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ROLES AND DUTIES OF LEAD-MANAGER, LEAD AND AGENT BANKS IN SYNDICATED INTERNATIONAL LOANS - A U.S. LAW APPROACH

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The need of corporations and governments for large amounts of money has increased extensively during the 1980s parallel to the evolution of national economies towards an interdependent world economy. All projections show that the globalization of world economy will continue in the current decade as well; thus, so will the need to fund such globalization[1]. Borrowers want to obtain quick, inexpensive and medium-term loans for a variety of reasons, includign the financing of mega-projects. On the international plane, the borrowings reach such huge amounts that no single lender is now able to lend the entire sum on its own. Commercial banks are only able to finance the borrowing entities throught the syndicates they form[2].

Besides the needs of corporations and government borrowers for large amounts of money, there are a number of other factors which continue to attract commercial banks to the practice of lending through loan syndicates. Since the sums involved are extremely high, the banks want to appreciate their capital accumulation through the renting of money[3]. They are also attracted by the management fees and the publicity they would receive throught joining loan syndicates. Finally, these banks are willing to increase their business relationships either with other banks or with borrowers[4].

The most typical of the syndicated loans are those limited to commercial bank term-

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1) *Four the evolution of national economies towards a globalized world economy see, J. NAISBITT, MEGATRENDS-TEN NEW DIRECTIONS TRANSFORMING OUR LIVES 53-80 (1982); J. NAISBITT & P. ABURDENE, TEN NEW DIRECTIONS FOR THE 1990's - MEGATRENDS 2000 19-61 (1990).*

2) *See generally, R.N. Bee, Syndication, in OFFSHORE LENDING BY U.S. COMMERCIAL BANKS 151 (F.J. Mathis ed. 1975); R.H. Ryan, International Bank Loan Syndications and Participations, in INTERNATIONAL FINANCIAL LAW-LENDING, CAPITAL TRANSFERS AND INSTITUTIONS 25 (R.S. Rendell, ed. 1980); P. Wood LAW AND PRACTICE OF INTERNATIONAL FINANCE 256 (1980).*

3) *See, J. NAISBITT & P. ABURDENE, supra note 1, at 27.*

4) *See, R.N. Bee, supra note 2, at 151-152.*

loans[5] and funded in Eurocurrencies, or to be more specific, in Eurodollars[6], although domestic currencies may also be used either separately or in conjunction with Eurocurrencies[7].

In any syndicated loan arrangement there are three parties: The borrower, the participating banks and the syndicate leader. In this tripartite relationship, it is in the immediaté interest of the borrower to have its financing needs met in a convenient, flexible and economical manner. It is in the interest of the banks, on the other hand, to make profits and to gain exposure to the financial markets, while subjecting themselves to moderate financial risk. The highest degree of responsibility falls upon the syndicate leader in this triad.The leader's functions include sourcing, structiring, selling and servicing of the syndicated loan[8]. The scope of each function varies depending on the method by which a certain loan syndication is structured.

PART I- STRUCTURES OF INTERNATIONAL LOAN SYNDICATES AND ROLES OF PARTIES INVOLVED

This article primarily aims to discuss the duties and liabilities of syndicate leaders in syndicated international loans before (as a lead-manager or lead bank) and after (as an agent bank) the loan is extended to the borrower[9]. It is first necessary, however, to identify the basic syndication structures generally used in international loan syndications together with the roles played by the parties involved and to describe some salient features of syndicated loan agreements[10].

1. BASIC SYNDICATION STRUCTURES

Loan syndicates are mostly organized by a limited number of managing banks which commit themselves to finance a large portion of the loan to be extended to the borrower. One of the managing banks, the lead-manager or the lead bank, negotiates the terms of the loan directly with the borrower, structures the proposed credit terms and selects the potential bank lenders. As a resultst, this bank bears most of the responsibility for coordinating the formati-

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5) *For a detailed discussion of commercial bank term loans see, F.D. Logan, Term Loan Agreements, in INTERNATIONAL FINANCIAL LAW- LENDING, CAPITAL TRANSFERS AND INSTITUTIONS 11 (R.S. Rendell, ed 1987.*

6) *See, R.N. Bee, supra note 2, at 151; A.D. Calhoun, Eurodollar Loan Agreements: An Introduction and Discussion of Some Specila Problems, 32 BUS. LAW. 1785 (1977).*

7) *B.W. Semkow, Syndicating and Rescheduling International Financial Transactions: A Survey of the Legal Issues Encountered by Commercial Banks, 18 INT'L. LAW. 869 (1984).*

8) *R.N. Bee, supra note 2, at 153-154.*

9) *See generally, P.R. Stansbury, Legal aspects of Syndicated Eurocurrency Lending, in 1 INTERNATIONAL FINANCE HANDBOOK Sec. 3.5-3, 3.5-4 (A.M. George & I.H. Giddy eds. 1983).*

10) *Discussions in this Part of the article draw primarily on the United States international banking practice which is very much representative of the practice in the international stage.*

on of the syndicate[11]. There are two basic types of syndication structures: "Direct Loan Syndicate" and "Participation Syndicate"[12].

1.1. DIRECT LOAN SYNDICATE

In a direct loan syndicate, each participating lender signs the loan agreement with the borrower, and the borrower may in turn issue to each lender a note evidencing the loan made by such a lender[13]. Hence, all of the lenders are in privity with the borrower, although their rights are limited by the terms of the syndication agreement[14]. The syndicated loan agreement signed by each lender creates a debtor-creditor relationship between the borrower and each lender bank[15].

A direct loan syndicate is organized by a lead-manager bank and, depending on the size of the credit, by a number of comanagers[16]. It is the mandate letter of the borrower which authorizes the lead-manager to arrange the loan. In return for the mandate letter the lead-manager commits to the borrower looks to the lead-manager for informed advice as to what terms are in the best interest of the borrower and yet also acceptable to bank lenders[17].

Upon securing a "mandate" from its prospective borrower, the lead-manager forms a management group and drafts a loan agreement is accompanied by an "information memorandum, "which describes the loan trasaction and contains relevant data about the borrower. These two documents are the main instruments used in soliciting other banks[18] who may be interested in joining the loan syndicate[19]. Once the relevant procedures are exhausted andt the syndicated loan agreement between the lead-manager, co-manager, the participating

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11) *See, P.R. Pollock, Notes Issued in Syndication Loans- A New Test to Define Securities, 32 BUS. LAW. 537, 538 (1977). Also* **see**, *R.H. Ryan,* **supra** *note 2, at 25-26.*

12) *These are two typical types of syndication structures, common to international loan syndications. A third type, however, has been specified. It combines the central characteristics of the two basic types. For this latter type of syndication structure see, B.W. Semkow,* **supra** *note 7, at 874.*

13) *P.R. Pollock,* **supra** *note 11, at 538-539. Also see, R. Slater, Syndicated Bank Loans, 1982 J. BUS. L. 191; M. Gruson, Legal Aspects of International Lending, in HANDBOOK OF INTERNATIONAL BUSINESS sec. 27, at 15-16.*

14) *See, Note, International Loan Syndications: The Next Security, 23 COLUM. J. TRANSNAT'L L. 155, 159 (1984).*

15) *R.H. Ryan, supra note 2, at 32.*

16) *B.W. Semkow,* **supra** *note 7, at 871.*

17) *P. Wood,* **supra** *note 2, at 256; R.H. Ryan,* **supra** *note 1 at 25-26.*

18) *Not all loans are sold to participant banks. ın smaller loans to frequent borrowers, usual!y when there is uncertainty in the market, club deals are arranged. In that instance the lead bank and the manager banks fund the entire loan. Thus, there is no need for placement memorandums in such cases. See, L.S. Goodman, Syndicatea Eurolending: Pricing and Practice, in 1 INTERNATIONAL FINANCE HANDBOOK, sec. 3.4 at 13 (A.M. GEORGE & I.H. GIDDY, eds. 1983).*

19) *Also see B.W. Semkow,* **supra** note 7, at 871. P. WOOD, **supra** *note 2, at 256-257.*

banks and the borrower has been executed, an agent bank is chosen among the member banks of the syndicate. Very often, it is the lead-manager who is chosen as the agent bank[20].

In this process of structuring a loan syndicate, as briefly described above, the lead-manager plays a key role. The borrower depends on the lead-manager for expert advice in drafting the terms of a syndicated loan agreement which would be attractive to bank lenders and, in the meantime, beneficial to the borrower. The bank lenders also rely on the lead-manager for communicating accurately their credit requirements to the borrower and for disclosing pertinent information to them about the borrower to enable them to make a proper credit analysis[21].

1.2. PARTICIPATION SYNDICATE

In a participation syndicate[22] the lead bant enters into a loan agreement with the borrower, and the borrower issues only one note to the lead bank evidencing the entire principal amount of the loan[23]. The lead bank then sells participations in that loan to other bank lenders and enters into separate participation agreements with each of them. Under this system[24] the participating banks do not hold separate notes from the borrower, but they are issued participation certificates by the lead bank in order to evidence the amount contributed by each of them[25].

The lead bank usually arranges participations of other bank lenders in the loan without the knowledge of the borrower[26]. In fact, the lead bank sells to the participating banks an undivided fractional interest in its loan in consideration for the funds provided by them [27].

The lead bank grants the participations in several ways.[28] The way chosen has an impact on the legal position of all parties to the loan. For example, in the case of a grant in the form of an assignment, the participant acquires a direct claim against the borrower whereas in the form of a sub-loan, the participant does not have any direct claims against the borrower and is merely a creditor of the lead[29]. Thus, in the former situation, like under a direct loan

20) *B.W. Semkow, **supra** note 7, at 872-873.*

21) *R.H. Ryan, supra note 2, at 25; M. Gruson, **supra** note 13, at 16.*

22) *For a detailed discussion of participation syndicates or participation loans see, J.D. Hutchins, What exactly is a loan participation, 9 RUT.-CAM. L.J. 447 (1977/78); Comment, Bank Loan Participations as Securities; Notes, Investment Contracts, and the Commercial/Investment Dichotomy, 15 DUQ. L. REV. 261 (1976-1977). **also see**, R.H. Ryan, **supra** note 2, at 32-34.*

23) *See, P.R. Pollock, **supra** note 11, at 539.*

24) *It should be noted that participation loans are identical in substance to loan participations commonly used in U.S. domestic banking. See, Comment, **supra** note 22, at 261.*

25) *See, J.D. Hutchins, **supra** note 22, at 448-449.*

26) *P. Wood, **supra** note 2, at 273.*

27) *Comment, **supra** note 22, at 262-263. Also see, M. Gruson, **supra** note 13, at 16.*

28) *The lead bank may choose one of the following ways in granting a participation: Substitution, undisclosed agency, sub-loan, assignment of a share of the benefits of the loan-agreement, assignment of proceeds, trust, joint venture, and unit trust. See, P. WOOD. **supra** note 2, at 274; J.D. Hutchins, **supra** note 22, at 458-474.*

29) *P. WOOD, **supra** note 2, at 275.*

syndicate[30] there is privity between the borrower and the lender, and, it is likely that the participant could set off a deposit held by it from the borrower against the unpaid participation[31]. However, in the latter situation there is no debtor-creditor relationship between the borrower and the participant bank and, therefore, there is no basis for a right of set-off of the participant bank in cases where the borrower fails to pay the bank's participation[32].

The way the lead bank administers a participation syndicate is almost the same as the way the lead-manager and agent banks administer a direct loan syndicate. Its rights and duties are indicated in the participation agreement it signs with the participating banks and in the loan agreement it signs with the borrower[33].

2. SOME SALIENT FEATURES OF SYNDICATED LOAN AGREEMENTS

Syndicated loans take a variety of shapes, forms and sizes, depending on the amount involved and the amount involved and the number of lending banks. These loans usually have a life of three to eight years, although loans as long as fifteen years may be syndicated. In the Euromarket, syndicated loans compose almost half of bank lending to nonbanks[34]. The borrowers, on the other hand, may either be corporate entities or governments. All these factors have a bearing upon the documentation used for the particular transaction, however, the basic legal isues covered remain the same[35].

Syndicated loan agreements are usually lenghty documents with many provesions governing the contractual relationship between the borrower, lender banks and the agent bank[36]. Like an ordinary commercial loan agreement, syndicated loan agreements inculude provisions having other operational provisions which primarily govern the role of the agent bank administering the loan. Typical of such provisions are the provisions specifying the advances to be made by the lending banks and the drawdow1ns of the borrower[38], provisions concerning the determination of the interest rates by the agent bank for each drawdowns of new funds,[39] and the provisions concerning the repayment of the loan according to an amortization schedule as agreed upon by the borrower and lending banks[40].

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30) *See the text accompanying supra notes 13-15.*

31) *P. WOOD, supra note 2, at 277.*

32) *For the practice in the United States, see,* ***In re Yale Express System Inc.*** *245 F. Supp. 790, 792 (S.D.N.Y. 1965).*

33) *B.W. Semkow, supra note 7, at 874.*

34) *L.S. Goodman, supra note 128, at 3.*

35) *R. Slater, supra note 13, at 173-174.*

36) *For a typical syndication agreement see, Syndicated Loan Agreement for a Corporate Borrower, in 2 [Current] ENCYCLOPEDIA OF BANKING LAW K 1051-2000 (Cresswell, Blair, Hill & Wood eds. 1982).*

37) *See generally, R. Slater, supra note 13, at 177-181; B.W. Semkow, supra note 7, at 893-910.*

38) *B.W. Semkow, supra note 7, at 893-895.*

39) *Syndicated international loans are predominantly funded in Eurodollars. The interest rate to be determined by the agent bank is conventionally expressed in terms of a percentage spread over the London interbank offered rate (LIBOR). See, P.R. Stansburry, supra note 9, at 6.*

40) *B.W Semkow, supra note 7, at 895-896.*

Should an event of default occur in the course of the syndicated loan, the lending banks can resort to the remedies determined inthe substantive provisions[41]. The substantive provisions in a loan agreement serve as protective measures to the bank lenders against the risks involved in their lending operation. Such provisions generally include representations and warranties, covenants by the borrower and a listing of events of default[42]. Among these substantive provisions are the governing law and jurisdiction clauses[43].

Most of the international financings in today's globalized world economy originate from commercial bans situated in financial centers like New York and London. Common law principles and concepts govern the practice of law in these two centers. Loan documentation prepared in these centers often choose New York law or English law as the governing law of the agreements. Hence, the discussions below will inevitably use the terminology and concepts contained in syndicated loan agreements originating from these common law jurisdictions, and will attempt to outline the legal practice in the United States concerning the duties of syndicate leaders with respect to syndicated international loans.

Against this general background, the article will now proceed to discuss the duties of lead-manager and lead banks under direct loan and participation syndications, respectively. The third part of the article will be devoted to a discussion of the duties of agent banks.

PART II - DUTIES OF LEAD-MANAGER AND LEAD BANKS

The duties of lead-manager and lead banks under direct loan and participation syndicates are similar in many respects. Thus, for purposes of convenience, and unless otherwise indicated, the duties of lead-managers will also be those of lead banks throughout the discussions of this Part[44].

1. DUTIES OF DISCLOSURE

As indicated earlier[45] in a direct loan syndicate the lead-manager commonly distributes an information memorandum to solicit participations for the syndicate to be formed. In a participation syndicate, the lead bank distributes a document resembling an information memorandum to prospectieve participants. Notwithstanding the form in which they are prepared, these documents may give rise to the liability of the lead-manager or the lead bank[46].

In common law jurisdictions, a lead-manager or a lead bank may be subject to civil and criminal liablitiy if it fails to disclose information known by it about the borrower or if it dicloses incorrect, incomplete or misleading information regardless of the manner in which

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41) See generally, P.R. Stansbury, supra note 9, at 9-14; M. Gruson, supra note 13, at 5-9b

42) R. Slater, supra note 13, at 178.

43) See, B.M. Semkow, supra note 7, at 903-907.

44) For the same approach see id. at 875.

45) See , the text accompanying supra notes 18-19.

46) See, B.M. Semkow, supra note 7, at 259.

the information is conveyed; in the bank's own name or as an agent of the borrower[47]. This non-statutory duty to disclose is based on common law concepts of intentional or negligent misrepresentation or nondisclosure[48]. Whether the lead-manager or the lead bank would be held liable for a breach of duty depends on several factors[49]. The greater the reliance of participant banks on the syndicate leaders for the information that the participants cannot secure anywhere else, the more likely a duty of care is owed to the participant banks by the managing banks[50].

The highest standards of disclosure are found in the securities laws of the common law jurisdictions such as the United States and England[51]. The securities laws may of course apply in the case fo international loan syndications only if the syndication of a loan is found to involve the issuance of a security[52].

It is important if a note or a participation certificate issued as a result of an international loan syndication or participation is characterized as a security because this would force commercial banks to be more prudent and careful in lending funds syndicated through bank lenders inexperienced in international lending. This is more so in the case of borrowing countries which need financing through far-flung syndicates of banks. It has been seen that commercial banks active in the international loan market may at times engage in practices which would violate securities laws, if their transactions were characterized as involving securities[53]. These banks, and mostly the ones at lead-manager or lead bank levels, are said to have had a an important stake in the recent international debt cirisis. They granted loans to the borrower countries through extensive syndicates of banks, each contributing millions of dollars to the loan based merely on telexes or phone calls. The syndicate leaders failed to provide the participant banks in their syndicate with complete and prudent information about the financial conditions prevalent in the market and in the borrowing country[54]. Moreover, they concealed the negative aspects of a countruy's financial situation from the participant banks

47) *See, P. WOOD, supra note 2, at 259.*

48) *See infra note 84, and the text accompanying.*

49) *B.W. Semkow, supra note 7, at 882. It should be noted that all managers in a syndication may be responsible for the contents of the information memorandum if they are listed in it, or if they are engaged in soliciting participations on the basis of that memorandum. It does not matter that the actual preparation of the memorandum was done by only one of the managers. See, P. WOOD, supra note 2, at 260.*

50) *For a discussion of these limitations see generally, P. WOOD, supra note 2, at 261-263; P.R. Stansbury, supra note 9, at 17-19; R.H. Ryan supra note 2, at 30-32.*

51) *For the United States see, Securities Act of 1933, 15 U.S.C. 772-22 (1982), Securities Exchange Act of 1934, 15 U.S.C. 776-78kk (1982). For England see, The Financial Services Act (1986).*

52) *See, L. Clarke & S.F. Farrar, Rights and Duties of Managing and Agent Banks in Sndicated Loans to Government Borrowers (1982) U. ILL. L. REV. 229, 236; A. Berg, Syndicated lending and the FSAA, INT'L FIN. L.REV., January 1991, at 27 et.seq.*

53) *See, Note, supra note 14, at 156.*

54) *See generally, W.N. Eskridge, Les Jeux Sont Faits: Structural Origins of the International Debt Problem, 25 VA. J. INT'L. L. 281, 292 (1985).*

whose numbers were expressed in hundreds[55]. under these circumstances, it would be protective to extend the application of securities laws to the syndication or participation instruments involved in such practices[56].

The United States securities laws could serve as a bisis for determining the duties and liabilities of lead-manager and lead banks with respect to providing the borrowers with information, should the syndication of a loan be found to involve the issuance of a security.

1.1. STATUS OF NOTES OR PARTICIPATION CERTIFICATES UNDER U.S. SECURITIES LAWS

In the United States, the highest standards of disclosure are those provided among the registration and antifraud porvisions of the 1933 Securities Act (Securities Act)[57] and those provided in the anti-fraud provisions of the 1934 Securities Exchange Act (Securities Exchange Act)[58]. Both Acts provide a very broad definition of security[59]. The slightly different definitions of a security in the 1933 and 1934 Acts are to be treated as "virtually identical" according to the U.S. Supreme Court[60]. A literal interpretation of this broad definition suggest that notes and participations involved in loan syndications may be regarded as securities.

A number of tests have been developed by the U.S. courts of appeal to determine whether or not a note or a participation is a security for purposes of the U.S. Securities Acts. A majority of the U.S. courts of appeals adopted the "investment-commercial" test[61] in determining the legal nature of a note or a participation certificate. According to this test, if the note or participation represents an investment, it is a security subject to the U.S. Securities Acts; if the note or the participation does not represent an investment, but a commercial loan, then it is not a security[62]. This test is a result of the courts' belief that "because one of the main purposes of securities acts is the protection of investors, the inquiry should center on whether

55) *See, Note, **supra** note 14, at 156-157.*

56) *U.S. Congress's response to these inadequacies extant in the international loan market has been to pass the International Lending Supervision Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153, codified at 12 U.S.C. 3901-3912. The Act, however, does not concern itself with the caharacterization of syndicated international loan documents. See, W.N. Eskridge, **supra** note 54, at 11 n. 20.*

57) *The registration provisions of the Act are set forth in § 5, whereas the anti-fraud provisions are found in § 12 (2) and § 17 (a).*

58) *The anti-fraud provision of the Act is set forth in §10 (b) and rule 10b-5, thereunder.*

59) *Both acts state that "uncless the context otherwise requires [t] he term 'security' means any note... or investment contract... or any participation in... any of the foregoing". See, Securuties Act of 1933, § 2(1), 15 U.S.C. 77b(1) (1982) and Securities Exchange Act of 1934, §3(a) (10), 15 U.S.C. 78c (a) (10) (1982).*

60) *See, **Tcherapnin v. Knight**, 389 U.S. 332, at 335.*

61) *See e.g. **Baurer v. Planning Group**, 669 F. 2d 770 (D.C. Cir. 1981); **C.N.S. Enterprises, Inc. v. G. § G. Enterprises. Inc.**, 508 F. 2d 1354 (7th Cir. 1975) **cert. denied** 423 U.S. 825 (1975). At the district court level the test is applied in **Provident National Bank v. Frankford Trust Company**, 468 F. Supp. 448 (E.D. Pa. 1979).*

62) *The **Baurer** Court expressed this approach as follows: "We, too, find persuasive the reasoning that Congress intended to include investment notes of whatever duration within coverage of both Securities Acts and to exclude only commercila loans". See, **Baurer v. Planning Group**, s upra note 61, at 776.*

a note in essence is an investment and thus subject to the securities acts or whether it is a simple commercial loan"[63]. However, it is submitted that the test is ambiguous, its impact in unpredictable[64] and that due to the uncertainty in its application it is not easy to make any prediction whether a particular syndication would involve a security under the "investment-commercial" test[65].

Another test applied by the appeals courts is the "statutory language" test[66]. Under this test, any note or participation falling literally under the securities acts'definitions of security will be considered security "unless the context otherwise requires"[67]. The courts applying this test listed in their decision examples of notes with respect to which "the context otherwise requires" and included in that list notes that bear a "strong family resemblance" to those examples. This test also presented some uncertainty, at least with respect to international bank loan syndications, which seems not to have been included in the statutory language of the securities acts[68].

The U.S. Supreme Court shed some light on the issue recently by stating in a decision that participatory notes may be found to consttitute "securities" within the meaning of the 1934 Act.[69] Indicating that "Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called"[70] the Supreme Court adopted the "family resemblance test" finding in it a "more promising framework for analysis", and suggested that an instrument's classification as a security should be assessed in light of the standards used by other courts earlier in fashioning a list of non-security notes[71]. Such criteria include looking at a seller's "motivation" in issuing a note to raise money, inquiring whether the note concerned igs included in a "plan of distribution", considering the "reasonable expectations of the investing public", and "existence of alternative regulatory schemes" other than the securities laws[72].

63) *See, Note, International Loan Syndications, The Securities Acts, and the Duties of a Lead Bank, 64 VA. L. REV. 897, 907-908 (1978) [Hereinafter cited as* ***"Note, International Loan Sydications"****].*

64) *Id. at 904.*

65) ***See,*** *R.H. Ryan,* ***supra*** *note 2, at 26.*

66) *Also referred to as "purpose" or "resemblance" test, the "statutory language" test is clearly formulated in* ***Exchange National Bank v. Touch Ross § Co.,*** *544 F. 2d 1126, 1137 (2nd Cir. 1976) and followed in* ***Golden v. Arthur Andersen,*** *726 F. 2d 930, 937-938 (2nd Cir. 1984). At the District Court level, this test is applied in* ***Commercial Discount Corporation v. Lincoln First Commercial Corporation,*** 445 F. Supp. 1263 (S.D.N.Y. 1978). Interestingly, there the court found that the loan participation considered was a security. **Id.** *at 1265-1268.*

67) ***In Exchange National Bank,*** Judge Friendly gave a list of cases in which "the context otherwise requires". Included are also notes that bear close resemblance to the examples listed. **See, Exchange NationalBank V. Touche Ross § Co., supra** *note 66, at 1138.*

68) ***See generally,*** *R.H. Ryan* ***supra*** *note 2, et 27.*

69) ***See, Reves v. Ernst § Young,*** *110 S.Ct. 945 (1990).*

70) ***Id.*** *at 949.*

71) ***Id.*** *ad 951.*

72) ***Id.*** *at 952-953,* ***Also see,*** *L.C. Buchheit, When is a loan not a loan, INT'L FIN. L. REV., November 1990, at 29, 30-31.*

Although the Supreme Court's decision did not discuss the character of a loan participation and qualify every loan note as a "security", it will serve as a serious indication to the commercial banks that the instrument they may use in granting loans may subject them to the scrutiny of securities laws with higher standars of disclosure[73].

1.2. REGISTRATION REQUIREMENTS AND PRIVATE PLACEMENT EXEMPTION

The foregoing discussions about the "security" nature of international loan syndication instruments indicate that the U.S. law is not yet entirely settled on this issue. If the note or participation underlying an international syndicated loan transaction could be characterized as a security, its issuance by a lead-manager or lead bank may be subject to the registration requirements of the Securities Act, unless an appropriate[74] A lead-manager in a syndicated international loan transaction, however, may avoid this registration requirement by showing that its syndication of the loan was without general solicitation or advertising and that it did not involve a public offering but a small number of sophisticated banks, each of which had been furnished or could gain access to information concerning the borrower[75]. This is a result of the private placement examption available under the Securities Act which exempts, from the registration requirements, "transactions by an issuer not involving any public offering"[76].

A further condition to be met by a lead-manager in a syndication, in order to qualify for private placement exemption, information, ideally the same kind of information that a registration statement would disclose. There is, indeed, no legal requirement for the preparation and distribution of an information memorandum by the lead-manager to prospective banks. Nevertheless, if prepared in accordance with the relevant guidelines, the memorandum could qualify the syndication as having satisfied the information requirements of the private placement exemption[77].

If the syndication involves a security, but fails to satisfy theprivate placement exemption requirements of the Securities Act, the syndication may still be structured in a way to avoid any registration requirement[78]. Over the years, the Securities and Exchange Commission (SEC) has taken the position that offers and sales of securities by domestic issuers exclusively to foreign investors are not subject to registration requirements, provided these securi-

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73) *See, L.C. Buchheit, **supra** note 72, at 31-32.*

74) *Securities Act of 1933, 5, 15 U.S?C. 77e (1982).*

75) *See, B.W. Semkow, **supra** note 7, at 880. **Also see, SEC v. Ralston Purina Co.**, 346 U.S. 119 (1953).*

76) *Securities Act of 1933, § 4(2), 15 U.S.C. 77d(2). **Also see,** Rule 506 of the Securities Exchange Commission which specifies an exemption for limited offers and sales without regard to dollar amount of offering. 17 C.F.R. 230. 506 (1984).*

77) *See, R.H. Ryan, **supra** note 2, at 28.*

78) ***Id.** at 28-29.*

ties are sold in a manner reasonably designed to preclude redistribution of the securities within the United States or to U.S. nationals[79].

1.3. ANTI-FRAUD LIABILITY

In an international loan syndication, if the lead-manager or the lead bank delivers to the prospective bank lenders an information memorandum, or any other written or oral communication, which includes any incorrect statement of a material fact or omits to state an important material fact, and if the lead-manager or the lead bank knows, or could have known in the execise of due diligence, of such misstatements[80] then the anti-fraud provisions of the U.S. securities acts may be applicable[81].

The anti-fraud provisions may be applicable even if the syndication is not subject to the registration requirement. However, the requirements concerning the accuracy and sufficiency of information are lower for disclosure documents in exempt offerings than for registration statements in registered offerings[82]. Even under the former situation there is still a requirement as to the exercise of due diligence[83]. Once some information is provided, then the lead-manager or lead bank should satistfy itself that the information is accurate, complete and not misleading[84]. The scope of the due diligence duty has been elaborated upon by the courts on a number of occasions[85]. The factors to beconsidered are the extent of the lead-manager or the lead bank's involvment in the preparation of the information memoradnum, the extent to which the participant banks rely on the memorandum and the overall relationship between the parties[86].

The importance of imposing liability on lead-manager or lead banks for their misrepsentations is clearly seen in the case of **In re Colocotronis Tanker Sec. Litigation**[87], notwithstanding the fact that the case raised a number of questions pertinent to U.S. domestic

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79) *See, Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) paras. 1361-1363 (July 9, 1964). For an article conerning foreign offerings of securities, see, H.D. Evans, Offerings of Securities Solely to Foreign Investors, 40 BUS. LAW. 69 (1984). For a discussion of the extraterritorial reach of U.S. Securities Laws, see, L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 54-72 (1988) and also L. Loss, 1990 Supplement, FUNDAMENTALS OF SECURITIES REGULATION 10-23 (1990).*

80) ***See**, R.H. Ryan, **supra** note 2, at 29.*

81) *The anti-fraud provisions which impose liability on "any person" invelved in the specified frauds include § 12(12) and § 17 (a) of the Securities Act and Rule 10b-5 thereunder. **See supra** notes 57 and 58.*

82) ***See**, Note, International Loan Syndications, **supra** note 63, at 911.*

83) ***Id.***

84) ***See**, P. WOOD, **supra** note 2, at 261.*

85) ***See, Stephenason v. Calpine Conifers**, 652 F. 2d 808, 813 (9th Cir. 1981); White v.Abrams, 495 F. 2d 724, 735-736 (9th Cir. 19/4).*

86) ***See generally**, B.W. Semkow **supra** note 7, at 882.*

87) *420 F. Supp. 998 (J.P.M.D.L. 1976).*

multi-bank lending[88]. In that case, seven American regional banks which had participated in syndicated loans to the Colocotronis shipping group alleged that they were inducet to the loan by untrue and incomplete representations of the lead bank[89]. Although the case was subsquently settled among the banks' parties to the dispute, it is significant in illustrating the difficulties involved in multi-bank financing, and in emphasizing the possiblity that bank participations maybe treated as "securities"[90].

2. LIMITATIONS ON THE LEAD-MANAGER OR THE LEAD BANKS LIABILITY FOR INFORMATION MEMORANDUM

The participant banks in an international loan syndication often tend to rely on the managing bank for obtaining complete and reliable information from the borrower in making their loan decisions[91] It is in the interest of the participant banks to place on the managing banks as much of the responsibility as possible for initial investigations, the commitment proposals, the drafting of the loan agreement and other documents, and the supervision of loan closings[92]. On the other hand, it is in the interest of the lead-manager or lead banks to take some precautionary steps to limit their liabilities[93].

The lead-manager might want to satisfy itself that it has at least met the due dilligence investigation standards specified by the securities legislation94. To this end, the lead-manager might review information not only with the borrower but also with its own experts and analysts[95]. It is to the interest of the lead bank to verify every piece of information obtanied[96].

The managing bank in a syndicate should emphasize that the information memorandum is not a substitute for an independent loan review by the participant banks, and it might obtain the borrower's written approval concerning the information included in the information memorandum before its release[97]. If the lead-manager or lead banks can not obtain information from the borrower which would otherwise be appropriate, they might then use public information and indicate this source on the information memorandum[98]. Moreover, the ma-

88) *See, R.H. Ryan, The Colocontronis Case: Considerations for Multi-bank Lenders, 60 J. COM. BANK LENDING, January 1978 at 54. [hereinafter cited as* ***Colocotronis Case****].*

89) ***See, In re Colocotronis Tanker Securities Litigation, supra*** *note 87, at 998-999.*

90) *See, R.H. Ryan, Colocontronis Case,* ***supra*** *note 88, at 55-58.*

91) *P.R. Stansbury,* ***supra*** *not e9, at 17. Here, it should be noted that in U.S. public offerings participating underwriters which made no independent investigation have been held bounded by, in at least one case, the managing underwriter's failure to carry out the necessary investigation functions. See,* ***Escott v. Bar Chris Constructino Carp.*** *283 F. Supp. 643, 697 (S.D.N.Y. 1968).*

92) ***Id.***

93) ***See,*** *R.H. Ryan,* ***supra*** *note 2, at 30.*

94) *P. WOOD,* ***supra*** *note 2, at 261.*

95) *R.H. Ryan,* ***supra*** *note 2, at 30.*

96) ***See id.***

97) ***Id.; Also see,*** *L.S. Goodman,* ***supra*** *note 18, at 11.*

98) ***See,*** *R.H. Ryan,* ***supra*** *note 2, at 30.*

naging banks should inform the prospective participant banks about any change in the circumstances of the borrower during the period between the distribution of the information memorandum and the execution of the loan agreement in order to avoid a fraudulent misrepresentation claim[99].

Sometimes the lead-manager or lead bank might perfer not to distribute an information memorandum for fear of incurring a risk for being held responsible concerning the accuracy and thoroughness of the information provided. However, the managing banks should weigh these risks against the benefits of an information memorandum and then decide the position to be taken.[100] Finally, the lead-manager or lead bank might further reduce its duty to disclose information by distributing the memorandum only to those prospective participant banks that know the borrower as much as the managing banks do[101].

Another way in which a managing bank may avoid liability for memorandum misrepresentations is the inclusion of exculpatory disclaimers either in the information memorandum or in the loan agreement[102]. Such disclaimers may limit the satandard of liability to gross negligence or wilful misconduct. The usefulness of such disclaimers varies as to the circumstances and jurisdiction[103]. For instance, the U.S. Securities Acts contain provisions which seem to cancel the effect of any such disclaimers as applied to violations of those acts[104]. Nevertheless, similar disclaimers have been enforced by the U.S. courts[105]. In any event, exculpatory disclaimers may not alleviate a managing bank's duty to disclose the so-called inside information, which is, in effect, material information possessed by such a managing bank, but as the managing bank knows, is not available to participant banks[106].

Sometimes, the possession of such inside information may put the lead-manager or lead bank in a dilemma. The bank may have obtained the information from the borrower on a confidential basis and feel obliged not to disclose it. On the other hand, failure to reveal this information to the prospective participant banks could result in liability for disclosure. It is submitted that the practice of managing bank, which is to prefer the borrowers when caught in such a dilemma, can justifiably be critizcized from the point that by exhibiting such preference they are acting as the agents and trustees of borrowers rather than protecting the interests of participant banks[107].

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99) See, B.W. Semkow, supra note 7, at 30.

100) See, R.H. Ryan, supra note 2, at 30.

101) B.W. Semkow, supra note 7, at 882.

102) See, L. Clarke & S.F. Farrar, supra note 52, at 238-240.

103) See, B.W. Semkow, supra note 7, at 883. Also see, R.H. Ryan, pra note 2, at 31.

104) See, Securities Act, § 14, 15 U.S.C. 77n (1976) which provides that "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void".

105) See, NBI Mortgage Investment Corp. v. Chemical Bank [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96.066 (S.D.N.Y. 1977).

106) See, Note, International Loan Syndications, supra note 63, at 914-915; R.H. Ryan, supra note 2, at 31.

107) Seea, Note, International Loan Syndications, supra note 63, at 915.

A manager or a lead bank may also have with the syndicate conflicts of interest that it should disclose[108]. Such conflicts of interest may include the existence of other loans to the borrower where the managing bank may be acting in the capacity of either lender, agent, trustee or affiliate of other lenders[109]. In addition to the foregoin, the receipt of a management fee from the borrower should also be disclosed[110]. Another conflict that the managing bank should reveal is the existence of any debt the borrower owes to the managing bank[111]. Disclosure in all these conflict situations has an imperative nature due to the great reliance of participant banks on the managing bank in deciding whether to participate in a particular loan syndicate[112].

In the case of sovereign borrowers, inclusion of country risk analysis in the information memorandum is an important disclosure duty of the managing bank. Factors relevant for that purpose are political and economic stability in a country, the country's balence of payments, and a profile of the country's debts structure[113]. Very often, sovereign borrowers tend to conceal information concerning their financial situtain[114]. Hence, it has been submitte that the managing banks should be excepted from supplying all materila information[115]. It should be noted that, given the increased flow of all kinds of information on the international plane, such an exception for the benefit of lead-manager or lead banks would no longer be justified.

PART III- DUTIES OF AGENT BANKS

In a direct loan syndication, the loan will normaly, be administered by an agent bank appointed by the participant banks, after the execution of the underlying syndicated loan agreement[116]. Frequently, the lead-manager or a manager bank is appointed as the agent bank[117]. In the case of a participatino syndicate it is the lead bank which administers the loan[118]. The agent bank in a direct loan syndication, and the lead bank in an indirect participatino syndication, have equivalent püsitions had very similar duties and rights, as far as their duties to te syndicate banks are concerned. Hence, the term "agent bank" will hereafter apply to both syndication structures, unless otherwise indicated[119].

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108) See, B.W. Semkow, supra note 7, at 883.
109) R.H. Ryan, supra note 2, at 31-32.
110) P. WOOD, supra note 2, at 263.
111) See, Note, International Loan Syndications, supra note 63, at 915.
112) See id.
113) Id. at 913.
114) See, Note, supra note 14, at 156-157.
115) Note, International Loan Syndications, supra note 63, at 914.
116) See, R.H. Ryan, supra note 2, at 32.
117) See, L. Clarke & S.F. Farra, supra note 52, at 244.
118) R.H. Ryan, supra note 2, at 32.
119) See id.; Also see, B.W. Semkow, supra note 7, at 885.

Although the functions of an agent bank begin upon the execution of the syndication agreement, the lead-manager or lead banks may anticipate the responsibilities of the agent bank before appointment because of the inclusion of specific provisions on the issue in the syndication agreement[120].

The agent banks usually owe the members of the syndicate duties to administer the contract as set forth in the syndication agreement[121]. They may also owe some implied duties whether or not they are written into the contract[122]. The scope of these duties is unclear. Hence, the managing banks usually include provisions in the loan agreement which are designed to disclaim any fiduciary[123] or trustee responsibility as the case may be if the agent bank is subjected to traditional agency rules[124].

1. IMPLIED DUTIES

The duties of the agent bank ordinarily extend beyond the express terms of the loan documents. Regardless of the terms of the loan agreement or of the information memorandum, the agent bank would appear to have the duties of a fiduciary as a result of an agency relationship[125] with the lending banks[126].

1.1. FIDUCIARY DUTIES

The most important of the fiduciary duties would be the one of care and skill which is standard for the type of work the agent bank is emploled to perform[127]. The scope of this duty of care of skill far exceeds standard contractual duties in a syndication agreement, which holds the agent bank liable only for "gross negligence and wilful misconduct"[128]. The fiduciary duty of care and skill includes, at least, the mechanical aspects of administering a syndicated loan such as keeping and rendering an account of funds the agent bank has received or disbursed on behalf of the lending banks[129], plus disclosing any significant remunion for its services[130].

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120) *See, P.R. Stansbury, **supra** note 9, at 18; R.H. Ryan, **supra** note 2, at 34.*

121) *See, B.W. Semkow, **supra** note 7, at 886; P. Wood, note 2, at 265-266.*

122) *P. WOOD, **supra** note 2, at 266.*

123) *It has even been argued that the term "Agent" has a special meaning in the context of syndicated loans and that the agent bank does not have a fiduciary duty to the members of the syndicate since the loan agreements usually provide that no fiduciary relationship exists between the agent bank ant the member banks. L. Clarke & S.F. Farrar, **supra** note 52, at 244.*

124) *See, P.R. Stansbury, **supra** not e9, at 18; P. WOOD, **supra** note 2, at 266.*

125) *See, Restatement (Second) of Agency 1 and 13 (1958).*

126) *See, R.H. Ryan, **supra** note 2, at 34.*

127) *See, Restatement (Seecond) of Agency 379 (1) (1958).*

128) *B.W. Semkow, **supra** note 7, at 886.*

129) ***Id.***

130) *See, **Spratlin, Harrington and Thomas, Inc. v. Hawn**, 156 S.E.2d 402 (Ga.. Ct. App. 1967). There the court held that failure of an agent to disclose to its principals a finder's fee and a servicing fee breached the agent's duty of loylty to its principals. Also see, Restatement (second) of Agency 387 (1958).*

Another fiduciary duty of the agent bank is to provide the participant banks of the syndicate with relevant information concerning the syndicate, unless otherwise agreed upon or unless the agent bank is bound by a superior duty to a third person[131]. This disclosure of information duty would include all relevant inside information obtained by the agent after the signing of the loan agreement and notification of any breach of the conditions specified under the loan agreement[132]. The disclosure of information duty[133] may also include a duty to disclose confidential information acquired by the agent in some capacity or connection other than as an agent. Then the agent bank is faced with conflicting dufties of disclosure: The duty owed to other lending banks in the syndicate as to disclose any confidential information and the duty owed to the borrower not to disclose confidential information[134]. The problem is similar to the managing bank's problem of disclosing inside information[135]. The agent bank, however, has fewer options compared to the managing bank. Unlike the managing bank, the agent bank does not have a chance to postpone the loan. The ultimate solution for the agentbank seems to be to eliminate its conflict by resigning as agent. Nevertheless, resignation by the agent may not be possible without the constent of the other lending banks if the loan agreement does not contain a successor agent provision136.

Unless otherwise provided in the provided in the loan documentation, the agent bank may have a fiduciary duty of monitorin the provided for in the loan agreement[137]. This duty, however, is disclaimed in most of the syndicated loan agreemnts[138].

An agent bank, as a fiduciary, can not make secret profits out of its agency relationship or subdelegate its authority to administer the loan. Moreover, the agent bank should not allow its responsibility as agent to conflict with the interests it may have because of acting in some other capacities[139]. In practice, however, an agent bank may be engaged in capacities which give rise to such conflicts of interest. Illustrative of these conflicts of interest are the situations where the agent bank may have extended other credits to the borrower, is an agent for the borrower under other loan syndications, or is a trustee for the security holders of the borrower[140.] These conflicts of interest should be disclosed to other lender banks before they participate in the loan[141].

A default under a syndicated international loan agreement may also give rise to some

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131) See, Restatement (second) of Agency 381 (1958).

*132) B.W. Semkow, **supra** note 7, at 887.*

*133) In the U.S., if the managing or agent banks benefit from nondisclosure of any information, they may be liable either directly or as "aider of abettor". See, Rosen v. Dick, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 94.786 (S.D.N.Y. 1974); **Monsen v. Consolidated Beef Co.**, 579 F. 2d 793 (3d. Cir. 1978).*

134) See, R.H. Ryan, supra note 2, at 34.

*135) See **supra** the text accompanying notes 106-109.*

*136) R.H. Ryan, **supra** note 2, at 35.*

137) See, Restatement (second) of Agency 426 (1958).

*138) See, R.H. Ryan, **supra** note 2, at 35; P. WOOD, **supra** note 2, at 266.*

*139) See, P. WOOD, **supra** note 2, at 268; B.W. Semkow **supra** note 7 at 886-887.*

*140) See, R.H. Ryan, **supra** note 2, at 35.*

141) Id.

responsibilities and liabilities for the agent bank.The agent bank should inform other lending banks of the borrower's default and of its negotiations with the borrower. If the agent bank fails to take corrective actions, this may give rise to claims by the lending corrective actions, this may give rise to claims by the lending banks. Agent banks could prevent such claims of the lending banks by making a diligent inquiry about the borrower's financial situation through financial and legal audits[142].

1.2. EXCULPATORY DISCLAIMERS

In syndicated international lending, it is customary for the managin bank to assume the inclusion in the loan agreements of provisions designed to disclaim fiduciary responsibilities of the agent bank to the other lending banks of the syndicate[143] reducing the responsibilities of the agent to that of handling the administrative burdens of the syndicated loan arrangement[144].

It is usually stated in the loan agreements[145] that the agent bank does not have any duties and powers other than those expressed in the agreement, and that its duties are of a mechanical and administrative nature only[146]. It is also stated that the agent is not liable for any-default or omission staded that the agents is not liable for any default or omission in the case of gross negligence or wilful misconduct[147]. It is common to provide specific immunities which serve to exonerate the agent from liability for its reliance on documents it believes genuine, or on the advice and statements of lawyers and other experts selected by it or for non-disclosure of information acquired in another capacity[148].

Finally, each lending bank agrees in a specific provision that it has not relied on the agent bank or on other lenders in determining to enter into the credit agreement[149] and that any credit decision by the agent bank is made with respect to its own participation, and is not to be regarded as a recommendation by the agent bank to the other participants as to what they should decide[150].

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142) See, R.H. Ryan, supra note 2, at 36.

143) See, P.R. Stansbury, supra note 9, at 18.

144) See, L. Clarke & S. F. Farrar, supra note 52, at 244 and 247.

145) P. WOOD supra note 2, at 269; P.R. Stansbury, supra note 9, at 18.

146) In this regard, a common provision found in the syndicated loan agreements is the one which "irrevocably, authorizes the Agent to take such action on its behalf and to exercise such powers under the Agreement as are delegated to the Agent by the terms hereof, together with such powerks as are reasonably incidental thereto", quoted in L. Clarke & S.F. Farrar, supra note 52, at 248.

147) See, P. Wood, supra note 2, at 269.

148) See, L. Clarke & S.F. Farrar, supra note 52, at 248; Also see, B.W. Semkow, supra note 7, at 888.

149) L. Clarke & S.F. Farrar, supra note 52, at 248.

150) P.R. Stansbury, supra note 9, at 18.

2. EXPRESS DUTIES

An agent bank has several express duties set forth in the loan agreement. These express duties are mostly mechanical in nature and require very little discretion[151]. This is partly because other bank lenders do not want to lose their competitive position with the borrower, and partly out of fear that the agent bank would be inclined to give more importance to its own relationship with the borrower rather than to the collection of the syndicate's loans[152].

The agent bank plays the role of a payment center in the disbursement and collection of funds. When the borrower desires to obtain funds, it contacts the agent bank before the drawdown. The agent bank, in turn, notifies the bank lenders of the syndicate to pay their **pro rata** share and, in the meantime, calculates the interest rate the borrower will pay[153].

Frequently, agent banks may have disbursed more funds to a borrower than recieved on a drawdown or to a syndicate on repayment.Most loan agreements, however, now provide that the agent bank may do so at its discretion and that the unpaid amounts must be repaid to the agent bank together with interest[154].

The agent bank also has to make sure that conditions precedent to the bank lenders' obligations have been satisfied before making any disbursements to the borrower[155]. The agent bank must receive and distribute copies of all documents pertinent to the proper execution of the loan agreement, including guarantees, security and legal opinions[156]. The agent bank may entirely rely on its in-house counsel[157] to determine whether these closing conditions are met[158]. By doing so, the agent bank can shift what otherwise would be a worrisome risk, since virtially all loan agreements now inculide a provision which protects the agent bank when it relies on counsel[159].

The agent may be required by the loan agreement to monitor and report to the syndicate members the financial condition of the borrower[160]. The loan agreement may also insturict the agent bank to notify the members of the syndicate about an event of default. This duty does not necessarily cover the notification of minor defaults. The test to be considered is whether the syndicate may be materially prejudiced by the agent bank's failure to notify[161]. Sometimes the loan agreements give the agent bank a discretion to accelerate the loan in the

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*151) See, B.W. Semkow, **supra** note 7, at 889.*
*152) See, L. Clarke & S.F. Farar, **supra** note 52, at 247.*
*153) **Id.***
*154) See, L.Clarke & S.F. Farrar, **supra** note 52, at 245, **Also see**, P. WOOD, **supra** note 2, at 265-266.*
*155) L. Clarke & S.F. Farrar, **supra** note 52, at 246.*
*156) B.W. Semkow, **supra** note 7, at 890.*
*157) It should be noted that independent or in-house counsels play a very important role in the preparation of the loan documentation and in monitoring the loan. See, R.H. Ryan, **supra** note 2, at 36-38.*
*158) B.W. Semkow, **supra** note 7, at 890.*
*159) L. Clarke & S.F. Farrar, **supra** note 52, at 246.*
*160) See, P. WOOD, **supra** note 2, at 266.*
*161) **Id.** at 267.*

event of default, but in most cases the agent bank will consider the instructions of the majority of bank lenders. Since an untimely default notification and loan acceleration would have very harmful results upon the borrower and the market, the agent bank is advised to verify properly that a default has taken place.[162]

CONCLUSION

There are two questions which control the scope of the lead-manager, lead and agent banks' duties.Are notes or participation certificates issued in connection with international loan syndications securities? Is the relationship between the agent bank and other bank lenders in an international loan syndication an agency relationship?

As the law now stands, it can be submitted that it is not yet legally clear whether international loan syndications involve securities. The env·ronmental constraints, however, require that they be characterized as securities. There is an increasing number of small and unsophisticated banks which need to be protected like any other individual or corporate investor.

On the other hand, although several disclaimers provided for in the loan agreements nullify the effect of any fiduciary duty, the relationship between the bank lenders in a syndicate and their agent banks can still be characterized as an agency relationship. Such a caracterization would serve as a protection tool for the same small and unsophisticated banks against any misconduct by the agent bank.

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162) ***Id.*** at 268.