secured rateably and equally by the borrower (ibid, p. 321).

As for negative-pledge's ambit, commentators recommend that it needs to go further to include the so-called quasi-security device. For example, leaseback or repurchase the borrower's assets. Also, to include the borrower's subsidiaries because they could be used as a trick to obtain further debt (Ross, 2002).

The Pari Passu clause:
Unlike the negative-pledge clause which sets to combat encumbering the borrower's assets, the pari passu clause is a commitment from the borrower to ensure that the current loans obligation and other future obligation will rank equally.

However, commentators believe that it does not necessarily mean that it ensured treatment of all indebtedness in parallel, this due to the fact that the borrower may be exposed to a third party's unsecured obligations, furthermore, this third party may be remunerated ahead the other lenders. Moreover, in the case of loan default, pari passu does not stop other indebtedness to be paid.

Material Adverse Clause:
It is a common sense that Market Adverse Change clause is to tackle unforeseeable events or incidents which are very challenging to respond to.
The surge in the popularity of the MAC clause came after the terrorist attack a decade ago in the US followed by the global economic collapse of 2008.
It is recommended to identify the MAC clause is draw to cover or not before initiate a transaction, whether there is particular danger linked to the borrower or the transaction. Therefore, the lending industry prefers to specify these clauses within the agreement as specific event of default.
It is agreed that the MAC clause is a point of tension between the borrower and the lender. As for the borrower, will tend to achieve a narrow scope of the clause with objectivity test, also will seek to cover possible material adverse changes according to the definition and determine to limit the events will have a

material adverse affect. Lender in contrast, will seek to widen the possibilities in order to reach other borrower's entities by using subjective evaluation within the Market Adverse Change definition.

As example of the MAC clause, see the case of *Levison v Farin* [1978] 2 All ER 1149 (p. 213)where Mrs Levison sold her business to Mr Farin, the vender inpected the account in late 1972 and he was aware that the businss is making losses. However the purchase accomplished by mid 1973, which appears that there is a considerable reduction of the net assets. The court held that there is a material adverse change in the net asset. However, the seller stated that the buyer was aware of the business situation before signing the contract and it constitute a discloser. The court held against the seller stating that the discloser is inadequate to consider it as a warrant.

Conclusion:

The manager bank can be regarded as a fiduciary of the loan syndicate as soon as the loan arrangement commences. The fact that the manager bank acts as an agent for the borrower in soliciting lenders does not preclude it from acting as a fiduciary for the member banks at the pre-contract stage. An information memorandum is normally prepared by the manager and the borrower jointly. That is, the manager does not act as the agent for the borrower in the preparation of the document. In fact, the manager bank can be treated as the syndicate members' fiduciary in preparing the disclosure documents, at least where it has the scope for unilaterally exercising discretion to affect member banks' legal or practical interests. In negotiating the loan agreement, the manager act as the agent of the syndicate since it is the manager who will be doing the bargaining and it is a member of the lenders' team.

The agent bank in the operation of a syndicated loan should be regarded as the syndicate's fiduciary. That is because an agency relationship between the agent bank and the member banks arises from the loan agreement and an agent is a prima facie fiduciary. The agent bank must be presumed to be the agent of the syndicate. It would be difficult to displace this presumption as the agent is in a position to unilaterally exercise its discretion so as to affect the syndicate members' legal and practical interests and the member banks are vulnerable when the agent exercises its discretion given the informational advantage of the agent.

As for the provisions of the agreement. As a conclusion from the above investigation of the variety of clauses that the agreement contains, it seems that it is difficult to predict an event or scenario, as in case of invoke any clause there will be uncertainty with regard the outcome and the consequences and the court rule as well. Therefore, it is well established that the lending industry is a risky environment and players whether they were borrower's or lenders or participants must bear the risk of losing their investment.

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