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# Structuring Agent and Co-Lender Agreements in Syndicated Facilities: Balancing Differing Rights and Obligations

Navigating Rights of Agents, Exculpatory Clauses, and Information Sharing in Syndicated and Club Transactions

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TUESDAY, JUNE 11, 2019

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Today's faculty features:

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# Responsibilities of Agents

## Initiation Process

- Regulatory requirements including money laundering, anti-terrorist financing, anti-bribery, among others require that the initiation of process assure the agent and the syndicate members that the required information about the Borrower, any Guarantors, and any involved third parties is appropriately obtained and verified.
- Credit review by each of the syndicate members requires that the initiation process obtain, confirm, and provide the information necessary for each syndicate member to make the appropriate decisions and meet regulatory requirements.
- The structuring of the transaction should ensure that the appropriate control over the Borrower and Guarantors, as a corporate group, has been contemplated, the members of the corporate group have been identified, and the structuring ensures valid security and guarantees over suitable portion of a corporate group.
- The techniques to ensure “ring-fence” of the Borrower and Guarantors as to the movement of funds, business and assets should be considered.
- International challenges need to be identified early, as an example jurisdictions where security cannot validly be taken or where guarantees cannot be provided need to be identified.
- Syndicate specific requirements need to be check listed, and materials obtained, syndicate participants will have different regulatory and internal control requirements for the information and materials they require to enter into the credit relationship.

# Responsibilities of Agents Forming a Syndicate

- The composition of the syndicate does matter, large group or small, a club deal or lead and silent deal – rights and relationships will vary depending upon the nature of the syndicate.
- The usual criteria for the formation of a syndicate includes long standing relationships, known expertise, reputation for good syndicate behaviour, financial capability given the size, recognized interest given the size and nature of credit.
- Agents will take into account protection of their existing relationships with the Borrower group, generally wanting to ensure they form a syndicate which will not interfere with that relationship.
- Voting rights and decision-making levels will vary depending on the size and nature of the syndicate, in large syndicates a tiered lender approval level arrangement will prevail, small syndicates is more likely to either be a club where approval is all or nothing or a lead and silent participant structure.
- Types of decision that require syndicate approval and the vote level should be indentified early in the formation of the syndicate.
- The voting provisions - when voting is to be undertaken, the votes which will govern for different types of decision should also be identified early in the formation of the syndicate.
- What emergency powers are going to be given to the agent to react rapidly when required should be determined as this may be controversial with other members of the syndicate

# Responsibilities of Agents Regulatory Issues

- Essentially all syndicate members will be subject to regulatory requirements for anti-money laundering and anti-terrorist financing requirements, this will be a combination of statutory-regulatory and internal policy, requirements must be identified early, check list prepared, information obtained, and the basis for information direct or indirect identified.
- Increasingly financial institutions are subject to regulatory requirements as to credit assessment, this will to some extent dictate what materials they must be provided and how they must assess it to ensure that the credit is suitable. This will dictate the nature and extent of information to be obtained and must be understood early in the process.

# Securities Law Issues

- The broad range and reach of Securities Law, and its application to debt financing, requires consideration at the stage of initiation of the transaction and formation of the syndicate, different syndicate members may be subject to different securities law requirements and the extent and nature of these requirements need to be identified and appropriate information obtained on a timely basis.
- Issues specific to the Borrower group and transaction such as increased exposure to regulatory issues based upon product, industry, environmental concerns need to be identified.
- The specific requirements of syndicate participants check listed and understood, and deliveries organized to ensure regulatory compliance by the Borrower group and receipt of the required regulatory based information by the syndicate.

# Responsibilities of the Agencies – Regulatory for Ongoing Monitoring

- If regulatory issues are required to be considered, information and materials obtained and provided, at the time of the origination and initial organization of the transaction and syndicate, those regulatory issues will generally require ongoing monitoring.
- The nature of the reports which are required so regulatory issues can be monitored need to be understood, often on a syndicate member by a syndicate member basis and appropriate arrangements made to obtain, and provide on a timely basis, the reports each will require.
- Timing for the provision of reports needs to be reviewed for the specific requirements of each of the syndicate members.
- Credit assessment, ongoing credit review, in many instances mark to market evaluation, for a transaction has become reality for many syndicate members, and accordingly for the agent and the Borrower groups, these requirements should be identified, and appropriate content and timing for delivery of these regulatory required reports scheduled and agreed to.
- Syndicate members will need information when changes occur as to information and materials which they require for regulatory purposes, this extends to follow up and further information regarding changes under anti-money laundering, anti-terrorist financing, anti-bribery, politically exposed persons, as well as credit changes.
- The responsibility to obtain, and provide, the information and reports and the timing for those reports, particularly as to changes, should be negotiated early in the syndication process.

# Credit Monitoring

- Increasingly lenders, particularly regulated financial institutions, are required to undertake credit monitoring beyond the simple identification of the occurrence of a default.
- The nature and extent of that credit monitoring will need to be understood at the time of setting the reporting and financial covenant panels.
- The differences in required reporting can be significant and will need to be reconciled in the negotiation of syndicate members participation, and agent and syndicate members responsibility and rights.
- The nature of the ongoing credit monitoring packages need to be determined, where mark-to-market requirements exist these must be identified and the basis for determining mark-to-market negotiated.
- Credit monitoring ties into the representations and warranties, the requirements for ongoing credit monitoring should be taken into account when setting the financial and other representations, warranties and covenants.

# Credit Monitoring *(cont'd)*

- Differences between public and private companies should be recognized, in general public company information, particularly for ongoing monitoring, should tie into the regular reports which the public company is filing with its required filing agency (Edgar or similar), private companies will need a specifically dictated reporting requirements.
- Agents will generally require full exculpatory provisions such that they are not responsible for the quality or timeliness of the credit reporting provided, they are not responsible for ensuring that the syndicate member receives or reviews the ongoing reports, they are not responsible for completeness, or accuracy of the reports, and are not responsible for any credit decisions made based upon the reporting materials.

# Independent Reviews

- The agent is the most likely of the syndicate members to be negotiating with the Borrower group, the details of the credit arrangements including the requirements for insurance. The agent will generally deal with establishing insurance requirements, but will take no responsibility, requiring full exculpatory protections, with regard to the setting of the insurance, the retention of independent insurance consultants should, accordingly, be considered.
- Insurance monitoring will generally be the responsibility of the agent, the agent will be required to ensure renewal of policies come with payment of premiums, this responsibility will most often be accepted by the agent.

## Independent Reviews *(cont'd)*

- If the nature of the financing and of the collateral is such that operational functionality needs to be determined, and monitored, an independent engineer will often be retained, this will provide assurances to the syndicate members in circumstances where the agent will essentially always have required exculpatory provisions ensuring they have no responsibility for quality or functionality of the operating assets.
- The nature, timing, the extent of the independent engineer reports, to supplement agent and lender review, should be negotiated.
- The agent will want to ensure that they have the authority to retain, pay, and a full indemnity for those steps with regard to both insurance consultant and an independent engineer.

# Notice Consultation, etc.

- The provisions of the agreements dealing with notice, consultation and voting need to be recognized as being provisions which balance timing, the agent needing sufficient time to receive and react, syndicate members requiring sufficient time to receive and react, recognition of the necessity at times to move expeditiously – drafting needs to be done accordingly and the realities of the timing discussed.
- The use of information delivery systems needs to be considered, such as is the use of a portal based information centre with periodic notices accessible by all syndicate members suitable, does it satisfy the need for timely and full provision of documents and materials, should it be supplemented by additional delivery and if so what, is electronic only delivery sufficient for syndicate members will it satisfy the regulatory and internal policy requirements.

## Notice Consultation, etc. *(cont'd)*

- What happens when a notice goes astray, when it gets into the wrong hands, when it's forgotten, when the delivery system fails – the consequences for the agent, the syndicate member and the Borrower/Guarantor group needs to be considered and agreements reached.
- Protocols for consultation between the agent and the Borrower group, the agent and the syndicate members, among the syndicate members, should be considered, and an appropriate protocol drafted taken into account the size and nature of the syndicate, among other factors.
- Decisions as to whether the Borrower should be involved in consultation or meeting process should be made relatively early, the involvement or isolation of the Borrower group with the syndicate members can affect regulatory, credit policy and similar matters for the individual syndicate members.

## Notice Consultation, etc. *(cont'd)*

- Consideration should be given early in the formation of the syndicate, looking at the size and nature of the syndicate, the ongoing relationship, and the nature of the Borrower group, to set voting levels that will appropriately protect syndicate members and the agent, will allowing the agent to monitor and administer credit relationship in an efficient manner.

# Exculpatory Provisions

## Purpose

- Exculpatory clauses were originally designed to reduce the risk to the agent with regard to responsibilities syndicate lenders and the undertaking of its duties and to reduce cost of the agency role accordingly.
- Another purpose was to increase interest in and willingness to perform the duties of an agent in order to allow the formation of syndicates by reducing risk for the agent in undertaking its duties for the syndicate participants.
- Exculpatory clauses are intended to rebalance duties and rights so that agents and syndicate members are reasonably equal in their exposure to risk.
- The purpose of exculpatory clauses has been somewhat lost as increasingly draconian drafting has resulted in agents being protected from liability for essentially all of the duties that they undertake other than gross negligent or wilful misconduct while syndicate members continue to be reliant upon the agent for required deliveries and monitoring.

# Exculpatory Provisions

## The Issues

- Agents want to have no duties or responsibility, lenders need to rely on the agent, the balancing becomes difficult when access to the Borrower group is restricted and regulatory and internal policy requirements dictate the need for timely accurate information and assessments.
- Syndicate members are frequently isolated from the Borrower group as a matter of practicality, timing and efficiency, or desire to maintain relationships increasing the difficulty in appropriately balancing rights between the agent and syndicate.
- The syndicate agent frequently has an existing, rapidly growing, relationship with the Borrower group which the balance of the syndicate group does not have. This increases the difficulties face by syndicate members who are not in a position to use judgement to assess the materials and information which is provided to them either as to the extent, content, or accuracy.

# Exculpatory Provisions

## Trends

- Limitation of Liability, indemnity and exculpatory provisions of syndicate documentation increasingly protect the agent, agents are generally now responsible only for gross negligence and wilful misconduct.
- Combating the increasing protection for the agent is the start of a trend to allow syndicate members direct access to the Borrower group, whether through intake meetings, ongoing regular lender with Borrower group or advisors meetings, or through lenders being permitted to directly approach the Borrower group for the purposes of obtaining the regulatory and internal control required materials and information.
- Lender Borrower meetings, virtual, telephone, or in person or increasingly being found in syndicated transactions, particularly where there is a larger lender group where many of the syndicate participants do not have a pre-existing or developing relationship with the Borrower or the Borrower group.
- For some time syndicated loan agreements have included provisions where syndicate members acknowledge that the agent has in no manner influence their credit decision, these clauses are expanding to ensure that there is no reliance on the materials, information, credit assessment, or participation by the agent in the transaction for purposes of assessing in agreeing to the extension of credit.
- The primary duty of an agent in a lending syndicate is to obtain and to provide information, the determination is whether all the information will be obtained by, delivered by, and potentially assessed by, the agent rather than directly between a syndicate participants and the Borrower,
- Where the Borrower group is isolated from the syndicate, agent should bear more responsibility for the completeness, timeliness and accuracy of the information provided, where is direct access to the Borrower group the agent should be better protected with regard to the undertaking of the duties of obtaining and providing information.

# Exculpatory Provisions

## Ongoing Credit Assessment

- The agent will generally have originated the transaction, undertaken its structuring, and obtained and provided the information necessary for the syndicate members to make their credit decision both as to entering the credit relationship and as the steps to be taken during the occurrence of the relationship. Where the Borrower group is isolated from the lenders, the agent is the party with the ongoing relationship, the access to information and the ability to judge information as a consequence for relationship, and is in the best position to assess the quality, and any changes, in the credit: In circumstances where there is isolation of lender group the agent should take more responsibility for the completeness, timeliness and accuracy for their reviews, and for the exercise of judgment, where lenders are provided with more direct access whether by site visits, or access to the Borrower group and information directly, the agent should be better protected by exculpatory clauses, liability limitations and indemnity.
- The agent is generally the only the party in a position to appropriately identify and provide notice to the lending syndicate of breaches, impending breaches, default, information delivery failures at the commencement of and during the currency of the credit relationship. Where there is no direct conduct between syndicate members and the Borrower group the agent should bear responsibility for a commercially reasonable standard of monitoring for the purpose of determining matters which should be notified to the lender group, and timely providing such notification, where there is more direct relationship between the lending syndicate and the Borrower group, then the agent should be better protected from liability as to these duties.
- Syndicated loan documentation will generally provide discretion to the agent in connection with the taking of a number of steps, generally with regard to the obtaining of additional information, providing notifications, and taking step to protect collateral of the credit status of the Borrower group, where the lender group is isolated from the Borrower group the agent should have more responsibility for commercially reasonable undertaking of these duties, where the lender syndicate has more direct access to the Borrower group and its information then the agent should be protected from liability for the undertaking of these duties.

# Exculpatory Provisions

## Beneficial Attributes

- Direct contact between the lender and the Borrower group is generally considered to be favourably for syndicate participants allowing them to individually assess and make judgments based upon their credit criteria, internal policies, and credit experience.
- The nature and extent of the information requirements of the Borrower group, the manner in which they are to be obtained and the delivered, can be beneficial to the syndicate members when there is a reasoned, extensive, properly check listed information delivery requirement with direct delivery to the syndicate members.
- Regular meetings of the syndicate, and of the syndicate with the Borrower group is considered favourably to syndicate members allowing direct, individual, assessment of credit status and information delivery.
- Regular access to the Borrower group auditor is a beneficial attribute to a syndicate member, the ability to directly discuss financial statements with the auditor can be of assistance in completing proper credit assessment.
- Regular reports beyond the delivery financial statements, delivery directly by the Borrower group to each lender syndicate, and the ability to question the reports is beneficial for syndicate members.
- Timely notice provisions, with explicitly set timeframes, considered to be beneficial for syndicate members and should be looked for when participating in the syndicate.

# Exculpatory Provisions

## Issues To Avoid

- A structure which has the Borrower group isolated from the syndicate, dealing only with and through the agent, where the agent is completely protected from liability for the undertaking of duties responsibilities by exculpatory clauses, limitation of liability and indemnity should be avoided.
- Complete exclusion of any duty or responsibility, and liability to a lender group, except to the standard of gross negligence and wilful misconduct should be avoided, while some matters are suitable for complete exclusion, many are not and commercially reasonable standards for obtaining and delivery of materials, information exercise of judgement should be looked for.
- When the agent retains no financial interest in the credit, concerns should be raised. The agent retaining “skin in the game” is good sign for the syndicate that the credit is solid and that appropriate monitoring will be undertaken.
- Limited reports, as an example annual financial statements only, is not desirable in the syndicated transaction where the syndicate members do not have extensive direct ongoing relationships with the Borrower they require more regular and fulsome reports.
- A complete restriction on the ability to offer financing products to the Borrower group is undesirable, it does not give the ability to expand the relationship with the Borrower group so as to increase understanding the credit and the credit relationship to other products.
- A free and complete ability on the part of the agent to assign their interests in the loan meaning the agent can exit at “the first sign of trouble” is undesirable.
- The agent holding all of the accounts with no balancing of set-off rights is undesirable for the syndicate, the agent can look to the accounts, and set-off rights, to prime the rights of the balance of the syndicate, it is usual to include a rebalancing by allowing set-off that requiring a set-off to be prorated among the other lenders.

# Exculpatory Provisions

## Document Changes You Might Get

- Direct reporting, if not included in the initial drafts, can often be negotiated, it is a matter of requiring that the Borrower group provide the reports directly, and at the same time to the agent and to the balance of the syndicate members.
- Better mechanics around notice including an appropriate regime for how and when notices to be provided to syndicate lenders, the nature of the notice, the method of delivery and the times for delivery of the notice can often be improved to provide certainty, and better assurance, to the syndicate members.
- A request for regular, often quarterly, meetings between the syndicate members and the Borrower group, even if by telephone only, can often be negotiated and allows a valuable forum for direct discussion, and inquiry come between the syndicate members and the Borrower group.
- The ability to have a meeting, telephone or otherwise, with the auditor after delivery of the financial statements, to ask suitable questions with regard to the audit process and the financial statements can often be negotiated.
- The direct right to interact with, and obtain information from the Borrower, at the initiation of the relationship, to ensure proper compliance with anti-money laundering and anti-terrorists financing requirements, among other regulatory requirements, will often be granted as these requirements become increasingly complex, and required internal policies increasingly strict.

# Exculpatory Provisions

## Agent – Advice and Expenses

- Professionals are retained to give advice, legal, accounting, insurance or otherwise needs to be determined whether it is the agent hiring the professional in their capacity as agent or for and on behalf of the syndicate members, this will affect reporting, ability to rely, loyalty in the event of dispute.
- Basis upon which professional advice is retained can give rise to issues of conflict, particularly the retainer of legal counsel, which needs to be understood by the syndicate members at the time of retention and appropriately crafted as an agent for itself, an agent as agent, or an agent on behalf of the lending syndicate.
- Cost coverage needs to be negotiated, this should depend upon the basis of the retainer and the party to whom the professional advice has been given, where the professional advice is being given to the agent to protect the agent from a syndicate participants, this should not be the subject matter of indemnity by those lenders in the event there are cost coverage issues.
- Access to the reports need to be determined, this will again depend on the nature of the retainer, regardless of the nature of the retainer access, and potentially the reliance, agreements need to be entered into with the professionals providing the advice to allow the lenders to receive and rely on the reports.
- Most professionals will limit their retainer accordingly (a) at reliance agreement will be needed, or a direct addressing of the advice to syndicate members will be required.
- Selection of professionals should be considered, may be suitable for the agent to select professionals but in circumstances where there is potentially a conflict, or where special expertise is required then syndicate members should participate in this election process.

# Agent Rights

## Agent Relationship Issues to be Respected

- A required minimum hold on the part of the agent can at times be negotiated and is desirable for aligning the interest of the agent and syndicate members. An agent in syndicated transaction is filling at least two, and at times three or four roles, depending upon the agency appointment, whether other parties are filling agent roles, the role as a syndicate member lender, at times can conflict with the role of agent. The agent will need rights granted to them to balance out the differing roles.
- An agent may, absent rights and exculpatory clauses, be deemed to have additional information which, if the agency role is not limited this may lead to fiduciary responsibilities which are unintended, recognition that there is information friction is important, setting out the specific rights and responsibilities which arises a consequence of that information friction is desirable.
- The agent is generally is the party with the long term relationship, and as a consequence did a day-to-day contact the ongoing and increasing relationship with the Borrower group, putting the agent in a better position to be able to judge and assess information and credit status, having access to this information can give rise to a need to have rights, and duties, different than the other lenders in the syndicate.

# Agent Rights

## Agent Relationships Issues to be Respected

- The agent is most likely to be providing other products and services, to the Borrower group, or the members of the Borrower group, increasing their understanding of the Borrower group, improving their information allowing better credit assessment, the rights of the agent should be different with regard to an ability to sell down or exit without notice to, and the opportunity provided to other syndicate members as a consequence of this informational friction.
- An agent without the ability to act for their own benefit in their own capacity, as a lender, may have fiduciary or quasi fiduciary duties and responsibilities which would limit their ability to reasonably protect themselves as a lender in the syndicate
- The agent usually has the history, and ongoing relationship, with the Borrower group: syndicate members need to be aware that this provides the agent with a superior knowledge based and a relationship which may create conflicting duties between the desire of the agent to maintain a relationship and its commercial manifestation and the duties owed to the syndicate members.
- The agent is most frequently the syndicate member providing other products to the Borrower group where those other products have significant financial benefit to the agent may influence decisions with regard to impending or actual defaults, in steps and actions to be taken in connection with those events, understanding the relationship and value the relationship of the Borrower group to the agent is important for syndicate members to assess the manner in which the duties of the agent to the syndicate group may be carried out

# Agent Rights

## Agent Relationship Issues of Concern

- The relationship between the Borrower group and the agent will create an information friction allowing the agent the better means to judge credit status, the agent should be restricted from acting on this information, such restrictions can be done by means such as required retention levels.
- The information friction of the agent as to the Borrower group, at the commencement of the syndication process, should give rise to syndicate members questioning why the syndication is taking place; if this is a new transaction direct the syndication then there is likely less concern, particularly if there is a significant old level, if this is an older relationship now being syndicated where the relationship has not grown or another suitable trigger occurred which would provide a commercially reasonable reason for the syndication – the information friction might be as to credit issues which the agent is attempting to off load.
- Borrower group will require accounts, the holding of accounts provides a benefit to the holder of the accounts providing for improved information, daily tracking which will permit early identification of credit problems and superior rights of security through set-off, this can provide significant benefit to the holders of the operating accounts within the syndicate, this most often in the agent.
- The delivery of cash management services also provides the party providing that cash management with information friction around the cash flow behaviour of the Borrower group, more rapid access information of impending credit difficulties, and control over cash balancing and management again disadvantaging the other members of the syndicate if these are not rebalanced by the agreements among the lenders.

# Agent Rights

## Agent Products Changing Rights

- The party, usually the agent, providing derivative products will have access to fees, insight into Borrower group behaviour, and potentially security for additional products to the disadvantage of the balance of the group, if these imbalances are not corrected by the agreements among the lenders can result in disadvantage to the syndicate members.
- The party providing letters of credit, again most often the agent, will have access to fees, security, and frequently indemnity requirements from the other syndicate members, understanding these rights and benefits are being given to the agent is important in determining how to rebalance among the syndicate.

# Agent Rights

## Fees and Costs

- It is usual for an agent to get additional fees ranging from fronting fees and letters of credit, swing line fees when a swing line is provided, or hire origination fees together with ongoing administrative fees, these should be clearly identified, and the syndicate members privy to the extent and nature of these fees.
- Where the agents fees lie in the payment waterfall, ordinary course or in the event of default, should be determined, many syndicates will require that these fees are subordinate to the payment of fees and interest to the syndicate members.
- Security for the payment of fees and costs need to be considered, if the facility is a secured facility does the security extend the fees and costs, if it extends to fees and costs in what priority is compared to the security provided to the syndicate members for principal and interest.
- Consideration needs to be given as to whether the syndicate members will have any obligation to pay or indemnify the agent for fees and costs.
- The agreements should deal with potential conflict of interest of an agent receiving payments which are not available to the balance of the syndicate members, the precise nature and extent of the payments which can be made to the agents should be identified and agreed to.

# Agent Rights

## Performance Standards

- An agent will usually be required to act only in a commercially reasonable, industry normal, standard, and the provisions of the agreement, if there is not full exculpatory provisions, excuse the honest mistakes (some of these would include notice errors and delivery issues), to protect the agent.
- The agent should not be responsible for making credit or other assessments, including debts or action to be taken on default by the syndicate members, this should be the subject matter of syndicate member agreement, by vote. The agent should remain responsible for the obtaining and delivery of the information necessary for the syndicate members to be able to make decisions, where there is an error in assessing circumstance or missing a default but there has been a commercially reasonable and honest review, the agent should be excluded from liability.
- The agent's rights should extend to clarity of the timing and nature of notices to be provided, using vague terms such as immediate, promptly, or otherwise does not provide for an appropriate platform for the agent to properly undertake their duties and responsibilities, more precise times, reasonably set for the circumstances, should be considered.

# Agent Rights

## Performance Standards

- Determination should be made as to whether the agent must provide notices without any exercise of discretion or whether the exercise of any discretion is suitable, protection of the agent should be provided depending on the determination of the nature, and compulsory delivery, of notices.
- Determination should be made as to whether the agent has any discretion in the timing of a notice, at times an agent may wish to delay the provision of a notice, particularly of a default, until they are assured that the circumstance has occurred. Particularly with a larger syndicate, the specifics as to whether discretion is afforded to the agent, the nature of the discretion, and the consequence of the exercise of discretion should be considered.

# Amendments and Sacred Rights

- Required Lenders
  - Typically more than 50% in interest if more than 2 Lenders.
  - Typically both Lenders if only 2 (unless 1 has much greater percentage interest).
- Amendments typically require consent of Borrower and Required Lenders.

# Amendments and Sacred Rights (continued)

- Certain amendments (“Sacred Rights”) require consent of all Lenders
  - Increase in a Lender’s commitment.
  - Delay or extension of scheduled repayment dates or maturity date.
  - Reduction in principal, interest or fees due.
  - Release of all or substantially all of the Collateral.
  - Release of all or substantially all guarantees (carve out for guarantor that is sold, consolidated or dissolved).
  - Amendment to pro rata treatment of Lenders.
  - Amendment to definition of Required Lenders.
  - Amendment to “Amendments” section of Credit Agreement.
- Other Amendments require consent of specific Lenders or Lender groups.
  - Swing Line Lender.
  - Lenders disproportionately affected.
  - Letter of Credit Issuer.

# Non-Consenting (or Dissenting) Lenders

- If a Lender doesn't consent to an amendment requiring unanimous approval and Required Lenders have approved, Borrower can replace that Lender (this is sometimes known as “Yank – a – Bank”).
- Non-consenting Lender is taken out of at par.

# Permitted Amendments

- Borrower can propose amendments extending the Maturity Date or the commitments and changing the pricing.
- Lenders have a time window in which to accept or reject.
- Accepting Lenders have the amendments go into effect. All other Lenders are paid out on the Maturity Date.

# Notice Requirements

- When must the Agent notify Lenders of an Event of Default?
  - Actual knowledge of Agent.
  - Notification by another person.
- Notification is given “promptly” by the Agent
  - Typically there is a disclaimer of liability for failure to notify.
- Required Lenders can direct Agent to act
  - No liability for Agent if it acts pursuant to that direction.
- Typically a time window (e.g. 10 days) after receipt of notice for Required Lenders to direct Agent
  - If no direction, or the direction is inconsistent, Agent has discretion to act for protection of Lenders, but is not required to act.

# Notice Requirements (continued)

- If Required Lenders direct Agent not to act, it must follow that instruction
  - Sometimes an exception if time is of the essence.
- When “should” the Agent inform the Lenders of credit developments that have not become defaults?
  - Significant adverse event (but not necessarily a MAE)?
  - BK rumor?
- Agent has to use judgment, but failure to err on the safe side and inform may have consequences later.

# Platforms

- Most document deliveries are done through electronic platforms (e.g. SyndTrak or IntraLinks)
  - Deemed delivery when Borrower posts the document (or a link to the document) or when it is posted on Borrower's behalf.
  - Agent typically disclaims obligation to monitor compliance by Borrower.
  - Borrower assumes risk of electronic communication except for gross negligence or willful misconduct of Agent.
  - Platform is provided as is" by Agent with no warranties.

# Honest Mistakes

- Honest mistakes can happen
  - Material sent to the wrong place or person.
- Best approach is to correct them quickly – failure to do so will often have consequences.

# Agents Errors and Omissions

Case Law

## When What Can't Go Wrong Does Go Wrong:

Committee Of Unsecured Creditors v  
JPMorgan Chase Bank, N.A., et al

*The Gift that Keeps on Giving*

# The Defaulting Lender

## Effect on other Parties

- A **Defaulting Lender**
  - is a lender that fails to fund within an agreed number of days (or has given notice that it intends not to fund) any portion of its loan, any administrative fee or other expenses it is obligated to pay.
  - It is an exception to being a Defaulting Lender if the reason for not funding is due to Borrower's failure to meet conditions precedent to funding
- **Effect of a Defaulting Lender on Other Lenders**
  - Fronting Exposure – the exposure experienced by the issuer of letters of credit (Issuing Bank) or of a swingline lender resulting from a Defaulting Lender failing to fund or otherwise share in its share of the risk.
  - Reallocation of Participations –The non Defaulting Lenders reallocate their percentage interests to account for the Defaulting Lender's failure to fund. Typically there is a limitation to provide that no Lender's exposure shall exceed its credit commitment.
- **Effect of a Defaulting Lender on Borrower**
  - May be required to post cash collateral to collateralize Fronting Exposure
  - May be deprived of borrowing should Other Lenders be advanced up to their credit commitment
  - May be denied borrowing under a swingline if Swingline Lender is at risk of Fronting Exposure
  - May be denied issuance, extension, renewal, etc of LC if Issuing Bank is at risk of Fronting Exposure

# The Defaulting Lender

## Effect on Itself

- Does not participate in determinations on Waivers and Amendments
- Defaulting Lender's Waterfall shall be distributed:
  - To Administrative Agent for any amounts owed to it by Defaulting Lender
  - Pro rata* to Issuing Bank or Swingline Lender
  - To cash collateralize Issuing Bank's Fronting Exposure
  - Borrower to fund Defaulting Lender's unfunded loan
  - Held as determined by Administrative Agent and released *pro rata*
    - to satisfy Defaulting Lender's future funding obligations
    - to Cash Collateralize the Issuing Bank's future Fronting Exposure
  - A judgment obtained against a Defaulting Lender by a Lender, Issuing Bank or Swingline Lender
  - A judgment obtained against a Defaulting Lender Borrower
  - To Defaulting Lender
- Does not receive Commitment Fees for any period it is a Defaulting Lender (benefit to Borrower)
- May receive Facility Fee as allocable to funds actually advanced and LC cash collateral provided

# The Defaulting Borrower

## Declaring the Default

- If [Bank] has actual notice of, or receives written notice of and Event of Default under any Loan Documents, [Bank] shall promptly forward a copy of such notice to each Lender or otherwise advise each Lender of such Event of Default.
- In the event that Agent receives such notice [of a Default], Agent shall give notice thereof to Lenders.
- After an event of default under any of the Loan Documents, Agent shall have the unilateral right, without the consent of any Lender to take any and all actions permitted under the Loan Documents and applicable law, including without limitation, foreclosure, to enforce the rights of the Lenders.
- Following the occurrence of an Event of Default, the Agent shall have the right to demand repayment in full of all Obligations, whether or not otherwise due.
- The Agent may, and at the request of the Required Lenders shall, by notice to the Borrower, take either or both of the following actions
  - Terminate all future loan commitments
  - Declare the loan due and payable

# The Defaulting Borrower

## Pursuing the Default

- The Agent shall not be liable for any action taken or not taken by it (i) with the consent or at the request or direction of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary, or as the Agent shall believe in good faith shall be necessary), which consent or direction the Agent may solicit at any time, or (ii) in the absence of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and non-appealable judgment.
- The Administrative Agent shall be deemed not to have knowledge of any Default unless and until notice describing such Default is given to the Administrative Agent in writing by the Borrower, a Lender or an Issuing Bank
- The authority to enforce rights and remedies under the Loan Documents against any Loan Party shall be vested exclusively in, and all actions and proceedings at law in connection with such enforcement shall be instituted and maintained exclusively by, the Agent for the benefit of all the Lenders and the Issuing Banks;

# The Defaulting Borrower

## Syndicate Working Together

- “Required Lenders” means, at any time, [at least two] Lenders, (a) with respect to Revolving Lenders, holding at least [51] [66 2/3]% of the Revolving Credit Exposure, (b) with respect to Term A Lenders, holding at least [50] [66 2/3]% of the outstanding Term A Loans and (c) with respect to Term B Lenders holding at least [50] [66 2/3]% of the outstanding Term B Loans; provided that, the Revolving Credit Exposure, outstanding Term A Loans and outstanding Term B Loans of any Defaulting Lender shall be disregarded in determining Required Lenders at any time..
- “Supermajority Lenders” means, at any time, Lenders having aggregate Revolving Exposure, outstanding Term Loans and unused Commitments representing more than sixty-six and two-thirds percent (66<sup>2</sup>/<sub>3</sub>%) of the sum of the total Revolving Exposure, outstanding Term Loans and unused Commitments at such time; provided that, for the purposes of Section 2.17(b), if the requested amendment, waiver or other modification referred to in such Section by its terms affects the rights or duties under this Agreement of a particular Class (but not of any other Class), then the “Supermajority Lenders” shall be determined as if the affected Class of Lenders that would be required to consent thereto were the only Class of Lenders under this Agreement at such time. The authority to enforce rights and remedies under the Loan Documents against any Loan Party shall be vested exclusively in, and all actions and proceedings at law in connection with such enforcement shall be instituted and maintained exclusively by, the Agent for the benefit of all the Lenders and the Issuing Banks;

# The Defaulting Borrower

## Syndicate At Odds

- Subordinated Debt” means (a) [specify known subordinated debt (e.g., Mezzanine Debt and/or Seller Debt)] and (b) any other unsecured Indebtedness of the Borrower that has subordination terms, covenants, pricing and other terms that have been approved in writing by the Required Lenders
- Change of Control ... excluding any such individual who has been replaced by another individual or individuals reasonably satisfactory to the Required Lenders
- “Non-Consenting Lender” means any Lender that does not approve any consent, waiver or amendment that (i) requires the approval of all affected Lenders in accordance with the terms of Section 9.2(b) and (ii) has been approved by the Required Lenders.
- This Agreement nor any provision hereof may be waived, amended or modified except, pursuant to an agreement in writing entered into by the Borrower, the Agent and the Required Lenders
- No agreement shall (i) increase the Commitment of any Lender without the written consent of such Lender, (ii) reduce the principal amount of any Loan or reduce the rate of interest thereon, or reduce any fees payable hereunder, without the written consent of each Lender affected thereby, (iii) postpone the maturity of any Loan, or any scheduled date of payment of the principal amount of any Loan or any date for the payment of any interest or fees payable hereunder, or reduce the amount of, waive or excuse any such payment, or postpone the scheduled date of expiration of any Commitment, without the written consent of each Lender affected thereby

# Removing the Agent?

Not likely

- Each Lender hereby designates BANK to act as Agent for such Lender under this Agreement
- In no event may the Agent be removed from its position as agent without its prior written consent (which consent may be given or withheld in its sole discretion); provided however that if the Agent becomes a Defaulting Lender, then the Required Lenders shall have the right, in consultation with the Borrower, to appoint a successor.

# Thank You



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