

**UNIVERSITY OF RWANDA
COLLEGE OF ARTS AND SOCIAL SCIENCES
SCHOOL OF LAW
LLM IN BUSINESS LAW**

Arranger and Agent bank's Liability in Syndicated Loan Transactions

A Thesis submitted to the school of Law in partial fulfilment of the academic requirements for the award of a Master's Degree in Business Law (LLM).

By FURAHA David

SUPERVISER:

Dr. NTEZILYAYO Faustin

Kigali, June 2017

DECLARATION

I, the undersigned David FURAHA, declare that the thesis entitled « Arranger and Agent bank's Liability in Syndicated Loan Transactions» is my own original work to the best of my knowledge and has been never entirely or in part submitted by anybody else to any university or other institution of high learning for any award. Where the works of other individuals were used, the references were provided.

Student's signature

Names: **FURAHA David**

Date: 01st June, 2017

To the Almighty God, my lovely wife, my daughter, my Parents, workmates and all our sponsors,

THIS THESIS IS DEDICATED

ACKNOWLEDGEMENT

I would like to first and foremost, acknowledge the Almighty God who unceasingly provided me with all it required to do this work. Had it not been the special grace from the merciful God, I would not have completed this academic assignment.

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ABSTRACT

In the world economy, countries as well as organisations refer to borrowing to cover the deficit in their balance of payment whereby they contract loans with many lenders through a syndicated loan due to the fact that the targeted project exceeds the lending limit of one bank.

The formation of a syndicate commences with the borrower granting a mandate to a bank or group of banks which is referred to as Lead bank or arranger and the latter mandate authorizes the formation of a syndicate for a named purpose on certain terms and conditions contained in a term sheet and the bank that is given the mandate to organize syndication is referred to as the arranger. Once the loan syndication is successful and the Agreement is signed, the bank which was responsible for the formation of the syndicate and the negotiation of the Agreement is replaced by the Agent bank but in practice, both functions are normally performed by the same bank.

Interestingly, the syndicate is formed in a structure that makes the determination of relationships and liabilities complicated as the arranger who served in the capacity of an intermediate between the borrower and participants to the syndication may be seen to be liable to both the borrower and lenders. Additionally, since each lender is a member of the syndicate and a party to the loan documents, the borrower has a direct contractual relationship with each member of the lending syndicate and it may be inferred from the latter that the borrower may be directly liable to lenders and vice versa.

This research focused the relationship between the arranger/agent bank with the borrower on one hand and with lenders on the other hand but also the extent of their liability in the loan syndication structure.

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INTRODUCTION

I. Presentation of the topic

In the world economy, countries as well as organisations refer to loans to cover the deficit in their balance of payments. Countries and organisations that suffer a deficit in their balance of payment mostly refer to borrowing whereby they contract loans with many lenders through a syndicated loan due to the fact that the targeted project exceeds the lending limit of one bank.¹

The recourse to a syndicated loan would also be justified by the fact that the borrower may have relationships with a number of other institutions and may thus wish to ensure that they each have a share of the new business; or it may wish to establish a wider range of banking relationships.²

According to I. RAMPAUL, syndication refers to a group of banks joining together to lend directly to a borrower under a single loan agreement known as a syndication agreement (hereafter referred to as "Agreement"). It allows borrowers to quickly access large sums of money while lenders share the risk involved.³ Syndication is also mostly characterised by a loan arrangement by more than one bank to a single borrower.

The formation of a syndicate commences with the borrower granting a mandate to a bank or group of banks which is referred to as Lead bank or arranger. This mandate authorizes the formation of a syndicate for a named purpose on certain terms and conditions contained in a term sheet and the bank that is given the mandate to organize syndication is referred to as lead bank.⁴

During the process, prospective financiers are approached by the lead bank with an information memorandum usually prepared by the borrower and the lead bank. This memorandum contains the term sheet referred to above and the history, business, management details and financial statements

¹ L. L. Broome and J. W. Markham, *Regulation of Bank: Financial Service Activities, Case and Materials*, 4th edition, West, 2011, p.320.

² Ch. Proctor, *The law and Practice of International Banking*, Oxford University Press, New York, 2010, P.387.

³ I. Rampaul, *How does a syndication agreement deal with the conflicting needs of the lenders?*, http://www.dundee.ac.uk/cepmlp/car/html/car4_art8.htm, accessed on 11th November 2014.

⁴ *Ibidem*

of the borrower. The lead bank then does an analysis of the responses received and if favourable, commences negotiations.⁵

The arranger who served as an intermediate between the borrower and participants to the syndication may be seen to be liable to both sides meaning the borrower and lenders. He may be liable to the borrower for the default of lenders since he is the one who mobilized them to join the syndication but also may be liable to lenders for the default of the borrower because he is the one that organized the syndication.

Apart from the above, each lender is a member of the syndicate and a party to the loan documents. Therefore, the borrower has a direct contractual relationship with each member of the lending syndicate.⁶ This structure of the loan syndication makes the determination of relationships and liabilities complicated and lead us to do more research about it.

Theoretically, after successful negotiations and once the Agreement is signed, the bank which was responsible for the formation of the syndicate and the negotiation of the Agreement is replaced by the Agent bank. In practice, however, both functions are normally performed by the same bank.

The Agent bank serves as the agent of the lenders not of the borrower and has a number of important functions.⁷ The Agent's functions are basically to administer and operate the loan in return for a compensatory fee. These duties are spelt out in the Agreement and include ensuring where necessary that the conditions precedent to signing, drawdown and rollover are met.

The Agent would then issue notices of drawdown and transfer to the borrower the money paid by the syndicate into the proceeds account. The Agent receives payments made by the borrower in accordance with the Agreement and distributes these among Banks. The Agent is required by law to

⁵ Ch. Proctor, *op.cit.*, p.389.

⁶ L. L. Broome and Jerry W. Markham, *op.cit.*, note.1, p.321.

⁷Fr. Twinamatsiko, *What is the Role of Loan Syndication in Project Financing*, www.dundee.ac.uk%2Fcepmplp%2Fgateway, accessed on 15th December 2014.

fulfil its duties with skill, care and due diligence and would be liable for negligent performance thereof.⁸

The Agent is also bound by the duty to disclose information concerning events or potential events of default of the borrower. It is in the interest of banks to learn of an event of default as soon as possible. This would allow them to take informed action such as suspending further borrowings and accelerating the loans. The failure of the agent to disclose entails legal liability of the agent vis a vis the other lenders.⁹

It happens however, that all relevant information regarding the borrower is not willingly or unwillingly disclosed during this process. The borrower may hide the information to everyone including the lead bank (arranger) and the latter may not realize that something is missing. The borrower and the lead bank may also collaborate to hide important information which may have a great impact on the loan agreement implementation.

Considering that in the loan syndication, the arranger mostly continues to serve as an agent bank after a loan agreement has been signed and taking into account the important role that either the arranger or the agent bank plays in the whole process of loan syndication; the researcher's interest was lying in addressing the extent of liability of the lead bank that continued to serve as an Agent bank in the syndicated loan towards the borrower and towards other lenders.

The researcher also sought to understand if the eventual liability may not discourage some banks that would take on the role of arranger and Agent bank respectively and thus affect the financing of big projects which in the end reduce the pace of development. Through the same research, mechanism to minimise the discouragement of banks to take on the role of lead arranger and agent bank will be proposed.

⁸ I. Rampaul, *op.cit.*, p.2.

⁹ P. Dopsch et al., *Harbinger v. Wachovia: Could Arrangers of Syndicated Loans Have Increased Liability?* <http://www.mondaq.com/unitedstates> , accessed on 10th November 2014.

II. Research questions

The research aimed at responding to the following questions:

1. To what extent and in which circumstances is the Arranger/Agent Bank liable to the borrower?
2. To what extent and in which circumstances is the Arranger /Agent Bank liable to other lenders?
3. Can the eventual liability of the Arranger /agent bank affect the willingness of banks and financial institutions to take the role of arranger/Agent bank and halt the investment promotion?
4. What mechanisms that can be proposed to avoid the discouragement of banks to take on the role of arranger and Agent bank in the process of loan syndication?

III. Hypotheses

The research aimed at verifying the following two hypotheses:

1. The Arranger /Agent bank are liable to both the borrower and other lenders in a loan syndication.
2. The liability of the Arranger /Agent bank affects the willingness of banks and financial institutions to take on the role of arranger/Agent bank and halt the investment promotion.

IV. Methodology

While conducting this research we used mostly the exegetic method whereby we read and interpreted the laws in force in Rwanda at the time of research but also foreign legislation was considered so as to make the research questions get adequate answers from them by using a comparative study.

Beside, the exegetic method, documentary method was referred to whereby books and journals of legal scholars were used in order to get more informed answers to the research questions. Due to the fact that borrowing through loan syndication is not yet developed in Rwanda and there is no much literature about this type of lending available in Rwanda, we used the resources of what happens in other jurisdictions outside Rwanda to attain the goals of this research.

Finally, it is important to mention that local and foreign case laws were of vital role in this research process and were therefore considered in order to be informed on what courts may have decided in regards to the matter that is the subject of research, in order to enrich the research findings.

V. Interest of the topic

The research is worthy being done as it will benefit different people at different levels of involvement in business and development. Firstly, it will benefits potential borrowers as they will be informed of the duties and responsibilities of the arranger/agent bank and provide to them with clear guidance on the organisation and management of a syndicated loan.

Secondly, lenders will have sufficient information on the organisation and management of a syndicated loan and help them in the decision making process on where to invest and what measures to be taken in order to protect their money and how to deal with liability of all participants to the syndicated loan.

And thirdly, the importance of this research lies in the fact that mechanisms to avoid the liability of the arranger and agent bank affect the willingness of banks to take on the role of arranger and Agent in the syndicated loan.

VI. Limitation of the topic

The research focused on the formation of a syndicate and the management of a syndicated loan agreement specifically the liability of the lead bank that became the Agent bank after successful negotiations of the syndicated loan. The research focuses on the formation and management of the syndicated loan in Rwanda but it also considers how this type of borrowing is regulated so as to be able to advise Rwandan financial prayers on how to perfectly deal with syndicated loans.

VII. Subdivision of the work

The work is divided into two main parts whereby the first part will concentrate on General consideration of syndicated loans and the second one will focus on the liability of the lead/agent bank in a syndicated loan as well as recommendations to avoid any negative impact of this liability on the financing of big projects.

CHAPTER I: GENERAL CONSIDERATIONS ON LOAN SYNDICATION

Under this chapter we shall elaborate on the definition of loan syndication, the purpose of loan syndication, the process of loan syndication, the parties to a syndicated loan and some of the important characteristics of loan syndication. The literature reviewed in this chapter aims at shading light on loan syndication and will help in finding responses to the research questions highlighted in the introduction.

SECTION I. 1: DEFINITION AND FACTORS THAT LEAD BORROWERS TO LOAN SYNDICATION

This section defined the concept of loan syndication, highlighted the difference between loan syndication and other types of loan as well as indicating the factors that borrowers to loan syndication and its benefits.

I.1.1. Definition of loan syndication

Different scholars have defined the term loan syndication in many ways and we shall highlight some of the definitions hereunder. I. RAMPUL wrote that “*Syndication refers to a group of banks joining together to lend directly to a borrower under a single loan agreement known as a syndication agreement. It allows borrowers to quickly access large sums of money while lenders share the risk involved*”.¹⁰

According to Fr. TWINAMATSIKO, Loan syndication is a funding mechanism where two or more banks come together contribute a portion of the loan to finance the project,¹¹ whereas an article posted on the website of the Bank of China defines a syndicated loan as a form of loan business in which two or more lenders jointly provide loans for one or more borrowers on the same loan terms and with different duties and sign the same loan agreement.¹²

¹⁰ I. Rampul, *op.cit.*, p.2.

¹¹ Fr. Twinamatsiko, *op. cit.*, p.3, note 7.

¹² Bank of China, *Syndicated Loan*, http://www.bankofchina.com/uk/cbservice/cb4/201109/t20110924_1576332.html, consulted on 04/06/2015.

I.1.2. Difference between syndicated loans and other types of loan

There are different types of loan on the financial market. This sub section aims at showing the demarcation between syndicated loans and other types of lending

I.1.2.1. Syndicated business loans and bilateral business loans

The major difference is that there are several entities involved in syndicated business loans. There are the borrower, multiple lenders, and arrangers who work to locate the lenders for the individual borrower. The people who arrange the loan are usually professionals or investment bankers.¹³

Additionally, there are several expenses associated with these loans, because not only is a fee paid to the people who arrange the loan, but the lenders will charge more for the loan, too. The arrangers will charge more for more complex or difficult situations, such as a high loan request without good credit. These loans are most commonly used by large companies, or for projects that require large sums of money.

Generally speaking, this type of loan is used when a simpler loan form is not an option, unless the expense of the loan can be justified by the rate of return on the investment. If a company doesn't have a strong financial background, using this loan type may be the only way it can secure funding. The specific terms of the loan are based on the company's future expected profits. Lenders usually elect to participate in this loan type because of the high pay off for them.¹⁴

With a bilateral business loan, the only two parties are the lender and the borrower. Instead of multiple lenders, the borrower deals directly with the bank, and saves money by not having to hire people to seek out the financing lender. These loans are not as expensive for the borrower because the lender is not assuming a large amount of risk. Since the loan is not as complex, the loan terms can be clearly set forth by the lender. This is another reason why the loans are less expensive.¹⁵

¹³ E. c. Buljevic and Y. Spark, *Project Financing and the International Market*, Boston, 1999, p.26.

¹⁴ *Idem*, p. 27.

¹⁵ X, *Bilateral Business Loan*, <http://www.finweb.com/loans/understanding-the-difference-between-syndicated-and-bilateral-business-loans.html#ixzz38sTobmmL>, accessed on 04/06/2015.

These loans are most commonly used by small business owners who are looking to either start or expand a business. There isn't a limit on the amount of funding through this loan type, but depending on the exact amount, the funds may need to come from more than one place. Loan terms will vary based on the lender, the loan amount, and the borrower's credit record. The specific loan terms can be a revolving line of credit, like a credit card, an overdraft loan, which has a higher interest rate but offers more flexibility, or a term loan.¹⁶ Generally speaking, a syndicated business loan is best suited for large businesses or large expenses, while a bilateral loan is better for small businesses.

I.1.2.2. Syndicated loan and loan participation

The loan syndication is different from another form of lending called loan participation whereby the borrower who is in need of a quick financial commitment and there is no enough time to negotiate a loan agreement with several lenders and then a bank called "*Lead Bank*" does agree to lend the borrower the requested loan, and then assigns part of its interest under the loan agreement to other lenders. Ordinarily, in this type of loan agreement, the lead bank does not usually have a fiduciary duty towards other lenders when it negotiates the loan agreement.¹⁷

I.1.2.3. Syndicated loans and joint loans

Joint Loan is referred to as a loan in which two or more borrowers assume responsibility for repayment. That is, if one borrower stops paying, the others must pay on that borrower's behalf. A joint loan reduces the risk for the lender, which may reduce the interest rate. A joint loan also may be eligible for certain tax benefits.¹⁸

¹⁶ *Ibidem*

¹⁷ T. Ajayi and M. Sosan, *The Roles of Agent Banks in Syndicated Loans Transactions: A Critical Analysis*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260605, accessed on 03/06/2015.

¹⁸ X, Joint Loans, <http://financial-dictionary.thefreedictionary.com/Joint+Loan>, accessed on 22/05/2015.

I.1.3. Factors that lead borrowers to loan syndication

Borrowers seek funding through loan syndication due to different factors including lending limits, maintenance of a balance portfolio of loan assets, relationship with funding institutions and specialisation of lenders.

I.1.3.1. Lending limits

Some borrowers seek funding through loan syndication due to lending limits imposed to banks by the laws¹⁹ yet the credit facility exceeds the lending limit of one bank. In line with the latter, banks wish to diversify their loan portfolios and may not wish to extend credit to one borrower up to the maximum legal amount.²⁰

I.1.3.2. Maintenance of a balance portfolio of loan assets

Loan syndication is regarded as a tool that can be useful for banks to maintain a balanced portfolio of loan assets among a variety of industries. If one loan is too large, it may overweight the bank's portfolio. Therefore, banks may pursue a syndication to accommodate a loan and keep its portfolio in balance. At the same time, loan syndications may incur a large expense to the borrower. While the syndication fee is usually financed, the burden of repaying the loan and syndication fee is shouldered ultimately by the borrower.²¹

¹⁹ Regulation n° 05/2008 on Credit Concentration and Large Exposure, *Official Gazette N° 02 of 10/01/201*; According to article 3 of this regulation A bank shall not grant or promise to grant to a single person or to related parties, an advance, credit or commitment which is more than 25% of its Net Worth.

²⁰ L. L. Broome and J. W. Markham, *op.cit*, note.1, p. 320.

²¹ X, "Loan Syndication", <http://www.investinganswers.com/financial-dictionary/debt-bankruptcy/loan-syndication-579>, accessed on 03/06/2015.

I.1.3.3. Relationship of the borrower with funding institutions

The recourse to a syndicated loan would also be justified by the fact that the borrower may have relationships with a number of other institutions and may thus wish to ensure that they each have a share of the new business; or it may wish to establish a wider range of banking relationships.²²

I.1.3.4. Specialisation of lenders

A part from the above factors, a project may require a special type of investor or lender with expertise in a particular asset class. For example, a transportation project, such as a high speed rail, may involve a group of investors and lenders, each specializing in a portion of the project, such as rail lines, cars, bridges and tunnels, and signal and control technologies. This whole group is referred to as a syndicate. Not only do the various lenders or investors bring their own expertise to the project, they also spread the risk among themselves, especially among very large, complicated projects. Generally, it enables lenders to handle projects that may exceed their individual capital base.²³

As V. IVASHINA et al. point out, the advantage of syndicated lending is that it enables originating banks to share risk across the syndicate. Such risk-sharing is valuable if banks are themselves financed in an imperfect capital market and adverse shocks require them to raise costly external capital.²⁴ Syndicated loan is often referred to as flexible and adjustable in nature, whereby the borrower is allowed to redeem the loan and it has been said to allow a more efficient geographical and institutional sharing of risks.²⁵ Thus syndicated loan is adjustable, due to the fact that an original lender can transfer his rights and obligations under a particular loan agreement to a new lender, dissolving the previous agreement with the borrower who will in turn make new agreements with the present lender.²⁶

²² Ch. Proctor, *op.cit.*, p.390.

²³ X, « Loan syndication », *supra*, note.21.

²⁴ V. Ivashina and D. Scharfstein , “Loan Syndication and Credit Cycles(January 2001)”, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260605, accessed on 01/10/2014

²⁵ T. Ajayi and M. Sosan, *op.cit.*, p.6.

²⁶ *Idem*, p. 3.

I.1.4. Types of syndications

During our research, it was realised that there are three main types of underwriting for syndication, namely, an underwritten deal, best-efforts syndication, and a club deal. This sub section explains the difference between the three types of syndicated loan.

I.1.4.1. Underwritten deal

An underwritten deal is one for which the arrangers guarantee the entire commitment, and then syndicate the loan. If the arrangers cannot fully subscribe the loan, they are forced to absorb the difference, which they may later try to sell to investors.²⁷ J.B. CAOUETTE. and E. I. ALTMAN, indicated that the latter is only easy if market conditions or the credit's fundamentals improve. If not, the arranger may be forced to sell at a discount and potentially even take a loss on the paper. Or the arranger may just be left above its desired hold level of the credit.²⁸

Arrangers underwrite loans for several reasons. First, offering an underwritten loan can be a competitive tool to win mandates. Second, underwritten loans usually require more lucrative fees because the agent is on the hook if potential lenders balk. Of course, with flex-language now common, underwriting a deal does not carry the same risk it once did when the pricing was set in stone prior to syndication.²⁹

I.1.4.2. Best-efforts syndication

J. MADURA notes that this type of loan syndication refers to the one for which the arranger group commits to underwrite less than or equal to the entire amount of the loan, leaving the credit to the vicissitudes of the market. If the loan is undersubscribed, the credit may not close or may need significant adjustments to its interest rate or credit rating to clear the market. Traditionally, best-efforts syndications were used for risky borrowers or for complex transactions. Since the late 1990s,

²⁷ X, "Types of syndicated loans", http://en.wikipedia.org/wiki/Syndicated_loan, accessed on 03/10/2014.

²⁸ J. B Caouette,.; Ed. I Altman,. (1998). *Managing Credit Risk:The great Challenge for Global Financial Markets*, 2nd edition, New York, Wiley. p. 19.

²⁹ X, "3 Types of syndicated loans", <http://www.finweb.com/loans/the-3-types-of-syndicated-loans.html#axzz3F5zN8cT3>, accessed on 03/06/2015.

however, the rapid acceptance of market-flex language has made best-efforts loans the rule even for investment-grade transactions.³⁰

I.1.4.3. Club deal

A club deal is a smaller loan that is pre-marketed to a group of relationship lenders. The arranger is generally a first among equals, and each lender gets a full cut, or nearly a full cut, of the fees.³¹

I.1.5. Benefits of syndicated loans

Considering that each transaction is tailor made for an individual customer; syndicated loans offer various benefits in addition to meeting funding needs and those benefits vary depending on the purpose of the transaction.³² Here below is an outline of some of the benefits referred to in this subsection.

I.1.5.1. Improving financial soundness

Loan syndication helps in the rationalization of the borrower's balance sheet, in Securing financing at prevailing market interest rates, achieving flexible terms that meet the requirements of the borrower's cash flow plan and managing his/her funds efficiently. It is also beneficial to the borrower because it facilitates the unification of the terms of transactions with financial institutions as well as securing liquidity.³³

I.1.5.2. Enhancing flexibility of financing

It has been proved that syndicated loans facilitate in the raising of large-scale financing as they can meet borrowers' demand for funds of long term and large amount and are used for new projects loans, large equipment leasing, etc. They are also advantageous as they allow diversifying funding

³⁰ J. Madura , *Financial Markets and Institutions*, Thomson, South-Western, 2005, p.40.

³¹ X, "Club deal", <http://www.dlapipertradefinance.com/en/glossary/c/club-deal.html>, accessed on 03/06/2015

³² MIZUHO BANK, "Benefits of syndicated loans", http://www.mizuhobank.com/service/fin_product/syndicate/index.html, accessed on 10th May 2015.

³³ *ibidem*

sources as they have been established as a key means of raising funds, alongside bilateral loans and corporate bonds, developing new business relationships with financial institutions and reviewing the borrower's policy towards transactions with financial institutions and consolidating existing transactions.³⁴

I.1.5.3. Streamlining treasury and accounting departments

Since a syndicated loan is arranged by the lead bank and managed by the agent bank, it reduces the time and energy that would be spent by the borrower while negotiating lending terms. It is also advantageous in the fact that it alleviates the burden of administrative tasks such as settlement and management during the financial period.

It is usually the responsibility of the arranger for doing the preparation work of establishing the syndicate after the borrower and the arranger have agreed on loan terms by negotiation. During implementation of the loans, the borrower does not need to face all members of the syndicate, and relevant withdrawal, repayment of principal with interest and other management work related to the loans shall be fulfilled by the agency bank.³⁵

I.1.5.4. Further increasing added value, in addition to meeting financing needs

According to K. KANTIN and J. MADURA, it is affirmed that loan syndication facilitates in securing financial stability to facilitate the structural reform of business units, rationalization of corporate finances, such as by moving assets off the balance sheet, and using the increased flexibility to enhance competitiveness. It also helps in identifying those financial institutions that are willing to cooperate with the borrowing company, leveraging new transactions with financial institutions to expand your information centers and operating base, enabling the smooth transfer of financial

³⁴ S. Katerina, *Why do bank syndicate loans*, Boston, 1993, p.46.

³⁵ Bank of China, "Advantages of Loan Syndication", http://www.boc.cn/en/cbservice/cb2/cb22/200806/t20080627_1324062.html , accessed on 02 June 2015.

transactions when restructuring your business, giving a favourable impression to external credit rating agencies and widely appealing to the public that the borrowing company is forward-looking.³⁶

Loan syndication helps borrowers establish a good market image following that successful establishment of the syndicate comes from the participants' full recognition of the borrower's financial and operational performance, by which the borrower can build up their reputation.³⁷

Except the above highlighted benefits, economists and syndicate executives contend that there are other, less obvious advantages to going with a syndicated loan which include the following:

- Syndicated loan facilities can increase competition for your business, prompting other banks to increase their efforts to put market information in front of you in hopes of being recognized.
- Flexibility in structure and pricing. Borrowers have a variety of options in shaping their syndicated loan, including multi-currency options, risk management techniques, and prepayment rights without penalty.
- Syndicated facilities bring businesses the best prices in aggregate and spare companies the time and effort of negotiating individually with each bank.
- Loan terms can be abbreviated.³⁸
- Increased feedback. Syndicate banks sometimes are willing to share perspectives on business issues with the agent that they would be reluctant to share with the borrowing business.
- Syndicated loans bring the borrower greater visibility in the open market.³⁹

³⁶ K. Kantin, "Record Volume For US Syndicate Loan Mart in 04." *Bank Loan Report*. 10 January 2005 and J. [Madura](#), "Financial Markets and Institutions". Thomson South-Western, January 2005, <http://definitions.uslegal.com/s/syndicated-loans/>, accessed on 31st May 2015.

³⁷ S. Katerina, *Op. cit.*, p.57.

³⁸ G. Roberts, "Law relating to International Banking", Gresham books, Cambridge, 1998, p.36.

³⁹ X, "Syndicated Loans", <http://definitions.uslegal.com/s/syndicated-loans/>, accessed on 31st May 2015.

I.1.6. Borrower's application qualifications and required documents

This part aims at presenting the qualifications expected on the side of the borrower in order to be allowed to apply for loan syndication as well as the required documents in most of the legal systems.

I.1.6.1. Application qualifications

A. TAYLOR and A. SANSONE point out that the borrower should be the legal persons of enterprises and public institutions as well as other economic organizations approved and registered. The borrower must be qualified for basic terms and conditions on the borrowers of Lending General Provisions as well as crediting management policies. It should meet requirements of certain level after credit rating by the central bank or other recognized rating agency. The borrower should also be large and medium manufacturing enterprises or project companies with sound operation and finance as well as strong competition in respective industries, which shall be promising in the development.⁴⁰

I.1.6.2. Required documents

As far as required documents are concerned, there should be relevant information on the borrower and their national and foreign shareholders and guarantors; it is also required from the borrower to have Business license and articles of association of the borrower as well as joint venture or cooperation contracts of foreign-funded enterprises and associated enterprises.⁴¹

Furthermore, project proposals, feasibility study reports, engineering estimates and other documents approved by government departments and approval documents, as well as the approval documents on the project provided by administrations of taxation, environmental protection, and customs should be presented. Finally, purchase contracts, construction contracts, supply and sale contracts of project equipment but also other documents or information needed by the banks should be availed.⁴²

⁴⁰ Al. Taylor and A. Sansone, *The Handbook of Loan Syndications & Trading*, New York: McGraw-Hill, 2007, p. 36.

⁴¹ *Idem*, p. 42.

⁴² V. J. Signoriello, *Commercial Loan Practices and Operations*, 1991, p.79.

As we have indicated in this section, loan syndication goes through a long process and involves many players. In that regard, the following section is going to focus on the process of loan syndication and parties involved.

I.2. MAIN PLAYERS AND THE PROCESS OF LOAN SYNDICATION

This section aims at indicating the main players in loan syndication as well as its process. We also highlighted the role of each player and its impact in a syndicated loan.

I.2.1. Main players

There are many players involved in loan syndication. The following are the main ones in the process and management of loan syndication as well as their roles:⁴³

I.2.1.1. The borrower

A borrower is a corporate or other legal entity who seeks to borrow funds and/or arrange credit facilities. According to the Cambridge Business English dictionary a borrower is defined as a person, company, government, etc. that borrows money.⁴⁴

I.2.1.2. The mandated lead manager/arranger/book runner

All the above are names of a bank or banks mandated by the borrower and responsible for organisation and arrangement of the syndicated loan. It undertakes preparation of syndicate and distribution on commission of customers. The Arranger usually will underwrite the whole issue of syndicated loan. The responsibilities of mandated lead arranger include launching and organizing a syndicated loan, and sell the loan in part to member banks, conducting due diligence investigation on the borrower before lending, drafting information memorandum, and introducing the loan to potential participating banks, negotiating loan terms with the borrower on behalf of the bank

⁴³ See Bank of China, "Main Players in a syndicated Loan", http://www.bankofchina.com/uk/cbservice/cb4/201109/t20110924_1576332.html, accessed on 31/05/2015.

⁴⁴ X, "The Borrower", <http://dictionary.cambridge.org/dictionary/business-english/borrower>, accessed on 05/08/2015.

consortium. It also include employing relevant agencies to draw legal documents up, organizing member banks to sign a written agreement with the borrower, assisting the correspondent bank in managing the loan and other responsibilities as may be prescribed in the agreement:⁴⁵

I.2.1.3.The agent/correspondent bank

This refers to a bank selected by syndicate members and approved by the borrower during the loan period. After signing the loan agreement, the agent bank, on behalf of syndicate members, is responsible for withdrawal, repayment of principal with interest, post-loan management and other issues on loan management as well as communication between syndicate members and the borrower, handling contract breach, etc. in the light of terms of the loan agreement.

The main functions of the agent bank are to oversee and urge the borrower to implement the loan agreement and disbursing the loan or conducting other related credit businesses, handle the guarantee formalities as well as the management thereof, Laying out a scheme to manage related accounts, opening a special account to manage the loan fund, and recording every change of the fund, Informing member banks of transferring their committed fund to an designated account at the agreed time or when the borrower applies for disbursement, Receiving the principal, interest and fees, and distributing them promptly to the designated accounts of member banks according to their disbursed proportion.⁴⁶

It is also responsible for after-loan management, monitoring and examining the loan use, and regularly reporting the results to member banks, Paying close attention to the financial status of the borrower, especially the material events, organize member banks in a timely manner to settle the loan with proper preservation measures once the borrower breaches the agreement, Organizing and convening bank consortium meetings and harmonizing the relations among members as well as

⁴⁵ China Banking Regulation commission, “Main players in loan syndication”, <http://www.cbrc.gov.cn/EngdocView.do?docID=200801075590782D825743ABFF8BA45B574BA500> , accessed on 22/05/2015.

⁴⁶ V. J. Signoriello, *op.cit.*, p.80.

accepting consultation and checkups by member banks and handling other issues entrusted by the consortium.⁴⁷

I.2.1.4. Participating banks/ lenders

Participating banks refer to the banks who accept invitation of the arranger to join the syndication and provide loans according to shares determined through negotiation. Their main functions include attending bank consortium meetings, transfer full amount of fund in a timely manner to the account designated by the correspondent bank; to be aware of changes on the borrower's daily operations and credit status, and inform the correspondent bank of unusual issues in time.⁴⁸

I.2.1.5. Coordinator

The above refers to the bank, selected from lead banks, to supervise the whole syndicated loan and to partially undertake preparation tasks of the bank syndicate. This is in case there is more than one arranger.

I.2.1.6. Consultant

The consultant refers to the bank appointed by the borrower during the syndicated loan period, which provides paid financial advisory service for the borrower to make correct loan decision in face of various quotations and loan terms provided by other banks so as to facilitate all the loan work.

I.2.1.7. Guarantee agent

This is a person that is appointed in case the syndication loan has a complicated guarantee structure to take responsibility for the implementation of guarantees for syndicated loans, the registration of collateral (pledges) and management.⁴⁹

As the above subsection indicates, most of the work in loan syndication is respectively carried out by the arranger and the agent Bank compared to other players and they are likely to incur more liability than others. Additionally, the coordinator, the consultant and the guarantee agent are not present in

⁴⁷ Al. Taylor and A. Sansone, *op.cit.*, p.52.

⁴⁸Y. Wu, *Overview of syndicated loans*, <http://www.lexology.com/library/detail.aspx?g=d3cfd2c1-7887-4184-9945-b1e50966407d>, accessed on 20th January 2015.

⁴⁹ *ibidem*

every syndicated loan. Their involvement depends on the nature of the loan and the choice of the lending banks. The following section focused on the process of loan syndication and its different steps.

I.2.2. Process of loan syndication

The formation of a syndicate is a complicated process. It has two main phases referred to as pre-mandate phase and post- mandate phase with five major steps.⁵⁰ The first phase is that one whereby the borrower grants a mandate to a bank or group of banks. The second phase concerns the one in which the syndication of the loan takes place and facility agreement are negotiated.⁵¹

I.2.2.1. Selecting the lead bank and drafting the loan agreement

The borrower must locate a suitable lead bank and submit a mandate letter and an overview of the loan project. If the bank finds the project feasible after assessment and review, it will issue the borrower a conditional Commitment Letter; discuss the basic structure, methods and conditions of the loan with the borrower; and determine the preparatory steps to be taken. After receiving the Commitment Letter, the borrower must secure the approval of its Board of Directors and issue a Letter of Authorization. At this point, the lead bank assumes legal liability for the loan and organizes a consortium.⁵²

I.2.2.2. Preparing syndicated loan documents

After receiving the Mandate Letter, the second step is for the lead bank to entrust lawyers to prepare the legal documentation, which generally includes the Information Memorandum, the Term Sheet and Letters of Guarantee and Collateral Agreement. As regards the Information Memorandum, it is an important legal document drafted by the lead bank and the borrower. It details the legal and

⁵⁰ G. Chandni, "Loan Syndication", <http://fr.slideshare.net/Dharmikpatel7992/loan-syndication-24275360>, accessed on 20th January 2015.

⁵¹ D. Petkovic, "the Arranger's Liability in the Euro Market", <http://www.pillsburylaw.com/siteFiles/Publications/97BB1EC9C027B682FD0FC7053C115B98.pdf>, accessed on 20th January 2015.

⁵² G. Chandni, *op.cit.*, note.50.

financial status of the borrower as well as basic loan conditions. Normally it is distributed to potential participating banks by the lead bank to help them decide whether or not to join the consortium. The accuracy of the Information Memorandum bears directly on the security of the capital of the participating banks.⁵³

When drafting and distributing the information memorandum, the lead bank must faithfully disclose the borrower's true financial, commercial and legal information to potential participants. It bears legal liability for any inaccuracies in the Information Memorandum. The information memorandum frequently goes further than this and providing an analysis of any particular risks and any steps which have been taken in an effort to mitigate them.⁵⁴

The Term Sheet on its part is a basic legal document that lists the major conditions and parameters of the loan as determined by the borrower and the lead bank. It serves as a basis for drafting and negotiating the loan contract.

With regard to Letters of Guarantee and Collateral Agreements, they enter into play when the lead bank and the borrower reach an agreement on the major causes of the Loan Agreement. The borrower must obtain all necessary governmental approvals and permits, and must comply with all loan preconditions.⁵⁵

I.2.2.3. Loan marketing and invitations

The lead bank sends an invitation to potential participating banks in conformity with project demands. Interested banks then sign confidentiality agreements with the lead bank, which in turn provides them with the Information Memorandum on terms of confidentiality. After receiving an Invitation Letter, interested banks analyze project information and issue evaluation reports, upon which basis they will decide whether or not to accept the invitation. Banks that accept the invitation sign a Letter of Commitment to sign up for their loan shares and issue their conditions for participation in the project. The lead bank determines the loan shares of each bank, allocates risk and

⁵³ X, "Syndicated Lending", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260605, accessed on 15/04/2015.

⁵⁴ *Ibidem*

⁵⁵ G. Roberts, *Law relating to International Banking*, Gresham books, Cambridge, 1998, p. 89.

approves acceptable participation preconditions.⁵⁶ The lead bank then does an analysis of the responses received and if favourable, commences negotiations.⁵⁷

The mandate letter authorises the formation of a syndicate for a named purpose on certain terms and conditions contained in a term sheet. The nature of the undertaking at this stage varies from fully underwriting the loan which involves lending the entire amount if no other banks join them to a simple promise to use best efforts to procure commitments for the required sum.⁵⁸

The essential task of the arranger is to bring matters to a point where a number of institutions have given a formal commitment to participate in the loan facility. This is to mean that they have executed a loan agreement which legally obliges them to provide the facility, subject to the terms and conditions set out in that document.⁵⁹

I.2.2.4. Enforcement and follow-up supervision

After validating the Syndicated Loaning Agreement by all parties, the lead bank's functions come to an end as it will have completed the task for which it was mandated. However, it will remain subject to liabilities arising out of the role of being a lead bank. Due to the eventual liability, the lead bank will seek to be a party to the loan facility agreement so that it may seek to take advantage of the various exculpatory clauses included for its benefit and in most cases the lead bank (arranger) is appointed as the agent bank.⁶⁰

An exculpatory clause is defined as a part of an agreement which relieves one party from liability. It is a provision in a contract which is intended to protect one party from being sued for its wrongdoing

⁵⁶ *Idem*, p. 97.

⁵⁷ I. Rampul, *op.cit.*, p. 7.

⁵⁸ A. Mugasha, *Law of Multi-Bank Financing: Syndications and participations*, Mc Gill-Queen's University Press, Montréal, 1997, p.94.

⁵⁹ Ch. Proctor, *op.cit.*, p.389.

⁶⁰ *Ibidem*

or negligence.⁶¹ When the lead bank manages to negotiate an exculpatory clause in an agreement, it is exempted from the liability deriving from the latter role.

After the loan facility agreement has been signed, it comes thereafter the implementation of the terms contained in that agreement. Among other provisions, there is one that must indicate the party nominated to serve as an agent bank to coordinate the activities required for the implementation of the syndicated loan in accordance with the agreed structure.

The most common structure of loan syndication management is whereby there is a single Agent, a single Agent assisted by a group of co-managers or a group of banks with equal status and management obligations.⁶² In practice, the bank that served as lead bank continues to serve as the agent bank after a loan agreement has been signed.

At post contract- stage, the agent bank is charged with the responsibility of administering in terms of borrowing, repayments, interests, fee payments and the syndicated facility itself on the whole, but the most important role of the agent bank is to serve as a communication link between the lending institutions and the borrower, making sure that such a link is open and connected so that both sides remain informed about changing business and market realities, in return for providing these services, the agent bank could charge an annual fee.⁶³ The Agent would then issue notices of drawdown and transfer to the borrower the money paid by the syndicate into the proceeds account. The Agent receives payments made by the borrower in accordance with the Agreement and distributes these among Banks.

If and when necessary, the Agent may be responsible for monitoring the provision of original collateral, updating valuations, obtaining additional collateral and ensuring that the interest of the syndicate is protected in the relevant insurance policies, reviewing guarantee clauses; supervising the borrower's performance of the Loan Agreement and sending periodic reports to the participating banks. It also has the duty of reporting or informing the banks of an actual or impending default.

⁶¹ M. Izzzi, "Exculpatory clause", <http://www.legalmatch.com/law-library/article/exculpatory-clauses.html> , accessed on 20th January 2015.

⁶² X, "Syndicated lending", *op.cit.* p.20.

⁶³ Loan Market Association, "Guide to Syndicated Loans", [http://www.lma.eu.com/uploads/files/Guide to Par Syndicated Loans.pdf](http://www.lma.eu.com/uploads/files/Guide_to_Par_Syndicated_Loans.pdf), accessed on 20th January 2015.

Thus in the event of this, the agent bank has the power to accelerate the loan, but this has to be done by approval from a specific proportion of the banks.⁶⁴ All these duties should be spelt out in the Agreement.

The borrower in a syndicated loan incurs two expenses. One is the interest on the loan. The other is fees. These can take various forms, depending on how the loan is structured. Fees may include an administration fee, upfront fee, underwriting fee, commitment fee, facility fee, utilization fee, etc. Syndicated loans, like most loans, pose credit risk for the lenders. This can be extreme, as with some leveraged buyouts or loans to some sovereigns. Credit risk is assessed as with any other bank loan. Lenders rely on detailed financial information disclosed by the borrower. As syndicated loans are bank loans, they have higher seniority in insolvency than bonds.⁶⁵

I. 2.3. Major characteristics of syndicated loans

The Major characteristics of syndicated loans can be well understood through the following principles:⁶⁶

I.2.3.1. Principle of independent obligation

Referring to different scholars, banks disburse and collect their loans in accordance with the same loan agreement based on the independent relationships with the borrower following that there is no joint legal liability between banks. This principle comprises three aspects. Firstly, lenders are subject to their own obligations on the disbursement of loans to the borrower. A lender's failure to disburse its loan in accordance with the loan agreement will not influence the disbursement obligations of other lenders, and lenders do not act as guarantors of each other's disbursement obligations.⁶⁷

Secondly, under the Loan Agreement, creditors' rights and obligations are separate and independent, and the borrower's debts to each bank are also separate and independent.

⁶⁴ *Ibidem*

⁶⁵ X, "Syndicated Loan", http://www.riskglossary.com/link/syndicated_loan.htm, accessed on 20th January 2015

⁶⁶ Y. Wu, "Overview of syndicated loans", *op.cit.*, note 48.

⁶⁷ G. Roberts., "Law relating to International Banking", *op.cit.*, p.91.

Thirdly, unless otherwise provided in the Loan Agreement, all creditors are entitled to exercise their rights independently.⁶⁸

1.2.3.2. Principle of democratic decision-making

Profit conflicts can easily arise among members of a consortium. To operate effectively, a consortium adopts the principle of democratic centralism in its management. Consequently, the Loan Agreement usually provides that certain terms must be approved by all consortium members and others that must be adopted by a majority (or supermajority) of loan shares. Some model syndicated loan agreements require approval by consortium members holding no less than 2/3 of the total loan shares.⁶⁹

With respect to terms that must be approved by a majority of loan shares, the banks holding those shares restrict the banks holding minority shares (i.e. the majority oppresses the minority). As regards items that must be passed unanimously, each member has veto power over the entire consortium. Terms that can only be revised or eliminated with unanimous consent usually include matters concerning the currency of loan commitments, amounts, repayment dates or changes in maturity dates. Terms that require a majority or a supermajority vote include declarations of default, repayment acceleration, loan termination, and revision or termination of certain contract clauses.⁷⁰

1.2.3.3. Sharing clauses

P. MÄNTYSAARI explained that in a syndicated loan, the lead bank is always a deposit bank of the borrower and is in possession of a large quantity of the borrower's funds. If the borrower defaults, an issue of fairness will arise if the lead bank exploits its possession of the borrower's deposits and thereby imposes a disproportionate share of the risk of default on other consortium members.

⁶⁸ *Ibidem*

⁶⁹ M. Megliani, *Sovereign Debt: Genesis - Restructuring – Litigation*, Springer, Milan, 2015, p.331.

⁷⁰ *Ibidem*

Sharing clauses are drafted to insure that all consortium members share equally in the risk of default.⁷¹

He continued mentioning that sharing clauses are drafted in the loan agreement for the purpose of ensuring that all consortium members are fairly compensated, and to coordinate relationships among consortium members. Such clauses are drafted to ensure that lending banks are compensated in proportion to the amount they lent. A lending bank that received more than its pro rata share of returns from a borrower must share its returns with other consortium members through offset, litigation, disposal of collateral, return of the borrower's principal or interest, or other methods.⁷²

As to *Y. WU*, syndicated loans can trigger a wide range of legal issues. Compared to the rights and obligations of the parties to a general loan, syndicated loans involve complex issues related to coordinating the relationship between the consortium members consistently with the principles of independent obligation and democratic centralism. International syndicated loans also involve the foreign exchange management, currency policy, tax avoidance arrangements and conflict of laws. Consequently, there is a huge market demand for legal services from professional legal teams to construct rigorous legal frameworks and to establish risk warning and prevention systems based on flexible information, rapid response and effective dispute resolution methods.⁷³

As we put an end to chapter one , it briefly showed the reason as to why loan syndication is a type of lending that is opted for while sourcing funds for big projects. It also highlighted its complexity, the process of loan syndication but most importantly the role played by respectively the Lead and the Agent bank in the formation and management of loan syndication.

The above literature was paving a way to discuss the liability of the Lead and Agent Bank in a syndicated loan transaction which is going to be the focus of the next chapter.

71 P. Mäntysaari, "The Law of Corporate Finance: General Principles and EU Law: Volume III , funding, exit, Takeovers", *Handelsplanaden*, Vaasa, 2010, p.129.

⁷² *Idem*, p.130.

⁷³ *Y.Wu*, "Overview of syndicated loans", *op.cit.*, Note. 66.

CHAPTER II: LIABILITY OF THE ARRANGER AND THE AGENT BANK IN A SYNDICATED LOAN

This chapter focuses on the liability of the lead bank which continued to serve as an agent bank after the signing of the loan agreement.

China Banking Regulations provide that banks that make syndicated loans shall, in line with the state's laws, regulations and credit policies, respect equality and mutual benefits, make fair negotiation, honestly carry out agreements and bear their own risks.⁷⁴

In the same line as above, the same regulations state that the member banks shall determine their own credit lines pursuant to the principles of sharing information, making decisions and approval independently and taking sole responsibility for their own risk. Concurrently, they enjoy corresponding rights and assume relevant obligations to the extent of their respective credit lines.⁷⁵

The above consideration by the China Banking Regulations is similar to the position provided by Investing Answers website in regards to the liability of the parties in a syndicated loan whereby they stated that the loan syndication usually limits the liability of each lender to its share of the loan interest. In this way, each lender limits its loan amount to a manageable size, and limits its risk exposure. Additionally, each lender may have a collateral interest in a unique or specialized asset from the borrower, such as a piece of equipment.⁷⁶

In this chapter, our analysis focused on assessing whether the lead bank and/or agent bank's liability is limited to its share in the loan or it incurs other liabilities by the mere fact of having served as a lead bank and/or agent bank.

⁷⁴ X, "China Banking Regulations", *supra*, note. 44.

⁷⁵ *Ibidem*

⁷⁶ X, "Loan Syndication", <http://www.investinganswers.com/financial-dictionary/debt-bankruptcy/loan-syndication-579>, accessed on 27/05/2015.

Taking into consideration that the two roles are different and incur different liabilities though played by the same institution we opted to divide the chapter into two sections whereby the first one is going to concentrate on the liability of the lead bank (arranger) and the second one will tackle the liability of the agent Bank. Beside the two sections on the liabilities as previously mentioned, we shall have a third section concerning the drafting of a syndicated loan agreement and the importance of exculpatory clauses in a syndicated loan agreement.

II. 1. LIABILITY AS LEADING BANK/ARRANGER

According to M. JENABI, the liability of the arranging bank will vary depending on the exact role of the bank in the syndication and any exclusion clauses. If the arranging bank is a mere conduit for the information between syndicate banks and the borrower, then there will be no liability against the arranger. Nonetheless, if the bank was more actively involved in the marketing of the loan, which is often the case, then common law suggests the arranging bank may be liable for negligence or misrepresentation.⁷⁷

As mentioned in the previous chapter, in most cases, the arranger acts as a “salesman” for the facility by seeking loan participations from other institutions in the market.⁷⁸ The latter active participation of the arranger lead the researcher to reserve this section on the analysis of potential liability of the arranger vis à vis the borrower on one hand and vis-à-vis other loan participants on the other hand. The section is subdivided into two main subsections.

II.1.1. Liability of the arranger vis à vis the borrower

The liability of the arranger to the borrower can be mainly established against two issues including the failure by the arranger to form a syndicate and deliver the loan as well as misuse by the arranger of the information it has about the borrower.⁷⁹ Beside the latter, a question raises as to know if the

⁷⁷ M. Jenabi , “Durham Pro Bono Society, Arranger’s liability”, <http://durhamprobono.blogspot.com/2015/03/can-roles-and-legal-obligations-of.html>, accessed on 25 May 2015.

⁷⁸ Ch. Proctor, *op.cit.*, p. 390.

⁷⁹ P. Kortbeek , “The Arranger’s Liability vis à vis the Borrower,” <http://suewrightonline.com/content/compulsory-report-liability-arranger-vis-%C3%A0-vis-borrower> , accessed on 04/06/2015.

arranger may be liable to the borrower following the failure of a given participating bank to disburse the accepted loan amount.

II.1.1.1. Failure of the arranger to form a syndicate

According to P. KORTBEEK when addressing the failure of the arranger to form a syndicate, the author pointed out that the primary obligation of the arranger is to deliver the loan. The arranger's main risk is, therefore, if the loan cannot be delivered due to market circumstances beyond its control.⁸⁰ However, such uncertainty in the markets can be addressed through inserting '*market flex*⁸¹' and '*material adverse change*' clauses in the pre-loan agreements, such as mandates or commitment letters.

The market flex clause allows adjustment to the facility in the light of demand and supply and permits the arranger to re-open the key terms of the facility to the extent necessary to ensure a successful syndication. The material adverse change clause on the other hand, is intended to protect the arranger from extreme and sudden developments in the national or international market or the affairs of the borrower before drawdown and specifies predetermined grounds for the legitimate cancellation for the lending commitment. The clause thus mitigates the funding and credit risks which the arranger faces, i.e. the risk that other banks may not join the syndicate.⁸²

II.1.1.2. Misuse by the arranger of the information it has about the borrower

Regarding the misuse by the arranger of the information it has about the borrower, the Court of Appeal of the United Kingdom in *United Pan-Europe Communications NV v Deutsche Bank AG* held that a bank participating in a syndicated loan owed a fiduciary duty of loyalty to the borrower,

⁸⁰ *Ibidem*

⁸¹ A market flex clause is defined as A provision in bank loan financing fee letters that permits the agent banks to change the amount, pricing, structure, yield, tenor, conditions and other terms of the financing if necessary to successfully syndicate the loans(See <http://law.academic.ru>: Market flex provision, accessed on 24 May 2015).

⁸²Ch. Proctor, *supra*. note 78.

and the circumstances of the Court's ruling indicate that the arranger would clearly be liable to the borrower under fiduciary liability.⁸³

The background of the ruling was that Deutsche Bank (DB) participated in three syndicated loans to United Pan-Europe Communications (UPC) over successive years, and also became an underwriter to an initial public offer by UPC. Under the four transactions, UPC provided detailed information to DB about the cable industry, and DB had signed a customary confidentiality undertaking. Later, DB won a bid over a consortium involving UPC for a cable company, and UPC claimed that DB had made improper use of information given to it during the previous transactions. UPC claimed that a fiduciary duty arose from the key banking relationship formerly existing between UPC and DB. The Court held that a fiduciary duty of loyalty existed on the part of DB and that there was seriously arguable case that DB had breached that duty as well as the duty of confidentiality.⁸⁴

We agree with the court's decision in relation to the use of the acquired information and reiterate the fact that the received information must only be used for the only purpose of the formed loan syndication and not for other purposes out of the one the information had been received for.

II.1.1.3. Liability to the borrower following a failure by the participating bank to disburse the accepted loan amount

As regards whether or not the arranger can be liable to the borrower following a failure by the participating bank to disburse the accepted loan amount, the principle of independent obligations we have highlighted in chapter one clarifies this question. According to that principle, lenders are subject to their own obligations on the disbursement of loans to the borrower and therefore a lender's failure to disburse its loan in accordance with the loan agreement will not influence the disbursement obligations of other lenders, and lenders do not act as guarantors of each other's disbursement obligations.⁸⁵

⁸³ X, *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, <http://swarb.co.uk/united-pan-europe-communications-n-v-v-deutsche-bank-ag-ca-19-may-2000>, accessed on 25/4/2015.

⁸⁴ *Ibidem*

⁸⁵ G. Roberts, *op.cit.*, p. 93.

To our understanding and basing on the above principle, the arranger is not liable to the borrower when any of the participating banks fails to disburse any portion of the accepted loan amount rather the failing bank will be fully liable to the borrower up to the loan amount it has to disburse.

II.1.2. Liability of the arranger vis à vis other loan participants

The arranger's liability towards other lenders can be considered in five areas including tort of negligence, misrepresentation, tort of deceit, obligation of the arranger to provide information and a claim for breach of fiduciary duties.⁸⁶

II.1.2.1 Tort of negligence

The arranger's liability due to negligence may be considered in the circumstances where he has a duty of care to recipients of the information memorandum who choose to take part in the facility. There must be some assumption of responsibility by the arranger in the knowledge that the recipient will rely on the information memorandum provided by the arranger to it in making its credit decision.⁸⁷ In *Hedley Byrn & Co. Limited V. Heller & Partners Limited*, the court decided that a claim in negligence may arise against the maker of negligent statement if the maker owes a duty to take reasonable care in giving advice to the recipient and such duty was breached even though there was no written contract.⁸⁸

However, legal scholars argue that the arranger cannot generally be held liable due to negligence because of two main reasons. Firstly, the recipient bank is reputed to be a financial institution capable of making its own analysis of the borrower and its status. Secondly, the information memorandum will specifically disclaim (exculpatory clause) any liability on the part of the arranger and in the context of arrangements between financial institutions such disclaimers would appear to be valid.⁸⁹

⁸⁶ D. Petkovic, *op.cit.*, p. 8.

⁸⁷ *Ibidem*

⁸⁸ House of Lords, "*Hedley Byrn & Co. Limited V. Heller & Partners Limited*", <http://casebrief.me/casebriefs/hedley-byrne-v-heller/>, consulted on 25th May 2015.

⁸⁹ Ch. Proctor, *op.cit.*, p.10 and C. Bradley, "Issues In International Syndicated Loan Agreements", <http://blenderlaw.umlaw.net/wp-content/uploads/2010/02/infinmats2010chap4.pdf>, accessed on 12th June 2015.

II.1.2.2. Misrepresentation

Misrepresentation is another concept which can be the basis for a claim against the arranger in respect to inaccuracies or misleading information in an information memorandum. In UK, the Misrepresentation Act of 1967 provides in its section two that where a person has entered into a contract after a representation has been made to him by another party thereto and a result thereof he has suffered a loss, then if the person making the representation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall also be liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had no reasonable grounds to believe that the facts presented were untrue.⁹⁰

According to article 54 of the Rwandan law governing contracts, if a party's manifestation of assent is induced by misrepresentation by the other party, the aggrieved party may request that the contract be void.⁹¹

On the point of liability of the arranger resulting from misrepresentation, Ch. PROCTOR argues that where the information memorandum was prepared by the borrower and the arranger only distributes it, the latter cannot normally be liable for any misrepresentation contained in the information memorandum since an agent is not responsible for statements made by his principal, or made by the agent on behalf of the principal and within the scope of his authority. According to him, the arranger can only be liable for the misrepresentation if to the knowledge of the arranger, the relevant statement was made fraudulently or the relevant statement create a collateral contract between the lender and the arranger.⁹²

According to D. PETKOVIC, an arranger can escape liability for misrepresentation if it can establish reasonable grounds for believing the representation at the time it was made. However if the information memorandum contains inaccuracies which the exercise of reasonable care would have

⁹⁰ X, "Misrepresentation Act 1967", http://www.legislation.gov.uk/ukpga/1967/7/pdfs/ukpga_19670007_en.pdf , accessed on 11/12/2013.

⁹¹ Law n°45/2011 of 25/11/2011 governing Contracts, Official Gazette n° 04bis of 23/01/2012.

⁹² Ch. Proctor, *op.cit.*, p. 391.

avoided, then failure to exercise reasonable care can trigger the arranger's liability.⁹³The Rwandan Law on contract remains silent on the liability of the author of misrepresentation.

II.1.2.3. Tort of deceit

Another ground upon which liability of the arranger could be found for inaccuracies in the information memorandum is the tort of deceit. To make a case out of deceit, fraud must be shown which in the case of misrepresentation means that a representation must have been made knowingly or without belief in its truth or recklessly carelessly whether it be true or false, briefly dishonestly.⁹⁴

For example, in *SMITH NEW COURT SECURITIES V. SCRIMGEOUR VICKERS (2) CITY Bank NA*, fraud was shown to exist in the fact that a share broker owned by City Bank full represented to another share broker that two buyers were bidding for a troubled defence company at 81p per share to induce it to pay 82p per share yet in fact no such bids have been received. Smith subsequently sold the shares in small parcels between Nov 1989 and April 1990 for prices between 30-49p per share making a loss of 11.3M. The court held that actionable fraudulent misrepresentations had been made; the tort of deceit has been committed and ordered the misrepresenter to pay damages equivalent to the loss suffered by the plaintiff.⁹⁵

Since the share broker was condemned for deceit in the case mentioned case and considering that his role of serving as an intermediate resembles much to the one played by an arranger, we agree that the same liability should be applicable to the arranger who fraudulently misrepresented the statements from the borrower. The tort of deceit also applies in the circumstances where the arranger fraudulently fail to disclose the necessary information to participating banks unless an exculpatory clause has been included in the mandate letter.⁹⁶

⁹³ D. Petkovic, *op.cit.*, p. 8.

⁹⁴ *Idem*

⁹⁵ *Smith New Court Securities V. Scrimgeour Vickers (2) CITY Bank NA*, <http://www.e-lawresources.co.uk/Smith-New-Court-Securities-v-Scrimgeour-Vickers.php>, accessed on 04/06/2015.

⁹⁶ O. Masayuki and A. Yusuke, "Supreme Court Upholds Decision on Arranger's Liability in Syndicated LoanTransactions", <http://www.cliffordchance.com/publicationviews/publications/2013/07/supreme-court-upholds-decision-on-arranger.html>, accessed on 24th May 2015 .

II.1.2.4. The obligation of the arranger to provide information

As a party that took part in the elaboration of the information memorandum, the arranger is taken to possess a lot of information related to the borrower and its creditworthiness. He is therefore required whenever necessary to provide to the participating banks any material information regarding the borrower's creditworthiness.

However, the borrower may be taken to have breached the confidentiality duties in the disclosure of the information. It is therefore advised that the borrower himself discloses such information to the participating banks which will save him from being sued for breach of the confidentiality duty.⁹⁷ In November 2012, the Supreme Court of Japan ruled that the arranger the Arranger was liable for damages in tort in favour of the Participating Banks as the Arranger breached the obligation of providing relevant information.⁹⁸

On the other hand MASAYUKI OKAMOTO and YUSUKE ABE advised that participating financial institutions should be more diligent when conducting a review of a borrower's creditworthiness, since if any adverse financial information can be easily identified, this may impact any claim against an arranger. If an arranger can allege that a participating financial institution had acted negligently by failing to investigate the borrower's financial accounts, the arranger's liability for damages in tort may be mitigated to such extent.⁹⁹

II.1.2.5. Breach of fiduciary duties

A fiduciary is an individual in whom another has placed the utmost trust and confidence to manage and protect property or money. It is established in a relationship wherein one person has an obligation to act for another's benefit. A fiduciary relationship encompasses the idea of faith and

⁹⁷ *Ibidem*

⁹⁸ *Ibidem*

⁹⁹ *Ibidem*

confidence. The duties of a fiduciary include loyalty and reasonable care of the assets within custody.¹⁰⁰

All of the fiduciary's actions are performed for the advantage of the beneficiary. The term embraces legal relationships such as those between attorney and client, Broker and principal, principal and agent, trustee and beneficiary, and executors or administrators and the heirs of a decedent's estate.¹⁰¹

In a syndicated loan arrangement, one or more of the lending banks coordinate the lending activities such as pre-contractual documentation, negotiation of the loan agreement and administration of the loan. The coordinator(s) of such activities function as 'arranger(s)' and as 'agent(s)' at different phases of a loan syndicate. The nature of the relationship between the manager(s)/ agent and the syndicate determines the parties' rights and duties.¹⁰²

While considering the role of the arranger in a syndicated loan, it has been a question to know whether or not he has a fiduciary duty towards other participating banks. On one side, the arranger/lead bank has been held as the fiduciary of the member banks regarding the preparation of information memorandum, at least where its function resembles that of a trustee acting as the debenture holder of a company.¹⁰³

For instance in *UBAF LTD V EUROPEAN AMERICAN BANKING CORPORATION*, the lead bank provided the participants with an information memorandum which contained false representation about the purpose of the loans and the borrowers' financial situation. When the borrower defaulted, the participants took action against the lead bank. The court held that the lead bank was acting in a fiduciary capacity for all the participants because it was the defendants who received the plaintiffs' money and it was the defendants who arranged for the syndication.¹⁰⁴

¹⁰⁰ X, "Fiduciary", <http://legal-dictionary.thefreedictionary.com/fiduciary+duty>, accessed on 12th June 2015.

¹⁰¹ X, "Fiduciary duty", <http://legal-dictionary.thefreedictionary.com/fiduciary+duty>, accessed on 02/06/2015.

¹⁰² Ch. Qu, "The Fiduciary Role of the Manager and the Agent in a Loan Syndicate", *Bond Law Review*, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1184&context=blr>, accessed on 02/06/2015.

¹⁰³ *Idem*

¹⁰⁴ "UBAF Ltd V European American Banking Corporation", <http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971127/nykr02.htm>, accessed on 03/06/2015.

On the other hand, other scholars oppose the liability of the arranger for breach of fiduciary duty because to them, the arranger is the recipient mandated by the prospective borrower and there should be no scope for implying a fiduciary duty or similar obligation of good faith owed by the arranger to the prospective participants.¹⁰⁵

We share the same view with the first category of scholars and the court that upheld liability for breach of fiduciary duty against the arranger due to the fact that he is the one that had disseminated the information about the borrower and encouraged them to join the syndicate. In addition to this, the arranger is a financier as the other participating banks and there is a high probability that they may put much trust in it and base their decision to join the syndicate on this confidence in it. Therefore, when a breach of fiduciary duty has been determined against it, it should be liable for it.

As most of the lead Banks serve in the role of Agent Bank after the formation of the loan syndication, it is of great importance to assess the liability of the said Agent Bank in loan syndication and this form the centre of the following section.

I.2. LIABILITY OF THE AGENT BANK IN A SYNDICATED LOAN

This section focused on the liability of the agent Bank in a general perspective but also a special attention was given to the liability of the agent bank to the borrower and its liability to other participating banks.

II.2.1. General Perception of the Agent Bank's Liability in line with its Duties

As described in the first chapter, the practice in loan syndication is that the bank or financial institution that served as an arranger continues to serve as an agent bank after a loan agreement has been signed. However, the duties and responsibilities differ even though there may be some similarities in as far as liability is concerned. Under this section, we are going to elaborate on the liability of the agent bank in line with its duties.

¹⁰⁵ S. MISHKIN Frederic, *the Economics of Money, Banking and Financial Markets*, 6th edition, Addition Wesley, 2000.

G.A. GOODMAN and J.D. JACOBS pointed out that agent lenders usually limit their liability to co-lenders under the primary and syndication loan documents to wilful misconduct or gross negligence resulting in actual damages. The agent lender is usually held to the standard that it would use in its own transactions. The courts usually accept these provisions and do not read a fiduciary relationship into the agreements between agent lender and participants.¹⁰⁶

The above writers continue by indicating that most primary and/or syndicated loan documents provide that agent lenders are only deemed to have knowledge of a borrower default when the agent lenders have actual knowledge of such default. Some very large agent lenders, with far-flung operations, are concerned about being deemed to have knowledge of which employees not directly involved in the subject loan have actual knowledge. Therefore, they seek to limit their liability of knowledge of defaults to those defaults of which they have received written notice from either the borrower or their co-lenders. However, prospective co-lenders respond that it is a most unusual borrower that will give its lender notice of its own default and that the co-lender's likelihood of obtaining knowledge of a default before the agent lender receives it is very remote.¹⁰⁷

G. GOODMAN and J. JACOBS are of the view that in order to avoid liability to co-lenders, agent lenders require that co-lenders perform their own due diligence and credit analysis with the information provided by the agent lender. To memorialize the lack of co-lender reliance on the agent lender's analysis, the agent lender will typically require representations from each co-lender that such co-lender has not relied on the financial analysis of the agent lender and that the co-lender has done its own credit analysis and made its own decision with respect to joining the syndicate group.¹⁰⁸

Therefore, following the above representations, the agent lender is usually protected when making day-to-day decisions with regard to the loan. Liability issues do arise for an agent lender if a certain real estate loan requires specific skills and the agent lender explicitly commits to apply such skills in

¹⁰⁶G. A. Goodman and J. D. JACOBS, "Special Problems of Syndicated Loans", <http://www.mondaq.com/unitedstates/x/307302/real+estate/Special+Problems+of+Syndicated+Loans> , accessed on 28th May 2015.

¹⁰⁷ *Ibidem*

¹⁰⁸ *Ibidem*

administering the loan as additional obligations under the primary and/or syndication loan documents.¹⁰⁹

The above protection granted to the agent bank through representations that co-lenders did not rely on the financial analysis of the agent lender and that the co-lender has done its own credit analysis and made its own decision with respect to joining the syndicate group, is not common to all the jurisdictions following that the agent bank is required to apply due diligence in administering the loan in some of the jurisdictions which impliedly mean that if he is found to have lacked this due diligence he can be liable for that.

For example, Article 14 of the China Banking Regulations states that the agent bank shall take responsibilities with due diligence. If any loss occurs because of the agent bank's neglect of duty or non-foreseeability, the bank consortium meeting shall have the power to replace the bank pursuant to the loan agreement and require the bank to cover the loss.¹¹⁰

G. GOODMAN indicated that the agent is usually appointed by virtue of an agreement between the agent and the banks. This agreement is more often than not included in the loan agreement between the syndicate and the borrower. Therefore prima facie an agent-principal relationship exists between the agent and the participants. This prima facie agency relationship arises out of the agreement, which is the basic way in which agency relationship arises.¹¹¹ If there is an agency relationship between the agent and participants then prima facie, the agent owes fiduciary duties to the participants since it will be remembered, agent-principal is status-based relationship.¹¹²

Prima facie, agency relationship in the context of a loan syndicate is established by the consent of both the agent bank and the participants, since the relationship is established by virtue of the

¹⁰⁹ *Ibidem*

¹¹⁰ China Banking Regulations, *supra*, note.12.

¹¹¹ G. A. Goodman, "Syndication of Real Estate Loans in the Current Market Environment," *The Banking Law Journal*, January 2007: <http://www.dentons.com/en/gary-goodman>, accessed on 25/05/2015.

¹¹² *Ibidem*

agreement between the agent bank and the participants. According to H. ABUBAKARI, if an agency relationship exists, then the agent owes complete fiduciary duties to the participating banks.¹¹³

The same author affirms that some loan agreements purportedly preclude the agent from fiduciary obligations by the insertion of relatively uncomfortable clauses. However, the futility of these clauses came to light in the case of *Customs and Excise Comrs. v Pools Finance Ltd (1937)*, an exclusive clause denied any agency, but the Court of Appeal overlooked the form, took the substance of the transaction, and ruled that an agency relationship existed. One can, by the foregoing argument, state that agency-principal relationship is formed *ab-initio* by the substance and not the form of transactions.¹¹⁴

Under English law, the agent bank is a true agent and holds a fiduciary relationship with the participating banks. The exact scope of its obligations depends entirely on the nature and functions undertaken by the fiduciary.¹¹⁵ An agent clause could be expressed as:

*“Each bank hereby appoints the agent to act as agent on its behalf for the purposes of this agreement and to take such action on its behalf and to exercise such powers as are expressly delegated to it by the terms hereof together with all such powers as are reasonably incidental thereto.”*¹¹⁶

T. AJAYI and M. SOSAN indicated that when considering the legal responsibilities of an agent bank, it is tended usually to get back to the general legal burden of an agent for his principal under the general law of contract, even though some circumstances and issues relating to syndicated loan agreement differs considerably.¹¹⁷

¹¹³ H. Abubakari, “Alignment of the Interest of Lenders in a Syndication Agreement: Is it truly a concept in search of a principle?”, January 2012, p. 10.

¹¹⁴ *Idem*, p. 13.

¹¹⁵ *Ibidem*

¹¹⁶ *Ibidem*

¹¹⁷ T. Ajayi and M. Sosan, *op.cit.*, p.6.

In light of the above illustrations, it is worth noting that the agent bank is not totally exempted from liability which led the research to dig out some of the liability he may incur while exercising the role given to him. We analysed his liability to the borrower due to the default of lenders on one hand and his liability to other participating banks on the other hand.

II.2.2. Liability of the agent bank to the borrower for the default of a lender

Considering that the agent bank was the one that previously arranged the syndication and brought in all the other participating banks or lenders, it can be understood that it can be answerable to the borrower for the default of any of the lenders. However, an individual syndicate bank is not liable for the performance of the obligation of any other syndicate bank. This means that the obligations of lenders are several, rather than joint. The relationship therefore remains that of the borrower and lender as in the case of single bank loan.¹¹⁸

Additionally, G. ROBERTS emphasised that lenders are subject to their own obligations on the disbursement of loans to the borrower. A lender's failure to disburse its loan in accordance with the loan agreement will not influence the disbursement obligations of other lenders, and lenders do not act as guarantors of each other's disbursement obligations.¹¹⁹

Following the statement of the above paragraphs, each bank is only liable for the advance of funds to the borrower up to its own agreed participation limit and no bank shall be responsible for the failure of another institution to perform its obligations. Therefore, the same principle applies to the agent bank while waiving any liability to the borrower due to the lenders default.¹²⁰

II.2.3. Liability of the agent bank to the participating banks/lenders

As explained previously, the agent bank's role is to act as an agent for the syndicate banks and not on behalf of the borrower and it is liable to those participating banks than to the borrower. Mainly, the agent's risks are established in the case of acting outside the scope of its contractual authority;

¹¹⁸ Ch. Proctor, *op. Cit.*, p.398.

¹¹⁹ G. Roberts., *op cit.*, p.91.

¹²⁰ *Ibidem*

exercising discretion; and breach of his fiduciary duties. All the three scenarios expose him to liability from the syndicate, with the additional risk of claims from the borrower and third parties for breach of fiduciary duties.¹²¹ Beside the fiduciary duty, there are other duties the breach of which can lead to liability and which we developed below:

II.2.3.1. Fiduciary duties

Since an agent is a fiduciary, therefore, in theory, an agent bank is subject to the general principle of contracts binding fiduciaries, i.e. the agent must not make secret profits, its interest must not be in conflict with its duties as an agent, exercise of due diligence and discretion is necessary, negligence is not tolerated, and the agent bank must not delegate any of its duties to a third party, and many more. In *CHEMICAL BANK V SECURITY PACIFIC NATIONAL BANK*, the court held that the very meaning of being an agent is assuming fiduciary duties to one's principal; and that agent bank owe fiduciary duties to other banks, that it breached by failing to properly perfect their security interest in the collateral.¹²²

II.2.3.2. Duty to exercise skill, care and due diligence

An agent is required by law to fulfil its duties with skill, care and due diligence and would be liable for negligent performance thereof. On one hand, the agent is usually unwilling to assume such a high duty of care because its fees are not sufficient to pay for bearing such a risk. On the other hand, banks want to ensure that the Agent is held to a standard of performance. In this case, the normal compromise is an exculpation clause, which provides that "*The Agents shall have no responsibility for any action taken or omitted to be taken in connection with this Agreement... absent gross negligence or wilful misconduct.*"¹²³

¹²¹ K. Davies and H. Nathanson, "Form v substance: Agents' Liability in Syndicated Loans", <http://www.reedsmith.com/files/Publication>, accessed on 31/05/2015.

¹²² Toluwani Ajayi and Magaret Sosan, *op.cit.*, p.6.

¹²³ I. Rampul, "How does a Syndication Agreement deal with the Conflicting Needs of the Lenders?", <http://www.dundee.ac.uk/cepmlp/gateway/?news=27959>, accessed on 12th June 2015 .

II.2.3.3. Duty to monitor

This duty is part of the duty of due diligence and may be a source of liability at the time of preparing and signing of the loan agreement so that express clauses would be put in it and remove the duty of the agent bank to keep the syndicate banks informed of all matters affecting the position of the borrower.¹²⁴

The reason for the above statement is that whether the agent is responsible for monitoring the financial condition of the borrower in order to safeguard the interest of the syndicate is dependent on the terms of the agreement. This is an onerous obligation which the agent generally seeks to exclude itself from. Banks generally prefer the agent to accept this obligation since it invariably has superior access to information concerning the borrower. Most Agreements however provide that the Agent has no duty to do so and places that duty on each Bank.¹²⁵

II.2.3.4. Duty to disclose

The main issue here is the duty of the Agent to disclose information concerning events or potential events of default of the borrower. It is in the interest of banks to learn of an event of default as soon as possible. This would allow them to take informed action such as suspending further borrowings and accelerating the loans.¹²⁶

An Agent may become aware of a default in confidential circumstances. This generally occurs where the Agent also provides other services to the borrower. This conflict may lead to the Agent being liable for breach of duty either to the borrower or Banks. Whereas Banks would certainly prefer to have the information disclosed to them in any event, it is generally agreed that it is unfair to place the Agent in such a position. Accordingly, the Agreement expressly exempts the Agent from any duty to disclose information to the borrower which may in the opinion of the Agent place it in the

¹²⁴ V. H. Langer, "Syndicated Loan Agreements II – The Role of the Agent Bank", <http://www.ganz-recht.de/index.php?id=27,69,0,0,1,0> , Accessed on 31/05/2015.

¹²⁵ I. Rampul, *supra*, note. 122.

¹²⁶ *Ibidem*

position of breaching the law or any duty of secrecy or confidence. This clause usually gives wide and unfettered discretion to the Agent to decide what information should be withheld.¹²⁷

II.2.3.5. Duty to perform functions personally

According to I. Rampul, the general rule is that the maxim '*delegatus non potest delegare*'¹²⁸ applies to prohibit the Agent from delegating any of its duties. The law is unclear as to whether and to what extent sub delegation of duties is allowed. However, the Agent would want to be allowed to delegate its functions, e.g. to source specialist skills or avoid being unnecessarily encumbered. Banks are interested in the proper performance of these duties, especially those, which are not merely administrative. Banks would understandably be concerned about the quality of the sub delegates.¹²⁹

The standard Agreement caters to the interests of the Agent by permitting delegation of its duties. It further absolves the Agent from liability for the actions of its agents or employees. The interests of Banks seems to be ignored here, however, one may argue that if they trust the Agent to perform the functions they should also trust it to sub delegate.¹³⁰

II.2.3.6. Duty to avoid conflicts of interest

An Agent must not make a secret profit, use confidential information or have conflicting duties without the consent of its principal. A key issue here is the conflict of interest arising when the Agent also provides other financial services to the borrower. Accordingly, the Agreement usually contains a clause, which allows the Agent to engage in any kind of business whatsoever with the borrower without having to account to Banks.¹³¹

¹²⁷ *Ibidem*

¹²⁸ Delegatus non potest delegare : It is a latin expression and a Legal rule that an agent to whom an authority or decision making power has been delegated by a principal or higher authority may not delegate it to a sub agent unless the original delegator expressly authorizes it, or there is an implied authority to do so (<http://www.businessdictionary.com/definition/delegatus-non-potest-delegare.html#ixzz3bjht98Mv>, accessed on 31/05/2015.

¹²⁹ I. Rampul, *Supra*, note.3.

¹³⁰ *Ibidem*

¹³¹ Ch. Proctor, *op.cit.*, p.08.

Another conflict of interest arises from the fact that the Agent is usually also a lender and therefore wears two hats. This is addressed in the Agreement by a clause as follows: "*The Agent shall have the same rights and powers hereunder as any other Bank and may exercise the same as though it were not the Agent.*"¹³²

It is also standard practice to include a clause in the Agreement whereby the commitment fee, initial expenses, agency fee, management fee and any other fees to be paid by the borrower to the Agent are disclosed. The Agent is further protected by the inclusion of an exculpation clause, which relieves it from the duty to account for profits from any other business engaged in with the borrower.¹³³

II.2.3.7. Duty to act in the best interest of the syndicate

The agent should as far as possible, avoid any conflict between its parochial interest and that of the larger groups' interest. In most instances the borrower is always a client to the agent. The agent may be providing advisory services or some kind of lending arrangement beyond the syndicate loan to the borrower. In another context, the agent could be a member of a financial group that obtains transactions with the borrower by virtue of the contractual relationship between the borrower and the agent.¹³⁴

As H. ABUBAKARI points out, an agent who is a fiduciary to Participating Banks and discloses the borrowers' information to Participating Banks might be liable for breach of a confidential duty. This is because the agent could be thought to have two principals (in this case the borrower and the Participating Banks) and the interest of these principals is diametrically opposed. The agent, by oath, must balance this interest meaningfully. A special clause could be designed to relieve the agent from disclosing confidential information if such full disclosure shall amount to breach of

132 P. R. Wood, *International Loans, Bonds, Guarantees, Legal Opinions*, 2nd edition, Thomson, Sweet& Maxwell, The Law and Practice of international Finance series, Volume 3, <https://books.google.rw/books?id=Lu3Hkc348loC&pg=PT349&lpg=PT349&dq>, accessed on 12th June 2015.

¹³³ I. Rampul, *supra*, note.3.

¹³⁴ H. Abubakari, *supra*, note.111, p.11.

confidentiality.¹³⁵ If the agent Bank is proven to have not acted in the best interest of the syndicate, then he will be held liable for that and may be subject to pay damages to participating Banks.

The researcher is in the same line of thought with the above legal scholars and appreciates the fact that the above duties constitute safeguards in the management of the syndications and obliges the Agent Bank to appropriately deliver his duties. However, to our point of view, the Syndication Loan agreement must be detailed and clear enough to avoid any abuse that would result from the implementation of the above mentioned duties.

Taking into consideration the views of different legal scholars outlined in this section, it is evident that the Agent Bank may have some liability towards the members of the syndicate and as it has been stressed, the way a syndication agreement is written has an important role in tying the agent Bank to those liabilities or relieve him from them. It is from that perspective that the next section has focused on the writing of the Syndication Loan agreement and the importance of the exculpatory clause in the administration of the syndicated loan.

II.2.4. Sanctions to the lead/ agent bank resulting from the breach its duties

The lead/agent bank that is found to have not fulfilled its duties as indicated earlier may be removed from its position of administering the loan syndication and loose all the benefits attached thereto.¹³⁶ It may be also sanctioned with paying damages in tort to the participating banks.

In the case opposing the participating Banks and the Arranger/lead bank, the High Court and Supreme Court determined that the Arranger owed the Participating Banks an obligation to disclose the information on the Borrower's creditworthiness under the principle of good faith and set out general rules for when this liability arose. Further, it was held that the Arranger was liable for damages in tort in favour of the Participating Banks as the Arranger breached the obligation. In these circumstances, disclosure of the information by the Arranger did not breach the confidentiality

¹³⁵ *Idem*, p.7.

¹³⁶ R. J. MILES *et al* , “Syndicated Lending Update: Defaulting Lender Issues”, *Banking Law Journal*, Vol.126, 2009, p.4.

obligation owed to the Borrower, for which the Arranger had contended was the basis on which the Arranger could not disclose the information.¹³⁷

The measure of damages in tort for negligent misstatement or any other breach of duty will be the normal tortious measure i.e such compensation as would put the injured party into the same position he would have been in had the tort not been committed and the normal tortious considerations as to causation and remoteness of damage will be relevant.¹³⁸

I. 3. WRITING THE SYNDICATION LOAN AGREEMENT AND THE IMPORTANCE OF EXCULPATORY CLAUSES IN THE AGREEMENT

This section is divided into two sub-sections whereby the first one concentrated on important considerations while writing a Syndication Loan Agreement and the second one focused on the Exculpatory Clauses.

II.3.1. Writing the loan syndication agreement

E. ODIANOSEN defines the syndication agreement as a document which establishes the relationship between the borrower and the syndicate lenders, on one hand and between the syndicate lenders *inter se*. It marks the final stage of the pre-contract syndication process, and once it is signed by all the parties involved, it becomes a binding agreement, enforceable by law.¹³⁹

It is imperative for a well-designed syndication agreement to be extensively worded to cater adequately for the needs of all the lenders to the syndication agreement. The Agent Bank must be well protected within the Agreement and should not be over-burdened with liabilities.¹⁴⁰

¹³⁷ O. Masayuki and A. Yusuke, *supra*, note 96.

¹³⁸ David WARNE and Nicholas ELLIOTT, "Banking Litigation", Sweet and Maxwell, p.201.

¹³⁹ E. ODIANOSEN, "How Does a Syndication Agreement Deal with the Conflicting Interests of Lenders?", www.dundee.ac.uk/cepmlp/gateway/files.php?file=car8_article2, accessed on 03/06/2015.

¹⁴⁰ *Ibidem*

According to the above consideration by EIGBE ODIANOSEN, a special attention must be drawn to the wording of the syndication agreement and its content. Gr. Roberts stated that the method to avoid liability of the agent bank broadly consists of expressing its contractual duties with total precision so that there is little scope for additional implied duties.¹⁴¹

As affirmed by A. MUGASHA, a typical syndication agreement excludes fiduciary obligations on the part of the agent bank and this is significant because fiduciary duties are presumed to exist in every agency relationship.¹⁴² Therefore, if the Agent wishes to escape or modify any of the fiduciary duties which may be implied by law, it must therefore ensure the necessary clauses are placed in the agreement.

For example, in determining the relationship between the agent bank and the co-lenders, the agreement would usually contain words to the effect that "*nothing in this Agreement constitutes the Agent as trustee or fiduciary.....*" and whether or not this provision will be upheld remains to be seen as courts have always looked at the substance of an agreement rather than the form.¹⁴³

Even though the Court has a vital role in interpreting the clauses of the syndication agreement, the agent bank has to ensure that protective clauses are included in the agreement. In *SUMITOMO Bank V Bank Bruxelles Lambert*, an agent was held in principal liable for not taking care over an insurance policy which was taken out to protect the syndicate against the default by the borrower despite the inclusion of the exculpatory clause in the agreement.¹⁴⁴

For instance, if the agent Bank manages to include a paragraph to express that "*the Agent shall have the same rights and powers here under as any other Bank and may exercise the same as though it*

¹⁴¹ R. Graham, *op.cit.*, p.86.

¹⁴² A. MUGASHA, *Law of Multi- Banking Financing*, Oxford, 2008, p.247.

¹⁴³ E. ODIANOSEN, *supra*, note.136.

¹⁴⁴ X, *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* , <http://www.uniset.ca/other/cs2/19971LLR487.html> , accessed on 27th May 2015.

were not the Agent”, its position as the agent bank will not deprive it the freedom to carry out other transactions as if it was not the Agent Bank.

Another example of a protective clause would be the one which provides that *“the Agent shall have no responsibility for any action taken or omitted to be taken in connection with this agreement...save for actions arising out of gross negligence or wilful misconduct”*. The latter clause protects the Agent Bank from any consequence that would follow its acts or omissions and the power to determine any liability will be in the hands of the court which will have to prove whether or not the act or omission occurred through gross negligence or willful misconduct.

To end this sub-section, we must point out that it is crucial to write the syndication loan agreement with due diligence and care but also ensure that the person that drafts it has knowledge and skills in loan syndication formation and management because the style used in the agreement determines the liability of the arranger and agent Bank and the relief from liability conferred upon them. A loan syndication agreement that is well written and offers protection to the Agent bank is the one that caters for exculpatory clauses which were discussed in length in the following sub-section.

II.3.2. General exculpation clauses

Agents would be exposed to a considerable amount of risk arising from their duties were it not for exculpation clauses. Exculpation clauses are provisions within the syndication agreement which are inserted to exclude or limit certain fiduciary duties which may otherwise arise. They are usually drafted to exempt the Agent, its officers, employees from any liability for default or omission, other than due to gross negligence or wilful misconduct. Specific exculpation clauses also deal with matters such as excluding the Agent from responsibility for inadequacies in the contractual documents.¹⁴⁵

For example, an exculpatory clause may be worded to express that *“neither the Agents nor the managers would be responsible to any bank for the execution, genuineness, validity, enforceability, collectability or sufficiency of the loan agreement”*. In this case, the agent bank would be excluded from being liable in the enumerated circumstances.

¹⁴⁵CEPLMAF GATEWAY, “Exculpatory Clauses”, <http://www.dundee.ac.uk/cepmlp/gateway/?news=27959>, accessed 27th May 2015.

A. R. MANZER et al. indicated that the most controversial exculpation clause is that which seeks to protect the Agent from liability arising from the information memorandum used in persuading Banks to join the syndicate. It would seem that depending on the circumstances surrounding the preparation and distribution of the document the potential causes of action could be fraudulent or negligent misrepresentation.¹⁴⁶

In order to exclude the above potential liability a clause is usually included in the Agreement stating that the Banks have done their own credit analysis and document reviews and are not relying on the Agent's advice in joining the syndicate. To this end, the information memorandum is usually prefaced by a disclaimer by the manager of all responsibility for its content.¹⁴⁷

Except the above indicated exculpatory clauses, there are many others that are commonly found in most syndication loan agreement such as the one stating that “the agent shall not be liable for any action taken or not taken by it in the absence of its own gross negligence or willful misconduct”, another one saying that “the agent shall not be deemed to have knowledge or notice of any default unless agent has received notice of such default” and the one indicating that “*the agent shall not be responsible for or have a duty to ascertain or inquire into any statement, warranty or representation made in connection to the validity, enforceability, effectiveness or genuineness of this Agreement or any document.*”¹⁴⁸

In light of the above examples of exculpatory clauses, it is evident that they play a big role in protecting the Agent Bank against the potential liability from accepting and exercising the role of agent bank on behalf of the members of the syndicate. Therefore, it is vital that they are taken into consideration while drafting the syndication agreement.

¹⁴⁶ A. R. Manzer, J. C. Schulwolf and J.y A. Wurst, “Agents and Co-Lenders in Syndicated Facilities: Structuring Agreements to Balance Differing Rights and Obligations”, <https://www.straffordpub.com/products> , accessed on 27th May 2015.

¹⁴⁷ *Ibidem*

¹⁴⁸ V. R. ROSSMAN, *Commercial Contracts: Strategies for Drafting and Negotiating*, 2nd edition, Wolters Kluwer Law and Business, 2014, p.16.

CONCLUSION AND RECOMMANDATION

As we draw a conclusion to this research, it was proved that the arranger and agent bank have some liability to a certain level towards the borrower as well as to the other participating banks despite some controversies among legal scholars. Following the complexity of the process of loan syndication and the potential liability of the arranger and the agent bank, we understood that a high level of due diligence and care is required to the arranger even before taking on the mandate given by the borrower and while preparing the information memorandum.

More importantly due diligence and drafting skills should be focused on the phase of drafting the syndication loan agreement because it is this part that would tie or relieve the arranger and/or Agent Bank to liability. The agent Bank's representative should pay much attention to ensure that proactive expressions and exculpatory clauses are included in the contract to ascertain a level of relief from liability.

Otherwise, the lack of due diligence and care in the process of loan syndication can lead the arranger and the agent bank respectively to suffer a great level of liability and this, if not controlled, can have a significant negative impact on the financing of big projects through loan syndication.

The following are mechanisms or actions that are recommended in order to minimize the level of liability of the arranger and the agent bank but also limit the discouragement of banks or financial institutions to take on either the role of arranger or the one of agent bank.

Firstly, the bank or any other financial institution should make sure that it understands very well the workout of loan syndication and everything it involves before venturing into loan syndication and accepting the role of arranger or agent bank. This goes together with the application of a high level of due diligence and care during the whole process of loan syndication.

For the case of Rwanda where the market of loan syndication is not developed, we recommend that any bank that wishes to take on the role of arranger/Agent bank should hire consultancy services from very well experienced firms in the domain so as to advise and guide them in the whole process but also close all potential windows of liability.

Secondly, it is recommended that a high level of due diligence and care is considered during preparation of the information memorandum as well as in the drafting and negotiation of the loan agreement. A huge work is required on this point because this is where lies most of the solutions to the liability.

The arranger/Agent bank should make sure that exculpatory clauses are included in the agreement or information memorandum. It has been realized that even in circumstances where the arranger/agent bank was to be liable exculpatory clauses have been playing a huge role in relieving the arranger/agent bank from this liability.

The arranger/Agent should also ensure that a clause on disclaimer of fiduciary duty is inserted in the information memorandum and the loan agreement. This will waive the liability for breach of fiduciary duty and will wake up the consciousness of participating banks and put more effort, care and commitment in analyzing themselves the information memorandum but also in the implementation of the loan agreement.

It is important to also include a clause providing for liability of each participating bank to be only liable for the advance of funds to the borrower up to its own agreed participation limit and not to be responsible for the failure of another institution to perform its obligations. This will relieve the agent bank from liability to the borrower for the failure to perform by any participating banks.

The loan agreement must clearly state that the agent bank is allowed to conduct other business activities with the borrower other than those of the syndicate. This will limit the claim of conflict of interest even though the agent bank is not advised to carry out any other activity with the borrower before the syndicated loan is fully serviced.

Thirdly, it is advised that during the implementation of the syndicated loan agreement, the actions of the agent bank base on the decision of the majority of participating banks in order to avoid any claim by a lender who may suffer a loss resulting from an action by the agent bank.

And fourthly, the arranger/agent bank should use its best efforts to limit any fraudulent act, negligence or carelessness in any of its staff so that the required work is well performed.

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