SEPARATE REPAYMENT ENFORCEMENT RIGHTS OF MINORITY LENDERS IN DEFAULTING SYNDICATED LOANS

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ABSTRACT

A syndicated loan is one where two or more Banks separately lend to one borrower in terms of a single facility agreement concluded between the Banks, the borrower, the borrower's guarantors and the arranger or agent. The single facility agreement is a recordal of terms of the loan made available by each of the Banks forming part of the syndicate to the borrower. Taking deposits from the public is the primary business of a Bank, lending is the secondary business of a Bank. Though Banks are dominant participants in syndicated lending, there are now other participants such as fund managers and insurance companies who also have financial resources to participate just like Banks.

The purpose of syndicated lending, from a Banks' perspective, is firstly to avoid large single exposure to one borrower and secondly to participate in a loan which a Bank on its own would not have been able to make available to the borrower. By its nature syndicated lending contemplates an arrangement whereby participants will either fall into the category of being a majority or minority lender.

The manner in which the Loan Market Associations' ("LMA") standardised facility agreements are framed, favour the majority lenders as far as decision making is concerned. The most crucial event which its treatment depends on the decision of majority lenders is the borrowers' payment default. The conflict between the decisions of the majority and minority lenders on treatment of payment default by a borrower/s causes a legal dispute. The issue in dispute is usually the interpretation of clauses providing for separate repayment enforcement rights of minority lenders.

The decisions in the cases analysed further below demonstrate the limited separate repayment enforcement rights and decision making powers of minority lenders in instances where there is a payment default by a borrower/s. Separate repayment enforcement rights and decision making clauses are suggested to extricate minority lenders from commercial decision of majority lenders which are in conflict with theirs. The suggested clauses are structured in such a way that legal conflict between the lenders is diffused by viable commercial alternatives available to each of them.

1. INTRODUCTION

The issue under consideration in this dissertation is a limited one and it is about the contractual right/s of minority lenders in a syndicated loan, where payment default occurs, to separately enforce repayment of their proportionate loan by the borrower. The issue deserves consideration because the LMA's standardised facility agreements in terms of which syndicated loans are made available to borrowers in European, Middle East and African markets do not permit separate i.e. without majority lenders support or consent, repayment enforcement. [1]

In syndicated loans, majority lenders are lenders with an aggregate share of 66 (⅔) % of the outstanding loan whereas the minority lenders constitute the balance of the lenders.[2] Minority lenders' general decision-making in syndicated loans is subordinated to decisions of the majority lenders. More specifically decisions such as giving acceleration notices in the event of default and enforcing repayment are decisions that must be taken by the majority lenders.[3] In the event a borrower defaults on its payment obligations and the majority lenders decide to restructure the loan instead of enforcing repayment as required by minority lenders, a dispute arises.

The aforementioned scenario recently gave rise to a dispute between majority and minority lenders in a syndicated loan. This dispute culminated in the case of *Charmway Hong Kong Investment Ltd and Others v Fortunesea (Cayman) Ltd and Others*[4] *("Charmway* Case*")* which was decided by the Hong Kong High Court on 28 July 2015. The determination of this matter and the order given by Harris J were not appealed.

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1 Loan Market Association Form of syndicated loan agreement (18 November 2016) in clause 2.2 9 (c) provides that: A finance party may, except as specifically provided in the finance documents, separately enforce its rights (to debt owing to finance party) under or in connection with the finance documents. Acceleration clause 22.17 (c) negates separate enforcement right by providing that the agent shall only declare all or part of the loans be payable on demand by borrower on the instructions of majority lenders.

2 Definition of majority lenders in the Loan Market Association Form of syndicated loan agreement (18 November 2016) at 7.

3 Loan Market Association Form of syndicated loan agreement (18 November 2016) in the acceleration clause 22.17 provides that: On and at any time after the occurrence of an event of default the agent may, and shall if so directed by the majority lenders, by notice to the borrower; cancel all and any total commitments, declare due and immediately payable all or part of the loans with interest; and declare all or part of the loans be payable on demand by borrower on the instructions of majority lenders.

4 HCMP 3234/2013.

The issue decided in the *Charmway* Case is at the center of discussion in this dissertation. This dissertation commences by outlining the general background of syndicated loans and then proceeds to put into context the role of the Loan Market Association (LMA) in syndicated loans. Thereafter it offers a critical analysis of cases involving separate repayment disputes which focuses on how the Courts interpreted the relevant separate repayment enforcement clauses of the facility agreement in adjudicating the dispute. Finally, recommendations for reform are proffered on separate repayment enforcement provisions of the standardised LMA facility agreement. The final section is the Conclusion.

2. SYNDICATED LOANS

2.1. A SYNDICATED LOAN

A syndicated loan is an arrangement where a group of Banks or financial institutions contribute funds in different proportions and lends those funds to a single borrower or a group of related borrowers in terms of a single facility agreement. The single facility agreement is for commercial convenience and avoidance of multiple agreements on different terms between the lenders and the borrower/s for the same loan. Though there is a single facility agreement, in law each of the Banks has a separate facility agreement with the borrower/s.[5]

In recent times, insurance companies, pension funds, asset managers and other institutional investors have been participating in syndicated loans together with Banks. These institutions, particularly long-term insurers and pension funds participate because they have large cash reserves which are not immediately required in the short term to meet insurance claims or pension pay-outs. Syndicated lending, though it falls within the business of a Bank and is dominated globally by Banks is no longer exclusive to Banks.There is no prescribed form of a syndicated loan commercially and in law. The loan may be in the form of a money loan, letter of credit facility, Bank guarantee facility or other credit facility.

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5 Agasha Mugasha *The Law of Multi-Bank Financing; Syndicated Loans and the Secondary Loan Market* (2007) p 22-23.

The money loan may take the form of a loan with stated months or years for repayment or a revolving facility. A revolving facility is a loan with no prescribed term, it remains available for as long as the borrower can repay with interest the portion drawn down.[6]

2.2. COMMERCIAL RATIONALE FOR SYNDICATING A LOAN

Majority lenders have several persuasions for arranging a syndication. The syndication may assist the lenders to meet their clients funding requirements without sole credit exposure and contravening regulatory limits on risk concentration.[7] Previously Banks were forced to syndicate loans due to their inability to solely raise the required loan amount. Banks also syndicated loans to share the credit risk with other lenders.[8]

Though Banks in modern times still syndicate loans because of the size of the loan amount required, Banks in nowadays are forced to syndicate loans to comply with universal and local regulations on credit risk. These regulations have had an effect on the business of loan syndication. The regulation that has had significant impact on syndicated loans and ancillary practices is that which pertains to capital adequacy requirements.[9]

'The first capital adequacy regulations, Basel[10] I of July 1998, had a dramatic impact on the practice of syndicated loans by constraining the overall size of the lending portfolios of individual leading international Banks. Basel II of November 2005 refined the calculation of capital required of individual Banks by further distinguishing between different assets and types of risk'.[11] Currently Banks' compliance with regulatory limits on credit risk is regulated by Basel III. Basel III is a package of reforms which made changes to the existing Basel II framework to ensure that Banks withstand turbulent economic times. Basel III is not a replacement of Basel II framework but an improvement of same. The Basel III

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6 Agasha Mugasha op cit note 5 at 22-23.
7 Blaise Gadanecz 'The syndicated loan market: structure, development and implications' (2004) *Bank For International Settlements Quarterly Review* at 78.
8 Agasha Mugasha op cit note 5 at 7..
9 Agasha Mugasha 'Multi-Bank Financing: What It is and is Not' in *The Law of Multi-BankBank Financing* (2007) at 7.
10 Basel Committee on Banking Supervision is International Convergence of Capital Measurement and Capital Standards.
11 Agasha Mugasha op cit note 5 above at 7.

amendments re-enforce capital requirements under Basel II and introduces the liquidity coverage ratio (LCR) and the net stable funding ratio (NSFR).[12]

Having regard for the credit risk and/or lending constraints brought about by Basel III, syndication is commercially viable for senior Banks as it allows them to continue to meet their clients' (borrowers') debt-funding requirements without having to be overly exposed to credit and regulatory risks.[13]

The commercial rationale for junior Banks to participate in syndicated loans is that they obtain exposure to bigger loans to which they ordinarily would not have been exposed to due to their limited loan origination capacity. Furthermore, they obtain opportunities to learn and gain new expertise in underwriting loans for borrowers operating in novel sectors, such as information and communications technology and they are able to reduce credit exposure that they would have taken had they lended alone.[14]

Though junior Banks, in return for their participation in a syndicated loan earn a lending margin, they do not earn arranging fees. However, their participation in syndicate loans gives them exposure to the borrower for future business such as treasury management, corporate finance or advisory work, as well as the potential for originating small to medium-sized loans on their own.[15]

2.3. MAIN PARTIES INVOLVED AND THEIR ROLES IN A SYNDICATED LOAN

The parties and their roles as stated below, other than the borrower/s and obligors, are crucial in raising, disbursing and administering a syndicated loan.

2.3.1. *The agent* is 'responsible for managing the syndicated loan as a unified documented credit through servicing and enforcing the agreement'.[16] The duties of the agent are as follows:

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[12] Loan Market Association 'Regulation and the Loan Market' Loan Market Association Guide (2015) at 4.

[13] Phillips Lytle LLP 'The risks and rewards of multiple lender financings: loan participations and syndicated loans' Lexology United States of America 2014 at 4.

[14] Blaise Gadanecz 'The syndicated loan market: structure, development and implications' *BIS Quarterly Review*, (2004) at 79.

[15] Blaise Gadanecz op cit note 14 at 79-80.

[16] Paul H Hunn 'Bank Syndicate Agents Roles in Workouts' (1995) 36 Commercial Lending Review at 37.

Inviting various Banks through the information memorandum to fund the borrower. Negotiate lending terms and pricing on behalf of the borrower;

Specifically perform its duties as provided for in the facility agreement including but not limited to servicing and administration of the loan including security held to secure the loan; and

Managing conflict of interest of the various parties and acting as the conduit of payments and information between the borrower and the lenders.[17]

2.3.2. *The lenders*: The lenders are the Banks, insurance companies and fund managers which make commitments available and undertake to make loans to a borrower/s. Depending on the extent of commitments and loans advanced, a lender will fall into the category of majority or minority lenders.

2.3.3. *The lead counsel*: 'In syndicated lending, the lawyer who advises the lenders and prepares the credit documents is generally referred to as the *lead counsel*. The lead counsel is usually chosen by the majority lender/s, and since the lead counsel is chosen by the majority lender/s, he/she reciprocates and prioritises the interests of the majority lender/s'.[18]

The best practice is for each lender to retain its own counsel to protect its interest. It is impractical, if not impossible, for one lawyer to represent a group of Banks with different credit or investment criteria and different demands on the protection measures that must be provided by the facility agreement.

The duties of the lead counsel, among others, are to:

Draft, review and vet all and any credit or finance document/s and agreements pertaining to the syndicated loan;

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[17] Paul H Hunn op cit note 16 at 37-38.

[18] Reade H Jnr 'The role of Lead Counsel in Syndicated Lending Transactions' (2009) 64 Business Lawyer at 783-785.

Draft, review and vet the inter-creditor agreement and or common terms agreement; and

Conduct a legal review of the transaction under the law chosen as governing law.

2.4. DECISION-MAKING IN A SYNDICATED LOAN

In syndicated loans facility agreements, decision-making on repayment matters discussed hereunder is reserved for the majority lenders. The term *majority lenders* is crucial in identifying the decision-makers in a syndicate of lenders. 'The threshold for majority lenders will be determined on a transaction-by-transaction basis; however, 66 (⅔) % or 50,1% are the most commonly used thresholds'.[19]

In terms of the LMA standard form,[20] Investment Grade South African Law Unsecured Single Currency Single Borrower Term Facility Agreement ("the agreement"), a majority lender is defined in section 1 (Interpretation) as a lender or lenders whose commitments (amounts of money lenders have committed to lend during the term of the facility)[21] aggregate more than 66 (⅔) % of the total commitments. If the commitments were reduced to zero, then 66 (⅔) % of the total commitments immediately prior to the reduction. In the agreement repayment matters that require the approval of the majority lender/s as follows:

2.4.1 *Voluntary prepayment of loans*: In the event of voluntary prepayment of loans, clause 7.4 (a) provides that the borrower may give notice of prepayment of the whole or any part of the loan to the agent. The number of days for the notice is not specified in the agreement but it is left to the borrower and lender/s to negotiate and agree prior execution of the agreement. Though the prepayment notice period may be agreed and stated in the agreement, the agreement in clause 7.4 (a) also gives the majority lenders the discretion to agree to a shorter notice period for the prepayment.

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19 Loan Market Association, user guide to the recommended form of facility agreements for use in the South African Market, (18 November 2016) at 13.

20 Loan Market Association Form of syndicated loan agreement (18 November 2016).

21 Loan Market Association, user guide to the recommended form of facility agreements for use in the South African Market, (18 November 2016) at 11.

2.4.2 *Acceleration*: Clause 22.17 provides that, on occurrence of an event of default (non-payment, not satisfying financial covenants, non-compliance with any provision of finance documents, misrepresentation, cross default, insolvency, business rescue proceedings, creditors process, subsidiary ceasing to be subsidiary of borrower, unlawfulness, cessation of business, audit qualification and repudiation), the agent may and shall, if so directed by the majority lenders, by notice to the borrower;

(a) cancel all or any part of the total commitments whereupon they shall immediately be cancelled;

(b) declare that all or part of the loans, together with accrued interest, and all other amounts accrued or outstanding under the finance documents be immediately due and payable; and/or

(c) declare that all or part of the loans be payable on demand, whereupon they shall immediately become payable on demand by the agent on the instructions of the majority lenders.

An additional event of default, in addition to those listed in paragraph 24.2, is a material adverse change provided for in clause 22.16. In terms of the agreement a material adverse change is brought about by an event which, in the reasonable opinion of the majority lenders, will have an effect on the entire business of the borrower and its subsidiaries, the ability of the obligor to perform any of its obligations under the finance documents or the enforcement of the finance documents. Majority lenders have unrestricted powers to decided events that constitute material adverse changes.

On occurrence of the events of default, the agent has a choice as to whether or not to take the steps listed in (a), (b) or (c) above ("the steps") against the borrower, but the agent ceases to have a choice when the majority lenders instruct it to take step (a), (b) or (c) above. The agent may, without instructions of the majority lenders, take step (a) or (b). In step (c) the agent's power is limited to declaring the loans payable on demand, but the agent's authority to demand after the declaration repayment from the borrower rests with the majority lenders.

In the event of default, the acceleration clause favours the majority lenders' decision-making in that the steps in (a) to (c) are carried out by the agent and not directly by a lender/s. Proper construction of the acceleration clause suggests that, in the event the agent elects not to take step (a), (b) or (c), the minority lenders cannot instruct the agent to take any of the steps, as the instruction to take steps is a prerogative of the majority lenders.

In the event of a default caused, for example, by non-payment and the majority lenders elect not to instruct the agent to take any of the steps and opt to rework or restructure the loan, the minority lenders cannot be able to have benefit of repayment or enforcing repayment through the acceleration clause.

2.4.3 *Instructions*: Clause 25.2 (a)(i)(a) and (b) of the agreement provides that the agent, unless stated otherwise in the finance documents, exercise or refrain from exercising any right, power, authority or discretion vested in it in terms of instructions given by all lenders if that matter is, in terms of the finance documents an all-lender decision but in all other cases the majority lenders.

Clause 25.2 (c) of the agreement provides that, unless the matter is for decision by any other lender or lenders, or a contrary indication appears in the finance documents, any instructions given to the agent by the majority lenders shall override any conflicting instructions given by any other parties and will be binding on all finance parties.

The practical effect of the lender's instruction in the steps is that if the agent does not take the steps, the minority lenders do not have the power to decide on exercise of the acceleration clause. Even if the minority lenders could influence the agent to take the steps, in terms of clause 25.2 (c), the agent if instructed otherwise by the majority lenders is obliged to follow the instruction of the majority lenders instead of the minority lenders instruction.

The events of default are the only circumstances that permit the agent to take the steps. Other than events of default, save for agreed repayment by annual or semi-annual instalments, there is no other event that entitles the lenders to demand accelerated repayment. Therefore, the minority lenders' right to make a decision to enforce

repayment, in the event of default, is subordinated to the decision of the majority lenders.

The above assertion is fortified by clause 2.2 (finance parties' rights and obligations) of the agreement. Clause 2.2 (b) provides that:

The rights of each finance party[22] under or in connection with the finance documents are separate, and independent rights and any debt arising under the finance documents to a finance party from an obligor is a separate and independent debt in respect of which a finance party shall be entitled to enforce its rights in accordance with clause (c). The rights of each finance party include any debt owing to that finance party under the finance documents and, for avoidance of doubt, any part of the loan or any other amount owed by an obligor, which relates to a finance party's participation in a facility, or its role under a finance document is a debt owing to that finance party by that obligor.

Clause 2.2 (c) is more important and it provides that:

A finance party may, except as specifically provided in the finance documents (i.e., in the agreement and other documents designated as such), separately enforce its rights under or in connection with the finance documents.

Though clause 2.2 (b) recognises the minority lenders' rights in the agreement against the borrower or obligor as separate, independent and capable of being enforced at any time, these rights are limited by clause 2.2 (c). Clause 2.2 (c), in relation to enforcement of separate repayment of the minority lenders' loan, by stating except as specifically provided in the finance documents means that subject to clause 22.17 being the acceleration clause. In essence, the limitation is that no minority lender on occurrence of an event of default shall separately enforce its rights under the agreement without observing the provisions of the acceleration clause.

[22] A Finance Party is defined in section 1, interpretation, of the agreement as the agent, the arranger or a lender.

Repayment of loans to the lender/s occurs either in terms of clause 6.1 (repayment by one bullet payment on termination date or repayment by specific amounts as instalment on specific dates) of the agreement or in terms of clause 22.17.

The contractual difficulties of the minority lenders caused by the manner in which the acceleration clause is framed have been discussed above. However, it is worth stating that clause 2.2 (b) actually has no benefit to the minority lenders due to the limitations on decision-making for the purpose of engaging the acceleration clause as an alternative mechanism of obtaining repayment.

In the event repayment is not made to the lenders ("non-payment default") by the borrower in terms of repayment clause 6.1, the minority lenders have no certainty of receiving payment or at least that their instructions to the agent to declare the loans due and payable and demand payment in terms of the acceleration clause will be carried out.

Minority lenders are at the mercy of the decisions and discretion of the majority lenders who might just be willing to tolerate payment default or any other event of default.

2.4.4 *Partial payments:* Clause 28.5 (b) of the agreement provides that the agent shall, if so directed by the majority lenders, vary the order of application of partial payments. The order of application of partial payments is (i) pro rata payment of any unpaid fees, costs and expenses of the agent; (ii) pro rata payment of any accrued interest, fees, break costs or commission due but unpaid; (iii) pro rata payment of any principal due but unpaid; and (iv) pro rata payment of any other sum due but unpaid.

The minority lenders could benefit from good faith exercise of the power the majority lenders have to vary the payment waterfall stated above. For example, the majority lenders could decide and direct that pro-rata payments towards principal due but unpaid must occur first. Then the minority lenders would benefit from obtaining a substantial payment immediately and ahead of the parties who would have been paid under waterfall (i) and (ii). It is common cause that any partial payment subject to the order of the payment waterfall will be reduced on each and every waterfall and by the

time it pays the lenders under (iii) it is less than it would have been if lenders had been paid under (i).

From the foregoing, it is clear that the agreement is generally in favour of the majority lender/s as far as decision-making is concerned.

3. THE LOAN MARKET ASSOCIATION

3.1. THE LOAN MARKET ASSOCIATION

The LMA is a company limited by guarantee and not having a share capital. It has been in operation for 21 years. The association was registered as a company on 21 November 1996 in London in terms of the Companies Acts of 1985 and 1989. In terms of the association's memorandum of association the objects, which remain unchanged, for which it has primarily been established are:

(i) The promotion of growth, liquidity and product development in the primary and secondary markets for the purchase and sale of loans, commitments to lend and other forms of indebtedness and commitments to extend credit; and

(ii) To facilitate and promote the standardisation and simplification of primary loan documentation, purchase and sale documentation and other trading documentation

'The association seeks to improve liquidity, efficiency and transparency in the primary and secondary syndicated loan markets in Europe, the Middle East and Africa (EMEA). By establishing sound, widely accepted market practice, the association seeks to promote the syndicated loan as one of the key debt products available to borrowers across the region. As the authoritative voice of the syndicated loan market in EMEA, the association works with lenders, law firms, borrowers and regulators to educate the market about the benefits of the syndicated loan product and to remove barriers to entry for new participants'.[23]

[23] The Loan Market Association, 'About us', last accessed on http:www.lma.eu.com/about-us on 12 November 2017.

In the 21 years of its existence, the association has accumulated membership of 630 diverse organisations (commercial and investment Banks, institutional investors, law firms, service providers and rating agencies) spread over 60 jurisdictions.

3.2. THE LOAN MARKET ASSOCIATION STANDARDISED FINANCE DOCUMENTS

'The association endeavours to keep its standardised finance documentation under constant review to ensure that it continues to meet the aims and needs of primary and secondary loan markets. The production of recommended documentation remains one of its most important activities'.[24] The association develops and recommends forms of facility agreements for the EMEA markets.

'The association, for the South African market, recommended forms of facility agreements for use in syndicated loans. The forms of facility currently recommended are: single currency unsecured term facility for multiple borrowers and guarantors with reference LMA.SMBT.SA.02; single currency unsecured term and revolving facilities for multiple borrowers and guarantors with reference number LMA.STR.SA.02; single currency unsecured term facility for a single borrower and multiple guarantors with reference LMA.SSBT.SA.03, and single currency unsecured term and revolving facilities for a single borrower and multiple guarantors with reference LMA.SSBTR.SA.02'.[25]

The forms of facility agreements recommended for the South African market, as stated above, were developed in response to an existing demand from the syndicated loan market to have a recommended form due to the structures and credit-related specifics of the finance transactions.[26]

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[24] The Loan Market Association, 'About us', last accessed on http:www.lma.eu.com/about-us on 12 November 2017.

[25] Loan Market Association, user guide to the recommended form of facility agreements for use in the South African Market, (18 November 2016) at 2.

[26] Loan Market Association, user guide to the recommended form of facility agreements for use in the South African Market, (18 November 2016) at 2.

3.2.1. PRE-28 JULY 2015 SEPARATE REPAYMENT ENFORCEMENT PROVISIONS

The pre-28 July 2015 separate repayment enforcement provisions ("Pre-provisions") appearing hereunder are as quoted by Harris J from the syndicated loan facility agreement in issue before him in the matter of *Charmway Hong Kong Investment Ltd and others* v *Fortunesea (Cayman) Ltd and others* ("*Charmway* case") decided on 28 July 2015.

'2.2 NATURE OF A FINANCE PARTY'S RIGHTS AND OBLIGATIONS

Unless all the Finance Parties agree otherwise:

(a) the obligations of a Finance Party under the Finance Documents are several;

(b) failure by a Finance Party to perform its obligations does not affect the obligations of any other person under the Finance Documents;

(c) no Finance Party is responsible for the obligations of any other Finance Party under the Finance Documents;

(d) the rights of a Finance Party under the Finance Documents are separate and independent rights;

(e) a Finance Party may, except as otherwise stated in the Finance Documents, separately enforce those rights; and

(f) a debt arising under the Finance Documents to a Finance Party is a separate and independent debt'.[27]

[27] *Charmway Hong Kong Investment Ltd and others* v *Fortunesea (cayman) Ltd and others* HCMP 3234/2013 para 22.

3.2.2. POST 28 JULY 2015 SEPARATE REPAYMENT PROVISIONS

The post 28 July 2015 separate repayment provisions ("post provisions") cited hereunder are as they appear in the syndicated loan facility agreement: single currency unsecured term facility for a single borrower and multiple guarantors with reference LMA.SSBT.SA.03, which contains an update of the pre-provisions following the decision in the *Charmway* case.

Though the pre- 28 July 2015 separate repayment provisions quoted above were in a facility agreement concluded in terms of the association's European forms, clauses 2.2 on finance parties' rights and obligations is identical in the EMEA and South African forms. Clause 2.2 of the South African recommended forms of facility appear hereunder.

2.2 FINANCE PARTIES' RIGHTS AND OBLIGATIONS

(a) The obligations of each finance party under the finance documents are separate and independent. Failure by a finance party to perform its obligations under the finance documents does not affect the obligations of any other party under the finance documents. No finance party is responsible for the obligations of any other finance party under the finance documents.

(b) The rights of each finance party under or in connection with the finance documents are separate and independent rights, and any debt arising under the finance documents to a finance party from an obligor is a separate and independent debt in respect of which a finance party shall be entitled to enforce its rights in accordance with paragraph (c) below. The rights of each finance party include any debt owing to that finance party under the finance documents and, for the avoidance of doubt, any part of a loan or any other amount owed by an obligor, which relates to a finance party's participation in a facility or its role under a finance document (including any such amount payable to the agent on its behalf) is a debt owing to that finance party by that obligor.

(c) A finance party may, except as specifically provided in the finance documents, separately enforce its rights under or in connection with the finance documents.

3.3 CRITICAL ANALYSIS OF PRE- AND POST 28 JULY 2015 SEPARATE REPAYMENT PROVISIONS

Critical reading and comparison with each other of the pre- and post 28 July 2015 provisions reveal that, save for post-provision (b) being comprehensive, there is absolutely no difference, legally, between the two provisions. The pre-28 July 2015 provisions are concise and direct.

The central issues provided for in the pre- and post 28 July 2015 provisions are:

(a) Separate rights and obligations of the finance parties. Amongst the finance parties are the lenders made up of majority and minority lenders.

(b) Debts arising in terms of the facility agreement being part of the finance document is a separate debt identifiable with such lender who has made the commitment available.

(c) Separate enforcement of rights relating to the debt

Pre-provisions 2.2 (a), (b) and (c) were consolidated into one clause and thus became provision 2.2 (a) of post-provisions. Post-provision (b) provides in many words what provisions (d) and (f) of pre-provision provided for in a few words. The detailed drafting style and the content load on post provision (b) does no more and makes no contractual improvement to the minority lenders' rights to separately enforce repayment of debt because of the conditional application created by the reference to provision (c). The value of post-provision (b) is merely clarity of what the enforceable rights are and that is all.

Post-provision (c) is an improvement and a clarification of pre-provision (e) by substituting the words <u>*except as otherwise stated*</u> with <u>*except as specifically provided*</u>. In the *Charmway* case, which is the subject of a full and further analysis further below, Harris J, in adjudicating a dispute arising from a facility agreement with pre-provisions found various exceptions *(the except otherwise provisions such as the majority lender controlled acceleration clause)* which in his view negated the separate repayment enforcement provisions.

The words *except as otherwise stated* were good enough in the *Charmway* case to secure the majority lenders a ruling in their favor on the basis that the minority lenders' rights of separate enforcement of repayment provided for in pre-provision (e) were limited by those provisions wherein a lender's decision to enforce repayment requires permission of the majority lenders. The words *except as specifically provided* confirm the majority lenders' control. The agreement contains specific provisions, such as the acceleration clause, in which the demand by the agent for repayment of the loans of all lenders requires the permission of the majority lenders.

4. CRITICAL ANALYSIS OF CASES INVOLVING SEPARATE REPAYMENT ENFORCEMENT BY MINORITY LENDERS

4.1. *Charmway Hong Kong Investment Ltd and Others* v *Fortunesea (cayman) Ltd and Others*

4.1.1 The facts and Judgment.

On or about 3 December 2007 sixteen lenders loaned a total amount of US$47 812 590,60 to Rightway China Real Estate Limited ("Rightway"). The loan advanced to Rightway was arranged by Goldman Sachs, and its terms and conditions were recorded in a standardised LMA facility agreement. On or about 30 June 2011, 31 December 2011 and 30 June 2012, Rightway defaulted on its repayment obligations under the finance documents, and at the time of default the total capital and accumulated interest of the loan outstanding was US$ 612 373 000,26.

Consequent upon the defaults, the majority lenders gave a directive to the security agent, DBT Trustees Hong Kong Ltd ("DBT"), to act in terms of the facility agreement and do all things necessary to recover US$612 373 000,26 ("total amount outstanding") on behalf of the lenders. The security agent followed the instruction and issued an acceleration letter of demand for the total amount outstanding to Rightway and its guarantors.[28]

[28] *Charmway* case para 7.

There was change among the lenders. The new lenders acquired interest in the loan soon after the acceleration demand had been issued. This change culminated in the majority lenders directing DBT to discontinue the recovery processes against Rightway and its guarantors. The validity of the directive of the majority lenders was disputed by the minority lenders, and it was this directive that led to litigation between the minority lenders and Rightway on one hand ("the liquidation") and majority lenders and minority lenders, on the other hand ("the declaration application").

The central issue that the Court was called upon by the majority lenders to decide in the declaration application was 'whether on or not, on true construction of the facility agreement concluded on 3 December 2007, an individual lender is entitled to independently enforce repayment of its proportionate share of the syndicated loan facility'.[29]

The Court decided the matter in favour of the majority lenders by reaching a conclusion that 'the facility agreement created an aggregate loan rather than aliquot shares and that, this being so, in the absence of an express provision giving individual lenders a right to take independent enforcement proceedings it is for the majority lenders acting in good faith, to decide what enforcement proceeding to take'.[30]

To understand the nature of the finance party's rights and obligations, the Court considered the pre-provision discussed above. But for different reasons, the author agrees with the decision of the Court that on true and proper construction of the facility agreement, clause 2.2 thereof, no individual lender has a right to take seperate enforcement proceedings unless authorised by majority lenders.

4.1.2 Critique of the Judgment

The Court, in its analysis of the provisions of clause 2.2, stated that 'it is clear from sub-clause (d) that rights given to a lender are independent and sub-clause (d) provides for separate enforcement of the rights and that these clauses are of general effect and this general effect is emphasized by the words "*except as otherwise stated in the finance documents*" '.[31]

[29] *Charmway* case para 15.
[30] *Charmway* case para 50.
[31] *Charmway* case para 23.

The Court's decision is grounded on the conclusion, after considering various clauses dealing with aggregate facility, that the facility agreement created an aggregate loan or one unitary loan instead of a separate aliquot loan. In the author's view there is no doubt, from the manner in which the LMA facility agreements are framed, that the loan is aggregate but each lender advances separately with other lenders in one agreement for convenience. Though the loan (which constitutes the debt) advanced by each lender to the borrower is separate and thus capable of being independently collected by each lender, what is controlled by the facility agreement is the manner in which each lender obtains payment as and when it falls due in line with the principle of syndicated loans that the lenders are in it together.

The context in which the Court should have reasoned and decided the matter was that of the repayment enforcement rights of minority lenders, as triggered by Rightway's default. The Court should have found that the words *except as otherwise stated in the finance documents* limit the generality of application of sub-clause (e) in that acceleration clause 19.8 of the agreement in issue provides for repayment enforcement contrary to separate enforcement in clause (e).

Though the Court directed itself to the acceleration clause, it missed the point and/or failed to deal with the issue at hand and dispose of the matter solely on the provisions of the acceleration clause read together with clause 2.2. To demonstrate this, the Court stated in its reasons of judgment that 'Clause 19.8 provides that in the event of default the administrative agent may, and must if so instructed by the majority lenders, cancel all or any part of the cash loan or declare all or any part of it immediately due and payable. It follows that no individual lender especially minority lender can do this. Clause 19.18 does not state; if the cash loan is called due, *a debt owed to each lender arises* neither does clause 19.8 address enforcement of the rights to recover the cash loan in the event that the mechanism provided by clause 19.18 is engaged'.[32]The mere fact that the acceleration clause does not provide for the manner of enforcing repayment is inconsequential.

[32] *Charmway* case para 33.

The Court's concern would have been resolved by looking at clause 25.2 (f) of the facility agreement in issue, and also thinking practically about the fact that accelerated separate repayment enforcement can only occur through legal proceedings for specific performance if the demand for payment is not metby the borrower.

Clause 25.2 (f) provides that the agent, unless authorised by a lender, shall not act for it in any legal proceedings or arbitration. It therefore follows that among the competencies of the agent is that of instituting legal proceedings and claiming repayment on behalf of the lenders as soon as accelerated payment is demanded.

Having reasoned in the manner stated above, the Court would have decided the matter by stating that the acceleration clause prevents the minority lenders from separately enforcing their repayment rights granted by clause 2.2 (d) and (e). This way of reasoning would have made the Courts' judgment crisp instead of a lengthy exposition of how a debt is owed separately to each lender. The question of whether or not the loans are separate was an easy one to answer, as the total loans are made up of separate loans advanced by each lender.

When the agent declares all or any part of the loan immediately payable, the separate loans of the lenders become due and payable on demand. The Court should have found that it is only when the majority lenders have authorised legal proceedings after engaging clause 19.18 processes, can a minority lender withhold its authority to the agent and act for itself against Rightway to separately enforce repayment in terms of clause 25.2 (f).

The Court should have reasoned that the answer to question before it does not lie in whether the debt is separate or not, but in under what circumstances is a lender limited to exercise clauses 2.2 (d) and (e) in relation to claiming repayment. The Court should have reasoned and found that it is only when the majority lenders have authorised legal proceedings after engaging clause 19.18 processes that a minority lender can withhold authority to the agent from instituting legal proceedings for it in terms of clause 25.2 (f) and act for itself against Rightway to separately enforce repayment.

4.2. *Beal Savings Bank* v *Sommer ("Beal Sav Bank* case*")*

The New York Court of Appeal was called upon to decide the question whether 'one lender in a syndicated loan arrangement has standing to sue for breach of contract, contrary to the will of other 36 lenders to forebear from taking action'.[33]

The Court decided that the 'specific, unambigous language of several provisions, read in the context of the agreement as a whole, is convincing that the lenders intended to act collectively in the event of the borrowers' default and to preclude an individual lender from disrupting the scheme of the agreement at issue'.[34]

On or about 26 February 1998, thirteen institutions loaned Alladin Gaming LLC ("the borrower") $410 000 000,00 for the construction and development of Aladdin Resort and Casino in Las Vegas, Nevada, through a credit agreement and other ancillary agreements such as the Keep-Well agreement. The loan was arranged by the Bank of Nova Scotia, which was also the administrative agent.[35]

On reading of the judgment, it does not immediately appear that the agreements in question were concluded using the recommended LMA's form of agreement. The LMA is primarily concerned with European, Middle Eastern and African markets, and does not recommend forms of agreement to the American market. There are, however, similarities of principles in the agreements at issue and LMA facility agreements regarding the percentage of majority lenders. Though stated as required lenders in the credit agreement in issue in this matter, the percentage of determining them is 66 ⅔ % of the outstanding principal loan and interest.

The dispute in this matter arose when the borrower, after a year of operating the newly built casino, filed for protection under the Bankruptcy laws. Following filing for the protection, the loan was restructured with the support of 95.5% of the lenders, including the agent. The restructure culminated in a settlement agreement being concluded.The abstaining lender from the settlement holding the remaining 4.5% interest in the loan was BFC Capital Inc.,

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[33] *Beal Sav BankBank* v *Sommer* 2007 NY Slip Op 02437, Chief Judge Kaye majority judgment.
[34] *Beal Sav BankBank* case p 1.
[35] *Beal Sav BankBank* case p 1.

having obtained the interest by assignment and later assigned it to Beal Sav Bank ("the suing lender").

As part of the settlement, there was to be a distribution of 6,5 million dollars paid by Sommer Trust, a shareholder of the borrower, to the pre-petition lenders but excluding Beal Sav Bank who joined the syndication after the Bankruptcy filing. On account of the exclusion from sharing in the 6,5 million, Beal Sav Bank claimed by way of litigation from the borrower the total outstanding loan to share with the other lenders or its appropriate share.[36]

Credit agreement clause 8.1.4 was at the center of the litigation, and it provided that 'the borrower defaults if after the agent gives notice, the non-performance continues for 30 days and that at the direction of the required (majority lenders) the agent may exercise any or all rights and remedies at law or equity including the right to recover the outstanding loan by judgment on the Keep-Well agreement'.[37]

The Court's reasons for decision in the *Charmway* case were similar to those of Chief Judge Kaye in that instead of relying squarely on clause 8.1.4 to dismiss Beal Sav Bank he or she opted for a view that the agreement was designed for a collective action, and therefore, Beal Sav Bank could not act on its own against the borrower. Chief Judge Kaye stated this as she held that 'neither the credit agreement nor the Keep-Well contains provisions stating that a lender may or may not take individual action in the event of default and thus we are compelled to look to other specific clauses and other agreements as a whole to locate the party's intention'.[38]

In the author's view, Chief Judge Kaye should have reasoned that the words *including the right to recover judgment on the Keep-Well* agreement in clause 18.4 does not suggest unequivocal collective action, as the agent can commence legal action for judgment against the borrower at the instruction of the required lenders after the 30-day demand period. The decision of the required lenders is not necessarily the decision of the collective; it is only of the majority. In circumstances where the required lenders instruct the agent to restructure

[36] *Beal Sav BankBank* case p 3.
[37] *Beal Sav BankBank* case p 2.
[38] *Beal Sav BankBank* case p 5.

the loan whereas the suing lender proceeds to obtain judgment, there will be a dispute because the agreements favor the required lenders.

Clause 18.4 is framed differently to clauses 2.2 (d) and (e) of the pre-provisions, but similar to acceleration clause 19.18 of the agreement in issue in the *Charmway* case. The effect of clause 18.4 is that only the required lenders may take individual enforcement action against the borrower in the event of default because the agent acts at the behest of the principal being the required lenders. The Court should have reasoned that the agreement effectively states that only the required lenders can take individual action and Beal Sav Bank is not part of the required lenders; thus precluded from suing.

The author's view stated above is consistent with the decision of the Supreme Court to which Beal Sav Bank had appealed further in the New York Appeals Court. The view was that the loan documents explicitly and implicitly precluded Beal from obtaining a judgment under the Keep-Well agreement.

4.3. *Credit Francais Int'l S.A. v Sociedad Financiera de Comercio, C.A ("Credit Francais Int'l S.A* case*")*

On or about 24 November 1980 and in terms of a deposit (credit) agreement, a loan of $25 000 000 was advanced by nine Banks to Sociedad Financiera de Comercio, C.A., a Venezuelan ("the borrower") financial institution. The loan was arranged by Marine Midland Bank, which was also appointed as the agent, and was payable in six semiannual instalments.[39]

Credit Francais Int'l S.A French Bank ("the suing lender") had an interest of $3 000 000 in the loan. In 1983, the borrower defaulted on payment of the capital of the loan due to an act of state of the Venezuelan government passing currency regulation laws suspending payment of capital of loans dominated in dollars in order to control the use of dollars. At the time of default, the borrower owed the suing lender $2 000 000 and it is this

[39] *Credit Francais Int'l S.A. v Sociedad Financiera de Comercio, C.A* 128 Misc 2d 564 (N.Y Misc 1985) p 1.

amount that the suing lender claimed from the borrower on a breach of the deposit agreement cause of action.[40]

The issue relevant to this dissertation that the Court was called upon to decide was a point of law dispositive of the matter. The issue was whether the suing lender had standing to sue for the whole amount outstanding. The provision in issue of the deposit agreement was section 8, which provided for events of acceleration and the repayment procedure to be followed thereafter.

The acceleration clause provided that acceleration and declaration of the entire amount due and payable by the agent shall not occur unless sanctioned by the majority lenders. On reading of the *Credit Francais Int'l S.A* case, there appears no reference to the definition of *majority lenders*. However, the words *majority, in the context of the actual loan advanced* suggest to be those lenders who have a higher interest or exposure to the loan of at least greater than 50%. The suing lender was a minority lender as it only had 12% interest or exposure in the loan.

The loan advanced to the borrower in 1980 was not based on the Loan Market Association recommended forms as the association was only established in 1996. However, the principles of acceleration in the event of default are similar to those of the agreement discussed under decision-making further above. The similarity is in the powers given to the majority lenders to authorise acceleration and the agent's discretion to declare all amounts due and payable. The dominant feature in the acceleration clause in issue is the exclusion of the suing lender from sanctioning acceleration and separately enforcing repayment of amounts due and payable to it.

The Court, in dealing with the exclusion of the suing lender from enforcing repayment separately, held that 'depature from unitary or collective action can take place only when an individual Bank has been authorised to proceed by a majority of the depositors, or where judgment has already been obtained and an individual Bank is seeking post judgment remedies'.[41]

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[40] *Credit Francais Int'l S.A* case p 4.
[41] *Credit Francais Int'l S.A* case p 9.

In the circumstances of the *Credit Francais Int'l S.A* case, the individual enforcement of repayment by the suing lender would have undesirable consequences having regard to the fact that the borrower continued to service interest but because of the currency regulations it was precluded in law from servicing the capital. The undesirable consequences were that the transaction would lack commercial integrity, as, on the one hand, the borrower agreed to workable terms of repayment with the agent and/or the majority lenders, and on the other hand, the minority lenders caused confusion by suing for all amounts due and payable to it. Ultimately the separate action by minority lenders would spoil chances of eventual full repayment.

4.4. *AI Credit Corp v Government of Jamaica (AI Credit Corp* case*)*

The government of Jamaica was sued by *AI Credit Corp* ("the suing lender") for defaulting to pay capital in terms of a loan restructuring agreement. The restructuring agreement was concluded between the government of Jamaica ("the borrower") and 113 Banks and financial institutions due to the suspension of payment of interest because of the shrinking economy. Between 1979 and 1984, there were four restructurings of Jamaica's debt, but beyond 1984 the suing lender abstained from further restructuring and elected to enforce separately its repayment right in terms of the 1984 restructuring agreement.

The issue the Court was called upon to decide was whether the suing lender had sole standing to sue the borrower in the absence of participation and/or consent of other lenders. Section 12.13 of the 1984 agreement in issue provided that:

> ''The amounts payable at any time hereunder to each Bank shall be separate and independent debts and each Bank shall be entitled to protect and enforce its rights arising out of this agreement, and it shall not be necessary for any other Bank to be joined as an additional party in any proceedings for such purpose''.

Unlike the agreement in issue in the *Charmway* case, the 1984 agreement in this matter did not give the agent, the Bank of Nova Scotia, the power to act on behalf of lenders as far as action for repayment was concerned, nor did it contain provisions relating to the majority

lenders consenting to acceleration of the loan and legal action for recovering payment. The duties and powers of the agent were limited to administrative functions.

The Court correctly granted summary judgment to the suing lender on the basis that the 1984 agreement could hardly be clearer in establishing the suing lender's right to separately and independently sue for its portion of the loan. The Court also found that the suing lender's powers to sue individually were not surrendered to the agent. The Court emphasised that the language used in the 1984 agreement was clear that each debt owed to a lender was a divisible debt and because it was a divisible debt, there was a clear provision for separate recovery of the debt.

The difference between section 12.13 of the 1984 agreement and clauses 2.2 (d) and (e) of the agreement in issue in the *Charmway* case is that the separate enforcement rights of lenders are not qualified. In other words, the operation of section 12.13 is not dependent on any other clause in the 1984 agreement which may have limited the separate enforcement right and/or provide contrary to it.

It is common cause that in syndicated loans, the loans advanced by the lenders are divisible but the issue is always how and to what extent the separate enforcement rights are exercisable without restriction and/or consent of the majority lenders. The answer to this question always lies, as it has been discussed in other cases further above, in the manner in which the rights of the finance party's clause and the acceleration clause are drafted.

5. RECOMMENDATIONS FOR SEPARATE REPAYMENT ENFORCEMENT PROVISIONS

Smith J wrote a dissenting Judgment in the *Beal Sav Bank* case, and in his judgment made a comment to the effect that 'A Bank that lends money to a borrower and if it is not repaid is entitled to sue to get its money back. That is, at least, the assumption that most Banks surely make when they enter into loan agreements.

A Bank that is part of a lending group can, of course, agree that no suit will be brought unless a majority or supermajority of the lenders agree to take action, but if that agreement is made, it should be stated in plain language in the document. It is not hard to say "No suit should be brought except by the Administrative Agent, acting upon the written instructions of the required lenders'' '.[42]

The commercial nature of syndicated lending is that the Banks lend as a team, though in differing proportions. In times of default, other members of the syndicate may have a strong balance sheet that may be able to sustain and absorb non-payment for a specific time and opt for a workout, but other members of the syndicate, especially the minority lenders, may be suffocated by non-payment, run the risk of contravening regulatory levels of risk and opt to enforce repayment.

As suggested by Smith J in his dissenting judgment, a lender has to ensure that there are clear contractual provisions that enable recovery, by sole legal action, of its total outstanding loan. Smith J's suggestion is good and well on a strict legalistic approach, but lead counsel/s advising the majority lenders would have to consider the practical and commercial reality of such separate enforcement provisions in order to agree with suggestions made by counsel advising minority lenders.

Going forward, the question that the minority lender/s would have to ask themselves regarding the commercial viability of separate repayment enforcement are whether the money recovered by it will be available to pay its proportionate loan only or whether it would have to be shared with other lenders.

The answers to the above questions is found in clause 27.5 of the agreement, which states that a recovering finance party is not obliged to share with any other finance party proceeds obtained as a result of a legal or arbitration proceedings if the other finance parties were notified of the proceedings but, despite the notification, did not join the proceedings or institute separate legal proceedings. In terms of this clause, the minority lenders would have to share the proceeds of the legal proceedings or arbitration unless other finance parties did not respond to the notice calling them to join.

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[42] *Beal Sav BankBank* case p 7.

Going forward, the issue that has to be considered by the majority lenders in negotiating the separate repayment enforcement clauses is whether the legal action taken separately by the minority lenders without their support would be excluded or included as an event of default. If insolvency or a creditor process including that of a minority lender remains an event of default, then the borrower would be in default once minority lenders take action. Consequentially the majority lenders would have to accelerate their portion/s of the loan or waive or disregard the event of default and consequent acceleration.

The big issue for the majority lenders, on separate repayment enforcement, would be the effect on financial covenants usually based on the share price of listed investment grade borrowers. A creditor process surely, would constitute price-sensitive information, which would have to be disclosed to investors as required for example by the Johannesburg Stock Exchange listing requirements.

For leveraged financing, the issue for majority lenders would be what would happen to the shared security when the minority lenders sell pledged assets in execution or liquidation in order to recoup payment. For example, in the *Beal Sav Bank* case, the property built by the Bank loans to operate as a casino was pledged as security. In the event the casino is sold in execution or as part of liquidation by the minority lenders, there would be no reason for the majority lenders to remain because their business they funded would no longer be owned by the borrower. In effect, the borrower wouldn't have a source of revenue to repay the majority lenders.

Moreover, assets sold in execution are usually sold at a discounted price (fire sale) other than the price it would have fetched in a normal sale. The fire sale proceeds may be sufficient to repay the minority lenders but may be insufficient to repay the majority lenders. This would render the separate repayment enforcement clause commercially unfair to the majority lenders, whereas, on the other hand, if the minority lender/s remains in the loan with the majority lender/s it is likely to be paid in full in the end than to chart its own part and destroy the entire prospects of the transaction.

The commercial realities and considerations for inclusion of separate repayment enforcement clause would be outweighed by the considerations for its exclusion.

The Author if acting for a minority lender in a financing transaction, would strenuously, negotiate for amendment of the LMA facility agreement clauses relating to the finance parties' rights (clause 2.2) and acceleration (clause 22.17) as follows:

2.2 FINANCE PARTIES' RIGHTS AND OBLIGATIONS

(a) … .

(b) ... .

(c) A finance party may, on conclusion of the agents' procedure provided for in clause 22.7, separately enforce its rights under or in connection with the finance documents.

22.17. ACCELERATION

On and at any time after the occurrence of an event of default, the agent after advising the finance parties about the event of default, unless a finance party by notice to the agent opts out its commitment/s and loans before the notice contemplated herein, by notice to the borrower

(a) cancel the commitments, save for those opted out, whereupon they shall be immediately cancelled;

(b) declare those loans not opted out, together with accrued interest and all other amounts accrued or outstanding under the finance documents, be immediately due and payable whereupon they shall become immediately due and payable; and/or

(c) declare those loans not opted out to be payable on demand, whereupon they shall immediately become payable on demand by the agent on the instruction/s of the finance party/s who has elected not to opt out their loans.

The suggested clause 2.2 (c) grants the minority lender separate repayment enforcement that is only subject to the conclusion of the agent's process stated in clause 22.17. The suggested agent's process is not monopolised by the majority lenders but it gives any lender the option to opt in or out of the acceleration process.

Put differently: if the majority lender/s does/do not wish to cancel its/their commitments and declare its/their loans immediately due and payable and/or actually demand payment, it/they has/have a choice to exclude its/their loans from acceleration. The minority lender will then instruct the agent to demand payment and thereafter, if payment of its loan is not forthcoming, separately enforce its repayment rights in terms of clause 2.2 (c).

6. CONCLUSION

Edward J and Greenfield J famously held that 'the nine members of the consortium, i.e. the syndication, like the famous Three Musketeers, must stand "all for one, and one for all" '.[43] Authority of the majority lenders, as provided for in the facility agreements must not only be accepted by minority lenders in good times but must also be accepted in tough times, even when decisions contrary to theirs are taken. That is the nature of commerce when one has less to lose. It makes commercial sense to reserve certain commercial decisions for those who have a lot to lose.

Harris J in the *Charmway* case and Smith J in the *Beal Sav Bank* case agree in their judgments that, if there is a clause or provision that makes it clear that no individual lender can take separate action to enforce repayment of its loan without the consent of the majority lenders, the minority lenders have effectively surrendered their separate repayment enforcement rights to the majority lenders.

If a minority lender/s do not want to surrender its/their separate enforcement rights, then a clause or provision stating clearly and without any qualifications that, in the event of default, repayment may be separately enforced by a party who desires to do so. The suggested clauses 2.2 and 22.17, under recommendations for separate repayment enforcement provisions would, in the author's view, give sufficient comfort to minority lenders on their right to separately enforce repayment.

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[43] *Credit Francais Int'l S.A* case p 8.

In the event of default, in order to manage the commercial difficulties that would be created by the suggested clause 2.2 and 22.17, the majority lender/s could negotiate an exit of the enforcing minority lender by acquiring or arranging the acquisition of its interest in the loan.

The acquisition of a finance party's interest occurs in terms of clause 23 (changes to the lender) of the agreement by cession and delegation of rights and obligations. Cession and delegation transactions can be by the majority lender/s itself or any other Bank or financial institution or a trust, fund or other entity regularly engaged in or established for the purpose of making, purchasing or investing in loans or other financial assets.

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