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Syndicated loans: The facility agent's role

A syndicated loan is a loan advanced by a number of lenders, on a proportionate basis, to a borrower. In this article, the core role of the facility agent (referred to as the agent) in a syndicated loan is discussed.



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Syndicated loans: The facility agent's role

A syndicated loan is a loan advanced by a number of lenders, on a proportionate basis, to a borrower. In this article, the core role of the facility agent (referred to as the agent) in a syndicated loan is discussed.

The context within which the agent is appointed and functions, is important.

A standard syndicate is typically comprised of several parties, such as an arranger, a book-runner, an agent and different classes of lenders. The lenders' interests are, throughout the life of the loan, from its inception to its repayment, including exercising lender enforcement action and security rights, represented, and managed by the agent for the lenders' collective benefit. Often, the agent is also a lender and is appointed by the lenders in the facility agreement. Although a contractual relationship exists between the agent and the lenders, the agent attracts no fiduciary duties to the lenders and none can be implied, as discussed below.

The liability of syndicate lenders to lend the amounts promised is several in that each lender is liable only for its loan, not the other lenders' loans.

The lenders' liability to lend is not joint and several, and lenders who advance their loans cannot be held liable for defaulting lenders who fail to advance loans due to the borrower.

In a syndicated loan, senior lenders, mezzanine lenders and junior lenders/equity holders agree that the repayment of each of their loans rank in order of priority in a payment waterfall, one after the other. The senior lender's loan ranks senior to the mezzanine loan and the junior loan but ranks *pari passu* with other senior loans and it is repaid first by the borrower. The mezzanine lender's loan ranks after the senior loans, ranks *pari passu* with other mezzanine loans and it is repaid after the senior loan has been repaid. The junior lender's loan ranks and is repaid last. Similarly, the security rights held by each class of lender rank one after



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the other, with the senior lender's security rights ranking senior to the mezzanine lender's security rights, and mezzanine lender's security rights ranking next in line. Typically, senior lenders and mezzanine lenders are secured creditors for insolvency law purposes, and junior lenders are unsecured, concurrent creditors.

THE AGENT'S DUTY TO THE LENDERS

The agent is primarily an administrator, co-ordinator and facilitator of the facility, its repayment, the lenders' security rights and it represents the lenders. The view held by the English court in *Torre Asset Funding Ltd v Royal Bank of Scotland plc* [2010] All ER (D) 295 (Oct); [2013] EWHC 2670 (Ch) was that the agent in those contractual circumstances owed the lenders no fiduciary duties. The Loan Market Association (LMA) in its South African suite of standard

form facility agreements for secured loans expressly excludes any such fiduciary duties by the agent or the arranger.¹ It would also not be possible to contend that the language excluding fiduciary duties could be stretched to interpret to mean that the agent has fiduciary duties to the lenders. It is of course possible that an agent in other contractual circumstances, including a facility agent where the LMA standard form facility agreement is not used, may owe its principal(s) fiduciary duties. Understandably, agents would be averse to undertaking fiduciary duties to lenders because of the potential liability they would be exposed to. There are, however, contrary views that, given the nature of the agent's functions, it does in fact owe the lenders fiduciary duties. This article assumes the former position.

THE AGENT'S FUNCTIONS

Some of the agent's functions include the following. The agent would typically *inter alia* (i) review the obligors' fulfilment of the conditions precedent to which the facility is subject to; (ii) act as a conduit for all payments to and from the borrower; (iii) call defaults, exercise the lenders' rights to accelerate the loan due date, and exercise the lenders' discretionary rights; and (iv) act as a conduit for all notices issued on behalf of the lenders such as those issued under the facility, issued on obligor default or issued in respect of loan transfers. There are, of course, additional functions undertaken by the agent. Although the agent takes its instructions from the lenders, a distinction is drawn between matters that require all-lender decisions and

¹ See for example, clause 25.5 (titled *No fiduciary duties*) of the LMA's investment grade South African law single currency secured term facilities agreement, 21 December 2018.

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those that require majority-lender decisions. Majority-lender decisions are typically decisions taken by lenders whose commitments aggregate $66\frac{2}{3}\%$ or more of the total commitments, although the threshold can be set higher by consensus. These matters are often governed by the inter-creditor agreement entered into between the finance parties. The agent will need to abide by the all-lender decisions or the majority-lender decisions, as the circumstances may require, in the execution of its functions.

Although the agent's functions have become standardized over time, lenders ought to determine if the nature of such standard and typical functions would mitigate the lenders' risks in relation to the particular financial and organisational condition of the obligors. Furthermore, it is important for the lenders to consider if the party that the lenders intend appointing as the agent has the knowledge, capacity and expertise to fulfil and carry out its functions optimally.

ADNAAN KARIEM



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