

Benefits of Intercreditor Agreements in Cross-Border Restructurings

*Markus Wolf**

- I Context**
- II Challenges for Financial Creditors in Cross-Border Restructurings**
 - A *Potential for Value Destruction of Formal Restructuring Proceedings*
 - B *Inconsistency in National Restructuring and Insolvency Laws*
 - 1 General Remarks
 - 2 Opening of Formal Restructuring and Insolvency Proceedings
 - 3 Mandatory Stay on Enforcement
 - 4 Valuation Methods for Companies in Restructuring Procedures
 - 5 Cramdown of Out-of-the-Money Creditors and Other Holdouts
 - 6 Protection for Providers of Rescue Financing
 - C *Inconsistency in Corporate and Commercial Laws*
 - 1 General Remarks
 - 2 Value of Security Packages
 - 3 Personal Liability of Individuals Involved in Workouts
 - D *Secondary Debt Market and Creditor Activism*
 - E *Interim Conclusion*
- III Benefits of Intercreditor Agreements**
 - A *General Remarks*
 - B *Ranking and Priority*
 - 1 Approach Adopted in LMA ICA
 - 2 Benefits in Cross-Border Restructurings
 - C *Prevention of Cash Leakage*
 - 1 Approach Adopted in LMA ICA
 - 2 Benefits in Cross-Border Restructurings

*Dr. Markus Wolf, LL.M., is an Associate in Baker McKenzie's Banking & Finance team in Zurich. The views expressed in this article are the personal views of the author and not those of Baker McKenzie Zurich.

- D *Senior Creditors in Control of Capital Structure*
 - 1 Approach Adopted in LMA ICA
 - 2 Benefits in Cross-Border Restructurings
- E *Enforcement of Security Package and Facilitation of Distressed Disposals*
 - 1 Approach Adopted in LMA ICA
 - 2 Benefits in Cross-Border Restructurings

IV Conclusions

Bibliography

This article analyses major challenges faced by financial creditors¹ in cross-border restructurings and shows how intercreditor agreements can be beneficial in addressing them.

I. CONTEXT

Large enterprises often operate in various geographic markets. As a result, such enterprises are subject to multiple jurisdictions. The epitome of the multinational enterprise is the multinational group of companies, comprising legal entities located in various jurisdictions and controlled through a chain of holding entities. Reasons for the use of holding structures in cross-border business are manifold and include the quarantining of risk, tax efficiency and regulatory compliance, to name but a few. However, they may result in complicated group structures with the group's assets spread across various jurisdictions.

In addition, multinational enterprises are hardly ever financed through shareholders' equity alone. Often, their capital structure is optimised to increase shareholders' return on equity.² This is particularly true for enterprises that have recently gone through a structured finance transaction, e.g. in connection with a leveraged buyout. The optimisation of the capital structure is typically achieved through the employment of multiple forms of financing with different properties to accommodate risk appetites of a multitude of investors.³ As a result, a multinational enterprise regularly has a diverse group of financiers, each with a different commercial position.⁴

When such enterprises face financial difficulty, the combination of a complicated multijurisdictional group structure and a diverse group of financiers will give rise to considerable challenges to restructuring efforts. Part II of this article will analyse those challenges from the perspective of financial creditors. Part III of this article will show how intercreditor agreements can be beneficial in addressing them.

II. CHALLENGES FOR FINANCIAL CREDITORS IN CROSS-BORDER RESTRUCTURINGS

A. *Potential for Value Destruction of Formal Restructuring Proceedings*

In many countries, a debtor who becomes subject to formal (i.e. court-

supervised) restructuring proceedings carries the stigma of failure.⁵ As a result, the opening of formal restructuring proceedings may lead to a loss of public confidence in the enterprise, the defection of customers, and suppliers demanding upfront or cash on delivery payments. Even if formal restructuring proceedings were opened in a country where they entail a less negative association by market participants,⁶ they may have negative repercussions in different geographic markets. For financial creditors, this means that the instigation of formal restructuring proceedings may have a value destructing effect and may lead to lower recovery rates. Hence, in the context of cross-border restructurings, out-of-court solutions are often preferred by financial creditors.⁷

B. *Inconsistency in National Restructuring and Insolvency Laws*

1. General Remarks

One of the main challenges faced by financial creditors in cross-border restructurings is the inconsistency in restructuring and insolvency laws across jurisdictions. In the most extreme situation, each of the debtor group's subsidiaries could be subject to a different set of rules.

This inconsistency increases the complexity and costs of rescue attempts, as each relevant set of rules must be complied with. Furthermore, it exposes the financial creditors to the risk that the debtor group or individual creditors seek to obtain a more favourable legal position by initiating restructuring or insolvency proceedings in a particular jurisdiction (so called forum shopping). Finally, it may alter the dynamics of restructuring negotiations by giving individual creditors a possibility to undermine rescue attempts by threatening to take enforcement action abroad. The following is a short description of matters where, in the author's view, differences in national legislation may be particularly challenging for financial creditors.⁸

2. Opening of Formal Restructuring and Insolvency Proceedings

The question of which events trigger an entitlement and an obligation to initiate formal restructuring or insolvency proceedings and who may bring such proceedings is, in the author's opinion, of particular importance to financial creditors, as it determines the leverage of the parties involved in restructuring negotiations. It also determines the point in time at which (formal and informal) rescue procedures must give way to liquidation procedures. Differences between national regimes in this area may result in a situation where the directors of a subsidiary become obliged to initiate formal insolvency proceedings while a restructuring is still being worked out on a group level. Also, individual creditors may be able to gain leverage by threatening to initiate proceedings against a subsidiary in a particular country where individual creditors are entitled to force the opening of insolvency proceedings.

3. Mandatory Stay on Enforcement

It is crucial for the successful rescue of a financially distressed enterprise that individual creditors be prevented from destabilising restructuring efforts

by bringing enforcement action against the debtor.⁹ In formal restructuring procedures, this is commonly achieved through a statutory moratorium on creditor actions.¹⁰ However, the scope and length of national moratoria vary greatly.¹¹ This, again, may result in situations where individual creditors may be able to gain leverage by threatening to initiate proceedings against a subsidiary in a particular country where the moratorium does not extend to their enforcement action.

4. Valuation Methods for Companies in Restructuring Procedures

As the relative participation of stakeholders in a restructured enterprise is determined by the latter's valuation,¹² it is important for financial creditors to have certainty as to how the value of a company will be established in formal restructuring procedures. Given that there is no consistent valuation method across jurisdictions,¹³ individual creditors are interested in having formal restructuring proceedings initiated in a jurisdiction where the valuation method applied is most favourable for them. Conversely, they will try to prevent the opening of proceedings in a jurisdiction where the valuation method applied would render them out-of-the-money.

5. Cramdown of Out-of-the-Money Creditors and Other Holdouts

Individual creditors have an incentive to threaten opposition to a restructuring proposal (hold out) in order to get a better treatment.¹⁴ This is particularly true for creditors who, based on a valuation of the enterprise, are out-of-the-money and, therefore, cease to have an economic interest.¹⁵ Hence, it is important for the success of a restructuring as a whole, that a viable restructuring plan can be imposed on holdouts. This mechanism is known as 'cramdown'.¹⁶ Again, inconsistency across jurisdictions in the design of cramdown mechanisms may lead to attempts at forum shopping. One notable example of cramdown-related forum shopping is the use of English schemes of arrangement by a number of financially distressed continental European companies to restructure their debts.¹⁷

6. Protection for Providers of Rescue Financing

A financially distressed enterprise may require additional financial accommodation during a workout process in order to continue its operations and to fund restructuring efforts.¹⁸ Naturally, financial creditors are only prepared to provide rescue financing if there is a high likelihood that they will get repaid, even if a restructuring fails. This may be achieved by affording rescue financiers super-priority over existing creditors¹⁹ and by excluding repayments of rescue financing from avoidance actions. Inconsistency across jurisdictions increases uncertainty for rescue financiers regarding the safety of their investment, which may impact pricing and availability of rescue financing. It may also lead to subsidiaries in jurisdictions with no or weak protection for rescue financiers being carved out from financing arrangements.

C. Inconsistency in Corporate and Commercial Laws

1. General Remarks

Another set of challenges faced by financial creditors in cross-border restructurings is caused by the inconsistency in corporate and commercial laws across jurisdictions. In the author's view, the most pressing issues in this field relate to the value of security packages and to the risk of personal liability for individuals involved in a workout.

2. Value of Security Packages

Even if a financial creditor has provided financial accommodation on a secured basis, its security package may be incomplete or its value may be considerably impaired in an enforcement scenario due to variations in domestic corporate and commercial laws. While it is possible in certain jurisdictions (such as Australia)²⁰ for a debtor to grant security over all its present and after-acquired assets in a relatively cheap and simple manner, it is impossible or impracticable to take security over certain assets in other jurisdictions. For example, under Swiss law, it is impracticable for creditors to take security over a debtor's inventory because that would require the secured party to take possession over the pledged assets.²¹ In Germany, the taking of security over shares and real estate is costly and may, therefore, not be practicable given the economics of a particular transaction.²²

Furthermore, a financial creditor's ability to take recourse against certain members of a debtor group may be impaired by corporate benefit and/or capital maintenance issues. These issues arise in some jurisdictions when a member of the debtor group provides security, or incurs a contingent liability, for obligations of an affiliate (also known as 'upstream or cross-stream security').²³ In jurisdictions where corporate benefit rules apply,²⁴ a grantor of upstream or cross-stream security is generally required to derive a corporate benefit from doing so.²⁵ Jurisdictions that apply capital maintenance requirements (such as Germany and Switzerland)²⁶ may treat an enforcement of, or a payment under, an upstream or cross-stream security under certain circumstances akin to a repayment of share capital or a dividend distribution. While corporate benefits and capital maintenance issues can sometimes be dealt with by way of transaction structuring,²⁷ they have the ability to render parts of the security package worthless. For example, under Swiss law, the grantor's liability under an upstream or cross-stream security must at all time²⁸ be limited to the amount of its freely distributable equity, i.e. the amount it could use to distribute dividends.²⁹ It is fair to assume that if the group as a whole faces financial difficulty, the grantor's freely distributable equity will be zero.

Additional impairments may occur where financial accommodation was provided in connection with a leveraged buyout, as some jurisdictions restrict the ability of a company to provide financial assistance for the acquisition of shares in that company or a holding company.³⁰

3. Personal Liability of Individuals Involved in Workouts

Many countries have adopted rules against wrongful or insolvent trading,

which oblige a company's directors and, potentially, other persons to initiate formal insolvency proceedings when its financial distress reaches a certain level of severity.³¹ One commonality among these rules is that non-compliance may lead to personal liability.³² However, the details such as who may become liable, who may bring suit or what actions and omissions trigger personal liability, vary across jurisdictions.³³ In certain jurisdictions (such as Germany),³⁴ even financial creditors who participate in restructuring efforts run the risk of personal liability on the grounds of aiding and abetting their debtor in wrongful trading. Differences between national rules in this area may result in individual creditors gaining leverage by threatening to bring suit against directors of a subsidiary (or even against financial creditors) in a jurisdiction that has a particularly strict liability regime.

D. Secondary Debt Market and Creditor Activism

Bonds and lenders' commitments under syndicated credit facility agreements are, as a general rule,³⁵ capable of being traded on the secondary market. In addition, syndicated credit facility agreements frequently allow lenders to enter into sub-participation arrangements with third parties.³⁶ Sub-participation allows lenders to 'silently' transfer all or part of their risk under the credit facility.³⁷ The participation agreement between the lender of record and the sub-participant typically also governs the extent to which the sub-participant has a say on the lender's voting behaviour under the credit documentation.³⁸

Secondary debt trading may pose considerable challenges to restructuring efforts. First, the group of creditors may change constantly, making it difficult for the parties to know whom to talk to in order to come to a consensual solution.³⁹ Second, it may allow specialised distressed debt investors to acquire a stake in the debtor group. This may alter the dynamics of negotiations significantly, as uncooperative behaviour lies at the core of these investors' investment strategy.⁴⁰

E. Interim Conclusion

The above elaborations show that the combination of a complicated multijurisdictional group structure and a diverse group of financiers gives rise to considerable challenges for financial creditors in restructuring situations. Taken as a whole, those challenges threaten to fundamentally alter the commercial positions within the group of financial creditors that have been envisaged by those creditors when they first entered into their respective financing arrangements.

Hence, there is a need to regulate the relationship among the various financial creditors of a debtor group in order to ensure that the initial commercial positions can be sustained throughout the term of the financing arrangements and, in particular, in a potential future situation of financial distress of the debtor group. In practice, this is typically achieved through contractual arrangements between financial creditors and members of the debtor group, which the parties enter into at the outset of structured finance transactions. These contractual arrangements are commonly referred to as

'intercreditor agreements'.⁴¹ Part III of this article looks at how intercreditor agreements can be beneficial in addressing the above-mentioned challenges faced by financial creditors in cross-border restructurings.

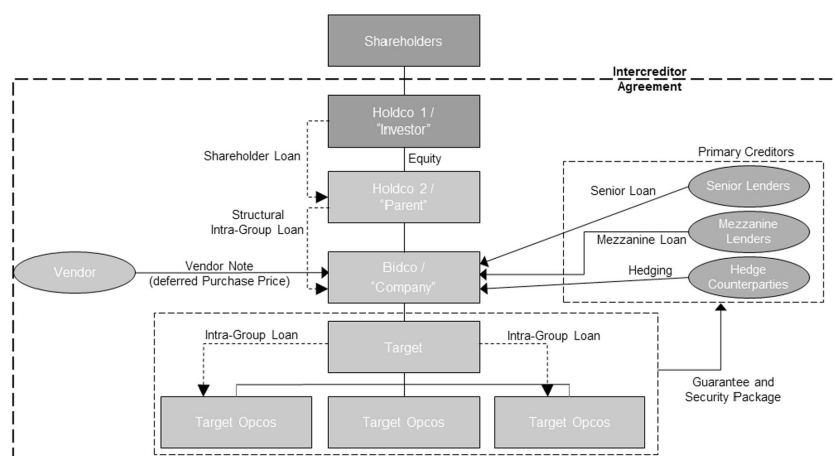
III. BENEFITS OF INTERCREDITOR AGREEMENTS

A. *General Remarks*

Standard market practices with regard to the typical content of intercreditor agreements vary significantly across geographic regions.⁴² The most consistent practice has emerged in the European market due to the widespread use of a form of intercreditor agreement published by the London-based Loan Market Association (LMA) (the 'LMA ICA').⁴³ It is this document that will form the basis for the further elaborations in this article. However, it must be pointed out that the content of intercreditor agreements used in transactions with a significant US component is likely to be different. This is due to the fact that chapter 11 of the US Bankruptcy Code makes many concepts that are contained in the LMA ICA available by operation of law.⁴⁴ Hence, in a US context, there is no need for the parties to provide for these concepts contractually.

The LMA ICA was developed for leveraged acquisition finance transactions and is intended to be used in conjunction with the LMA's recommended form of credit facility agreement for leveraged acquisition finance transactions.⁴⁵ It is not intended to be a standard form to be followed strictly, but rather a starting point for negotiation and drafting by the parties.⁴⁶ The document assumes a capital structure with different layers of debt provided by senior lenders, mezzanine lenders, intra-group lenders, parent/investor entities and a vendor.⁴⁷ Each layer of debt is documented under its own credit documentation. It also assumes that there are hedging liabilities towards hedge counterparties relating to the hedging of interest and/or exchange rate risks under the senior and, potentially, the mezzanine credit documentation.⁴⁸ It further assumes that the senior lenders, the hedge counterparties and the mezzanine lenders benefit from a common security package, while the other financiers are lending on an unsecured basis.⁴⁹ The security package is held by a security agent.⁵⁰ It is foreseen that, *inter alia*, all financial creditors and all members of the debtor group who incur any liabilities to the financial creditors or who give any security, guarantee, indemnity or other assurance against loss in respect of any such liabilities, become party to the intercreditor agreement.⁵¹ The following diagram illustrates the assumed capital structure:

BENEFITS OF INTERCREDITOR AGREEMENTS IN CROSS-BORDER RESTRUCTURINGS



The commercial deal assumed by the LMA ICA is that the senior lenders and the hedge counterparties have priority over the mezzanine lenders, and that all other forms of finance contemplated by the structure are subordinated to the finance provided under the senior and mezzanine credit facilities.⁵² The senior lenders, the hedge counterparties and the mezzanine lenders are, therefore, referred to as the ‘Primary Creditors’ for the remainder of this article. Of course, lenders providing less senior financing would expect their investment to yield more interest as compensation for the higher risk they take. The provisions that allow the parties to sustain this commercial deal in a situation of financial distress of the debtor group can, in the author’s view, be grouped into the following categories: (i) ranking and priority, (ii) prevention of cash leakage, (iii) control over capital structure, and (iv) enforcement of security package and facilitation of distressed disposals.

B. *Ranking and Priority*

1. Approach Adopted in LMA ICA

The LMA ICA provides for two types of ranking, namely ranking as to payment and ranking as to the proceeds of enforcement of the security package. In terms of ranking as to payment, it establishes the ranking among the liabilities owed by the members of the debtor group to the Primary Creditors. To this effect, it is explicitly stated that the liabilities owed to the senior lenders and the hedge counterparties shall rank first (and *pari passu* between them) and that the liabilities owed to the mezzanine lenders shall rank second.⁵³ It also establishes the ranking among the liabilities owed by the members of the debtor group to the Primary Creditors and to all other financial creditors which are party to the intercreditor agreement. To this effect, it is explicitly provided that the liabilities owed to all other financial creditors are postponed and subordinated to the liabilities owed to the Primary Creditors.⁵⁴ The LMA ICA does not, however, establish any ranking among liabilities owed to financial creditors who are not Primary Creditors as between themselves.⁵⁵

In terms of ranking as to the proceeds of enforcement of the security package, the LMA ICA explicitly provides that the security package shall secure the liabilities owed by the members of the debtor group to the Primary Creditors and shall rank those liabilities in the following order: first, liabilities owed to the senior lenders and the hedge counterparties (and *pari passu* between them) and second, liabilities owed to the mezzanine lenders.⁵⁶

In order to give effect to this ranking and priority regime, the LMA ICA contains a turnover clause and a waterfall clause. In simplified terms, the turnover clause provides that any financial creditor who receives any payment that it was not permitted to receive under the terms of the intercreditor agreement, must turn that payment over to the security agent who will then distribute it to the financial creditors in accordance with the waterfall provision.⁵⁷ This includes, *inter alia*, payments made to a financial creditor (i) contrary to the payment restrictions,⁵⁸ (ii) as the result of litigation against a member of the debtor group, (iii) in respect of liabilities of a member of the debtor group as a result of, or after, the insolvency of that member, and (iv) after any action has been taken under the acceleration provisions of the senior or the mezzanine credit documentation or after any enforcement of the security package.⁵⁹

In essence, the waterfall clause stipulates the order of priority in which the security agent must apply any amount received or recovered by it from enforcement of the security package or otherwise.⁶⁰ This, of course, includes any amount received by the security agent under the turnover clause. The LMA ICA foresees six levels of priority. In simplified terms, the order of priority is:

- (1) sums owing to the security agent;
- (2) enforcement costs and expenses incurred by any Primary Creditor in connection with the senior credit facilities, the hedging arrangements or the mezzanine credit facility;
- (3) liabilities under the senior credit documentation and under the hedging arrangements (and pro rata between them);
- (4) liabilities under the mezzanine credit documentation;
- (5) to any person to whom payment is required to be made by law; and
- (6) to the members of the debtor group.⁶¹

2. Benefits in Cross-Border Restructurings

The establishment of a clear order of priority among financial creditors in an intercreditor agreement, both in terms of payment and entitlement to enforcement proceeds, provides a necessary precondition⁶² for the determination of where the value breaks in a particular restructuring. In other words, it is crucial for the assessment of which creditors are in-the-money and which creditors are left out-of-the-money and, hence, for determining each creditor's economic interest in the restructured enterprise.

C. *Prevention of Cash Leakage*

1. Approach Adopted in LMA ICA

(a) *General Remarks*

In order to ensure that as many assets as possible remain available for application in accordance with the established order of priority, it is important to prevent the leakage of cash from the financing structure. On this point, the LMA ICA supplements the negative undertakings imposed on the debtor group under the senior and the mezzanine credit documentation. It does this by imposing restrictions on payments from members of the debtor group to the financial creditors, whereby the intensity of such restrictions is dependent on the level of seniority of the respective creditor. The restrictions on payments are given effect by the turnover and waterfall provisions.⁶³

(b) *Restrictions on Payments to Senior Lenders and Hedge Counterparties*

Owing to the senior lenders' ranking at the apex of the order of priority, the LMA ICA does not restrict payments by the members of the debtor group in discharge of liabilities owed to the senior lenders.⁶⁴ For the same reason, the restrictions on payments to the hedge counterparties are moderate, and mainly relate to the question of when the hedge counterparties are entitled to receive so-called 'close-out payments'. Close-out payments are payments due at the termination of a hedging transaction.⁶⁵ In simplified terms, the position reflected in the LMA ICA is that where a hedging transaction was terminated due to something having gone severely wrong in the capital structure,⁶⁶ the respective close-out payment is only permitted if no default is continuing⁶⁷ under the senior credit documentation.⁶⁸ If the hedging transaction was terminated for another reason,⁶⁹ the respective close-out payment is, generally speaking, permitted.⁷⁰

(c) *Restrictions on Payments to Mezzanine Lenders*

In terms of restrictions on payments from members of the debtor group to mezzanine lenders, the LMA ICA takes a differentiated approach. On the one hand, payments of principal and capitalised interest are generally not permitted until the liabilities owed to the Primary Creditors have been discharged in full.⁷¹ This is due to the senior lenders and the hedge counterparties relying on the mezzanine capital remaining in place as quasi equity.⁷² There are several exceptions to this rule, the most important of which being that payments in respect of liabilities of an insolvent member of the debtor group are permitted.⁷³ The reason for this exception is that it serves to maximise the rate of recovery of the group of financial creditors as a whole if each financial creditor is permitted to receive liquidation proceeds.⁷⁴ However, such payments are subject to the turnover clause and will be applied by the security agent in accordance with the waterfall provision in order to maintain the ranking and priority among the Primary Creditors.⁷⁵

On the other hand, due payments of any sum other than principal or capitalised interest are, as a general rule, permitted.⁷⁶ This includes pay-

ments of cash interest, fees, costs and expenses. However, the LMA ICA contains a concept which allows the senior lenders and the hedge counterparties to stop these payments under certain circumstances. First, payments to mezzanine lenders are blocked automatically when a payment default under the senior credit documentation or the hedging documentation is continuing.⁷⁷ Second, upon the occurrence of certain predefined material events of default under the senior credit documentation, a particular majority of senior lenders (and, under certain circumstances, hedge counterparties) may instruct the security agent to issue a so-called 'mezzanine payment stop notice'.⁷⁸ The issue of a mezzanine payment stop notice blocks payments in discharge of liabilities owed to the mezzanine lenders for a particular period.⁷⁹

Clearly, mezzanine lenders will perceive the blockage of payments as a serious intervention. Hence, they will regularly try to mitigate this concept in negotiations. Potential points of negotiation could be the choice of trigger events, the length of the blockage period,⁸⁰ a restriction on the number of payment stop notices that may be served per year,⁸¹ whether or not professional advisers' fees may be paid during the suspension period,⁸² and whether or not the mezzanine lenders are permitted to cure breaches of financial covenants under the senior credit documentation by way of injections of additional subordinated debt into the debtor group.⁸³

(d) Restrictions on Payments to Non-Primary Creditors

The most onerous restrictions are imposed on payments to financial creditors who are not Primary Creditors. Generally speaking, liabilities owed by the members of the debtor group to these creditors are only permitted once the liabilities owed to the Primary Creditors have been discharged in full, or, for the reasons outlined above,⁸⁴ if the payment in question is made in respect of liabilities of an insolvent member of the debtor group.⁸⁵ Less onerous restrictions are imposed on payments relating to intra-group loans⁸⁶ in order not to paralyse the debtor group by prohibiting it from circulating cash among its members.⁸⁷

2. Benefits in Cross-Border Restructurings

In a workout situation, restrictions on payments enable more senior creditors to prevent cash leakages to financial creditors who may be left out-of-the-money after the restructuring. They may also be beneficial for the financing of a workout. In particular, any possibility to impose a suspension of payments to more junior creditors can temporarily make additional liquidity available.

D. Senior Creditors in Control of Capital Structure

1. Approach Adopted in LMA ICA

(a) General Remarks

One of the key principles of the LMA ICA is that the senior lenders are in control of the capital structure.⁸⁸ It achieves this by restricting the financial creditors' rights to amend their credit documentation, by restricting their

rights to take security, and by restricting their rights to take enforcement action. The intensity of these restrictions is - as was the case with the restrictions on payment - dependent on the level of seniority of the respective creditor.

(b) *Restrictions on Amendment of Credit Documentation*

The restrictions under the LMA ICA on amendments of the senior credit documentation are mainly targeted at limiting an increase in the quantum of the debtor group's liabilities that are outstanding under that documentation. This is due to the fact that this quantum determines the amount of debt that ranks ahead of the liabilities owed to mezzanine lenders.⁸⁹ Hence, there are restrictions on increases in the size of the senior credit facilities, and in the margin and fees owing under the documentation.⁹⁰ These restrictions also apply to disguised increases such as payment waivers and deferrals.⁹¹ There are several exceptions. Most importantly, the LMA ICA foresees a so-called 'senior headroom' and 'senior yield headroom'.⁹² The senior headroom allows for an increase up to a certain limit by way of principal increase, payment waiver or deferral.⁹³ The senior yield headroom allows for an increase in margin or fees up to a certain limit.⁹⁴

Under the LMA ICA, amendments or waivers of terms of a hedging arrangement are only permitted if they do not result in a breach of the requirements under the intercreditor agreement and the senior credit documentation relating to hedging.⁹⁵ This particularly relates to requirements on the amounts hedged.

The LMA ICA imposes heavy restrictions on amendments to, and waivers under, the mezzanine credit documentation. In particular, no change to the principal amount, the terms of repayment or prepayment, or the basis on which interest, fees or commission accrue is permitted until the liabilities owed to the senior lenders and the hedge counterparties have been discharged in full.⁹⁶ In practice, mezzanine lenders may want to retain the right to convert cash pay interest to capitalised interest, and to increase margins up to a certain limit.⁹⁷

The heaviest restrictions apply to amendments or waivers of terms of the credit documentations of financial creditors who are not Primary Creditors. As a general rule, until the liabilities owed to the Primary Creditors have been discharged in full, amendments and waivers are only permitted with the consent of the Primary Creditors, or if they are of a minor and administrative nature and not prejudicial to the Primary Creditors.⁹⁸ In order not to paralyse the debtor group, the LMA ICA does not restrict amendments to, or waivers under, intra-group loans agreements.

(c) *Restrictions on Taking Security*

In simplified terms, the senior lenders may take any additional security⁹⁹ and/or any additional¹⁰⁰ guarantee or indemnity from any member of the debtor group, provided that it is also offered to the hedge counterparties and the mezzanine lenders.¹⁰¹ Hedge counterparties and mezzanine lenders, in turn, may only take any additional security and/or any additional guarantee

or indemnity if its benefit is also given to the other Primary Creditors.¹⁰² Financial creditors who are not Primary Creditors are, as a general rule, not permitted to take security, guarantees or indemnities prior to the discharge in full of the liabilities owed to the Primary Creditors.¹⁰³

(d) Restrictions on Taking Enforcement Action

(i) General remarks

The definition of the term ‘enforcement action’ in the LMA ICA is very broad. It includes, *inter alia*, the acceleration of any liability, the making of any demand in relation to any guarantee liability, the commencing of legal proceedings to recover any liability, the premature termination or close-out of any hedging transaction, the enforcement of any security, the entering into any compromise of any sort with any member of the debtor group in respect of any liability, and the taking of any steps in relation to any insolvency procedures.¹⁰⁴ Once again, the intensity of restrictions is dependent on the level of seniority of the respective creditor.

One commonality for all financial creditors is that they are entitled to take enforcement action in respect of a member of the debtor group in the insolvency of that member.¹⁰⁵ The reasoning behind this is that the rate of recovery of the group of financial creditors as a whole can be maximised if each financial creditor is permitted to take enforcement action against an insolvent member of the debtor group.¹⁰⁶ However, in respect of mezzanine lenders and non-Primary Creditors, the security agent may give directions as to enforcement and may take enforcement action on the relevant creditor’s behalf.¹⁰⁷ Furthermore, any recoveries are subject to the turnover clause and will be applied by the security agent in accordance with the waterfall provision in order to maintain the ranking and priority among the financial creditors.¹⁰⁸

(ii) Restrictions on Senior Lenders and Hedge Counterparties

As a general rule, the senior lenders are not restricted in taking enforcement action in accordance with the terms of the senior credit documentation.¹⁰⁹

Apart from their right to take enforcement action in respect of a member of the debtor group in the insolvency of that member, the hedge counterparties are generally not permitted to take enforcement action.¹¹⁰ However, under certain circumstances, they are entitled to terminate or close out¹¹¹ hedging liabilities prematurely. In particular, they may do so if something has gone severely wrong in the capital structure¹¹² and on a refinancing of the senior facilities,¹¹³ i.e. if the senior lenders are exiting the financing structure.

The LMA ICA contains an interesting concept for dealing with payment defaults under hedging liabilities. Once a hedge counterparty has notified the security agent of such a payment default, it is up to the senior lenders to take enforcement action. However, if the default has continued¹¹⁴ unwaived for a

predefined period of time, the respective hedge counterparty is entitled to terminate or close out the respective hedging liabilities and, until enforcement of any security, take proceedings against the debtors in respect of those hedging liabilities.¹¹⁵ This ‘nuisance right to sue’¹¹⁶ incentivises the senior lenders to swiftly pursue payment defaults under hedging liabilities.¹¹⁷ The LMA ICA also contains a mechanism that entitles senior lenders to require a hedge counterparty to close out hedging liabilities under certain circumstances.¹¹⁸

The rules applying to the enforcement of the common security package are discussed below.¹¹⁹

(iii) Restrictions on Mezzanine Lenders

So long as any of the liabilities owed to the senior lenders and the hedge counterparties are outstanding, an elaborate system of restrictions on the taking of enforcement action applies to mezzanine lenders. Once the mezzanine lenders¹²⁰ have given notice to the security agent specifying that an event of default under the mezzanine credit documentation has occurred and is continuing,¹²¹ the mezzanine lenders are prohibited from taking enforcement action for a predefined period of time (so-called ‘mezzanine standstill period’). If that event of default is continuing¹²² once the mezzanine standstill period has elapsed, the mezzanine lenders are, as a general rule,¹²³ entitled to take enforcement action.¹²⁴ The length of the mezzanine standstill period is determined by the type of event of default that led to the cause of action.¹²⁵

The purpose of this concept is to give the senior lenders time to negotiate and implement a workout with the debtor group without being disturbed by enforcement action taken by mezzanine lenders.¹²⁶ The mezzanine lenders, however, are interested in not being exposed to the senior lenders’ discretion for too long. Hence, the length and scope of mezzanine standstill periods are typically subject to heavy negotiations between the parties.¹²⁷ The LMA ICA also foresees a mezzanine lenders’ call option which entitles the mezzanine lenders under certain circumstances to purchase the senior facilities (and, potentially, the hedging liabilities) in full and at par.¹²⁸ While the purchase of the senior facilities would enable the mezzanine lenders to gain control over the enforcement process, they may, in practice, find it difficult to fund such a purchase.

Apart from their right to take enforcement action after the lapse of any applicable mezzanine standstill period, the mezzanine lenders may also take enforcement action if a particular majority of senior lenders (and, under certain circumstances, hedge counterparties) has given its prior consent.¹²⁹ Furthermore, if the senior lenders have taken action under any of the acceleration provisions of the senior credit documentation, the mezzanine lenders may take the same action under the acceleration provisions of the mezzanine credit documentation.¹³⁰ Finally, as mentioned above,¹³¹ the mezzanine lenders may also take enforcement action in respect of a member of the debtor group in the insolvency of that member.¹³²

The rights of the mezzanine lenders with regard to the enforcement of the

common security package are discussed below.¹³³

(iv) Restrictions on Non-Primary Creditors

For financial creditors who are not Primary Creditors, so long as any of the liabilities owed to the Primary Creditors are outstanding, the insolvency of a member of the debtor group is the only trigger event that permits the taking of enforcement action against that member.¹³⁴

2. Benefits in Cross-Border Restructurings

The ability of the most senior creditors to take control over the capital structure is, in the author's view, one of the most beneficial features of intercreditor agreements in restructuring situations, as it addresses several challenges. First, it places the most senior creditors in charge of restructuring negotiations with the debtor group. Second, it shields those negotiations from the destabilising effect of enforcement action by more junior creditors, thereby creating a quasi-moratorium. This is particularly beneficial in a cross-border context as the same standstill periods apply in respect of all members of the debtor group, regardless of jurisdiction. Third, the concept of senior headroom allows the senior creditors to provide rescue financing by way of a super-senior liquidity facility that benefits from the common security package.¹³⁵

As the analysis of the provisions of the LMA ICA has shown, there are certain ways in which intercreditor agreements can allow junior creditors to influence the workout of a distressed capital structure. While it is important that the stability of the capital structure can be maintained during workout negotiations, a certain level of influence from more junior creditors may be beneficial for the success of a restructuring. After all, the influence of junior creditors may provide an incentive to senior creditors and the debtor group to intensify restructuring efforts.

E. Enforcement of Security Package and Facilitation of Distressed Disposals

1. Approach Adopted in LMA ICA

(a) Enforcement of Security Package

As mentioned above,¹³⁶ the LMA ICA assumes that the Primary Creditors benefit from a common security package which is held by a security agent. Any enforcement of the security package must be made through the security agent¹³⁷ who, in turn, will act on instructions of the group of lenders which is entitled to give such instructions.¹³⁸ Of course, the security package may only be enforced if it has become enforceable in accordance with the terms of the security documentation.¹³⁹

The LMA ICA distinguishes between instructions to enforce the security package and subsequent instructions regarding the manner of that enforcement.¹⁴⁰ As a general rule, until the liabilities owed to the senior creditors and to the hedge counterparties have been discharged in full, instructions as to commencement and manner of enforcement of the security package may be given by a particular majority of the senior lenders and,

potentially, the hedge counterparties.¹⁴¹ After such discharge in full, instructions may be given by a particular majority of the mezzanine lenders.¹⁴²

Under the LMA ICA, the mezzanine lenders have a residual right to instruct the security agent to commence enforcement if the senior lenders have refrained from doing so. This residual right is, in simplified terms, conditional upon the lapse of any applicable mezzanine standstill period.¹⁴³ However, the senior lenders are entitled to regain control over the enforcement process by instructing the security agent regarding the manner of enforcement.¹⁴⁴ Hence, the mezzanine lenders may initiate the enforcement of the common security package but may not necessarily carry on as to the manner of enforcement.¹⁴⁵ This residual right of the mezzanine lenders is yet another example of how junior creditors can be given the possibility to influence the workout of a distressed capital structure.

(b) *Facilitation of Distressed Disposals*

Arguably the most important provisions of typical European intercreditor agreements are the rules on distressed disposal.¹⁴⁶ In essence, these rules allow the then most senior group of financial creditors to force a clean going concern sale of the debtor group (i.e. free and clear from security and obligations to financial creditors) in a situation where the security package has become enforceable. For this purpose, under the LMA ICA, the security agent is given the power to release the security package and to release, dispose of or transfer¹⁴⁷ obligations in respect of liabilities owed by the members of the debtor group to the financial creditors.¹⁴⁸ Due to their function, these provisions are also referred to as 'release and transfer provisions'.¹⁴⁹ The going concern sale as such can be achieved by way of enforcement of security over shares in a single entity high enough up in the corporate structure of the debtor group.

Of course, the proceeds from a sale of the debtor group will be applied by the security agent in accordance with the waterfall provision.¹⁵⁰ However, it is the nature of a distress situation that the value of the debtor group (or its assets) will often be insufficient for the full satisfaction of all financial creditors.¹⁵¹ In accordance with their commercial position, the risk of any shortfall is primarily borne by junior creditors. Hence, they are interested in ensuring that the debtor group will not be sold under value.¹⁵² There are several ways in which this can be achieved.¹⁵³ The LMA ICA contains optional language - which is intended as a starting point for negotiation only¹⁵⁴ - addressing this concern. It foresees that the security agent is required to obtain a fair market value, whereby this requirement is satisfied if certain formal conditions relating to the sales process are met.¹⁵⁵ The suggestions contained in the LMA ICA for these formal conditions range from the mere obtainment of a fairness opinion from a financial advisor to the requirement of a court approved process.¹⁵⁶ Other ways in which junior creditors are able to protect their interests include the stipulation of a requirement to apply a particular valuation method¹⁵⁷ and - more radically - the exemption of principal debt claims from the scope of the release and transfer provisions. It can be

expected, however, that the latter approach would in many cases defeat the purpose of the release and transfer regime.

2. Benefits in Cross-Border Restructurings

Rules governing the enforcement of a common security package and the facilitation of distressed disposals may provide senior creditors with powerful tools in restructuring scenarios: the former by enabling the most senior creditors to take control over the enforcement process, the latter by facilitating a swift out-of-court, out-of-insolvency sale of the debtor group on a going concern basis, unencumbered by security and liabilities towards financial creditors.

The possibility to effectuate a clean going concern sale of the debtor group is particularly beneficial in cross-border restructurings. First, a going concern sale can generally be expected to provide a better recovery rate than a piecemeal sale of the debtor group or its assets. It goes without saying that the preservation of the debtor group as a going concern is also beneficial for other stakeholders such as employees, customers and trade creditors. Second, the going concern sale provides an efficient ‘single point of enforcement’,¹⁵⁸ thereby saving the creditors from having to go through a costly and time-consuming piecemeal enforcement of the security package in multiple jurisdictions. Moreover, the enforcement at a single point in the group structure addresses the challenge of an incomplete or value-impaired security package¹⁵⁹ by allowing the creditors to capture the value of those assets that were carved out from the security package. Third, the power of the security agent to release or transfer liabilities of the debtor group offers a possibility to effectively cramdown junior out-of-the-money creditors and to remove them from the capital structure.¹⁶⁰

IV. CONCLUSIONS

The above elaborations have shown that financial creditors face a myriad of challenges in cross-border restructurings. Taken as a whole, those challenges threaten to fundamentally alter the commercial positions within the group of financial creditors that have been envisaged by those creditors when they first entered into their respective financing arrangements.

Intercreditor agreements offer a way in which many of those challenges can be addressed by contractually establishing a system of ranking and priority, preventing the leakage of cash from the financing structure, placing the most senior creditors in control of the capital structure, regulating the enforcement of a common security package and facilitating distressed disposals. In fact, an intercreditor agreement may be a crucial component for a swift out-of-court restructuring of a financially distressed enterprise and, thereby, for the preservation of its value for a large number of its stakeholders.

BIBLIOGRAPHY

Articles/Books

- Berman, Mark N. and David Lee, 'The Enforceability in Bankruptcy Proceedings of Waiver and Assignment of Rights Clauses Within Intercreditor or Subordination Agreements' [2011] *Norton Journal of Bankruptcy Law and Practice* 779
- Campbell, Mark, Caroline Jury and Toby Mann, 'LMA Intercreditor Agreement: What's New?' (2009) *Butterworths Journal of International Banking and Financial Law* 278
- Cohen, Adrian and Catherine Bridge, 'The Consequences of Subordination: Understanding the Junior/Senior Debt Divide' [2009] *Butterworths Journal of International Banking and Financial Law* 526
- Cohen, Adrian, Catherine Bridge and Lorraine Vaz, 'Upstairs Downstairs: Crossing the Creditor Class Divide' [2011] *Butterworths Journal of International Banking and Financial Law* 3
- Dworkin, Meyer C. and Monica Holland, 'Developments in Intercreditor Dynamics' in Thomas Mellor (ed.), *The International Comparative Legal Guide to Lending & Secured Finance 2015* (Global Legal Group, 3rd ed., 2015) 28
- Ford, Joanna and Jennifer Calver, 'Transferring Debt: The Borrower/Lender Tug of War' (November 2007) *The In-House Lawyer* 79
- Glanzmann, Lukas, 'Konzern-Kreditfinanzierungen aus Sicht der kreditgebenden Bank' [2011] *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 229
- Gullifer, Louise and Jennifer Payne, *Corporate finance law: principles and policy* (Hart Publishing, 2nd ed., 2015)
- Hanrahan, Lauren and Suhrud Mehta, 'A Comparative Overview of Transatlantic Intercreditor Agreements' in Thomas Mellor (ed.), *The International Comparative Legal Guide to Lending & Secured Finance 2015* (Global Legal Group, 3rd ed., 2015) 49
- Hooley, Richard, 'Release Provisions in Intercreditor Agreements' (2012) 3 *Journal of Business Law* 213
- Leeds Ruby, Caroline, Joshua Thompson and Michael Steinberg, 'Spot the Differences' [2012] *International Financial Law Review* 58
- Payne, Jennifer, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563
- Proctor, Charles, *The Law and Practice of International Banking* (Oxford University Press, 2010)
- Thomas, Richard D., 'Tipping the Scales in Chapter 11: How Distressed Debt Investors Decrease Debtor Leverage and the Efficacy of Business Reorganization' (2010) 27 *Emory Bankruptcy Developments Journal* 213
- Wenzel, Frank, 'Bankenhaftung bei fehlgeschlagenem Sanierungskredit' [1999] *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* 294
- Westbrook, Jay Lawrence et al., *A Global View of Business Insolvency Systems* (World Bank, 2010)
- Wood, Philip R., *International Loans, Bonds, Guarantees, Legal Opinions* (Sweet & Maxwell, 2nd ed., 2007)
- Wood, Philip R., *Principles of International Insolvency* (Sweet & Maxwell, 2nd ed., 2007)

Legislation

- Aktiengesetz* [Stock Corporation Act] (Germany) 6 September 1965, BGBI I 1089
- Corporations Act 2001* (Cth) (Australia)
- Schweizerisches Zivilgesetzbuch* [Swiss Civil Code] (Switzerland) 10 December 1907, SR 210

Other

- Association for Financial Markets in Europe, *Open Letter to the European Commission* (25 March 2015) <<http://www.afme.eu>>
- Baker & McKenzie, *Global Acquisition Finance Guide* (2016) <<http://www.bakermckenzie.com/acquisitionfinanceapp>>
- Loan Market Association, *Intercreditor Agreement for Leveraged Acquisition Finance*

Transactions (Senior/Mezzanine) (12 January 2017) <<http://www.lma.eu.com>> (access limited to members)

Loan Market Association, *Users Guide to Form of Facility Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)* (18 November 2016) <<http://www.lma.eu.com>> (access limited to members)

Loan Market Association, *Users Guide to Form of Intercreditor Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)* (12 January 2017) <<http://www.lma.eu.com>> (access limited to members)

Mann, Toby, 'Introduction to the LMA Leveraged Intercreditor Agreement' (LMA webinar held on 7 December 2015) <<http://www.lma.eu.com>> (access limited to members)

NOTES:

¹In this article, the term 'financial creditor' is used for providers of financial accommodation, as opposed to trade creditors, whose claims arise out of the day-to-day operation of the business.

²The question of whether an optimal capital structure exists is, however, contested among financial economists. See, e.g., Louise Gullifer and Jennifer Payne, *Corporate finance law: principles and policy* (Hart Publishing, 2nd ed., 2015) 55–58.

³Typical forms of financing include equity, shareholder loans, intra-group loans, secured and unsecured bank debt, bonds, mezzanine loans, and vendor loans. Other forms of financial indebtedness may include liabilities towards hedging or cash management providers.

⁴Cf. also Mark N. Berman and David Lee, 'The Enforceability in Bankruptcy Proceedings of Waiver and Assignment of Rights Clauses Within Intercreditor or Subordination Agreements' [2011] *Norton Journal of Bankruptcy Law and Practice* 779.

⁵Cf. Philip R Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2nd ed., 2007) 2-022.

⁶This is, arguably, the case with US chapter 11 cases.

⁷Meyer C Dworkin and Monica Holland, 'Developments in Intercreditor Dynamics' in Thomas Mellor (ed.), *The International Comparative Legal Guide to Lending & Secured Finance 2015* (Global Legal Group, 3rd ed., 2015) 28, 30.

⁸See also Association for Financial Markets in Europe, *Open Letter to the European Commission* (25 March 2015) <<http://www.afme.eu>>, which sets out the most important negative effects of the disparity of European insolvency and restructuring laws from the perspective of financial creditors.

⁹Wood, above n 4, 2-010.

¹⁰*Ibid.*

¹¹Jay Lawrence Westbrook et al, *A Global View of Business Insolvency Systems* (World Bank, 2010) 69–74.

¹²Association for Financial Markets in Europe, above n 7, 4.

¹³See Association for Financial Markets in Europe, above n 7, 4 regarding the situation in Europe.

¹⁴See, e.g., Westbrook et al, above n 10, 125.

¹⁵Association for Financial Markets in Europe, above n 7, 4; Wood, above n 4, 23-035.

¹⁶See, e.g., Westbrook et al, above n 10, 156.

¹⁷See generally Jennifer Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563, *passim*.

BENEFITS OF INTERCREDITOR AGREEMENTS IN CROSS-BORDER RESTRUCTURINGS

¹⁸Cf. Adrian Cohen, Catherine Bridge and Lorraine Vaz, 'Upstairs Downstairs: Crossing the Creditor Class Divide' [2011] *Butterworths Journal of International Banking and Financial Law* 3, 4.

¹⁹Wood, above n 4, 23-109.

²⁰See Baker & McKenzie, *Global Acquisition Finance Guide* (2016) <<http://www.bakermckenzie.com/acquisitionfinanceapp>>, section on Australia.

²¹*Schweizerisches Zivilgesetzbuch* [Swiss Civil Code] (Switzerland) 10 December 1907, SR 210, art 884(1).

²²See Baker & McKenzie, above n 20, section on Germany.

²³See, e.g., Lukas Glanzmann, 'Konzern-Kreditfinanzierungen aus Sicht der kreditgebenden Bank' [2011] *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 229, 230-231.

²⁴This is, for example, the case in the Netherlands; see Baker & McKenzie, above n 20, section on the Netherlands.

²⁵Wood, above n 4, 17-045.

²⁶See Baker & McKenzie, above n 20, sections on Germany and Switzerland.

²⁷For example, by effecting a so-called debt push down or by avoiding upstream and cross-stream structures in the first place.

²⁸Unless it has been granted at arm's length terms which will, realistically, hardly ever be the case.

²⁹See, e.g., Glanzmann, above n 23, 242-247.

³⁰Philip R Wood, *International Loans, Bonds, Guarantees, Legal Opinions* (Sweet & Maxwell, 2nd ed., 2007) 2-025. See, e.g., *Corporations Act 2001 (Cth)* (Australia) part 2J.3 or *Aktiengesetz* [Stock Corporation Act] (Germany) 6 September 1965, BGBl I 1089, § 71a(1) sentence 1.

³¹Westbrook et al, above n 10, 55.

³²*Ibid.*

³³*Ibid* 55-56.

³⁴See, e.g., Frank Wenzel, 'Bankenhaftung bei fehlgeschlagenem Sanierungskredit' [1999] *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* 294, *passim*.

³⁵Depending on bargaining power, a borrower may be able to negotiate a more restrictive transfer regime; cf. Joanna Ford and Jennifer Calver, 'Transferring Debt: The Borrower/Lender Tug of War' (November 2007) *The In-House Lawyer* 79, 79.

³⁶*Ibid.*

³⁷Wood, above n 29, 9-040.

³⁸*Ibid.*

³⁹Richard D Thomas, 'Tipping the Scales in Chapter 11: How Distressed Debt Investors Decrease Debtor Leverage and the Efficacy of Business Reorganization' (2010) 27 *Emory Bankruptcy Developments Journal* 213, 221.

⁴⁰*Ibid* 215.

⁴¹See, e.g., Adrian Cohen and Catherine Bridge, 'The Consequences of Subordination: Understanding the Junior/Senior Debt Divide' [2009] *Butterworths Journal of International Banking and Financial Law* 526, 526.

⁴²Lauren Hanrahan and Suhrud Mehta, 'A Comparative Overview of Transatlantic Intercreditor Agreements' in Thomas Mellor (ed.), *The International Comparative Legal Guide to Lending & Secured Finance 2015* (Global Legal Group, 3rd ed., 2015) 49, 49.

⁴³Ibid.

⁴⁴Caroline Leeds Ruby, Joshua Thompson and Michael Steinberg, 'Spot the Differences' [2012] *International Financial Law Review* 58, 58.

⁴⁵Loan Market Association, *Users Guide to Form of Intercreditor Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)* (12 January 2017) <<http://www.lma.eu.com>> (access limited to members) 2.

⁴⁶Ibid.

⁴⁷Ibid 3; Loan Market Association, *Users Guide to Form of Facility Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)* (18 November 2016) <<http://www.lma.eu.com>> (access limited to members) 6–7.

⁴⁸Loan Market Association, above n 44, 3–5.

⁴⁹Loan Market Association, above n 46, 8.

⁵⁰Ibid.

⁵¹See Loan Market Association, *Intercreditor Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)* (12 January 2017) <<http://www.lma.eu.com>> (access limited to members) 1 and clause 22.12(a). The long list of parties contemplated by the LMA ICA is one of the main differences compared to US intercreditor agreements; see Hanrahan and Mehta, above n 41, 49.

⁵²Loan Market Association, above n 46, 6.

⁵³Loan Market Association, above n 50, clause 2.1.

⁵⁴Ibid clause 2.3(a).

⁵⁵Ibid clause 2.3(b).

⁵⁶Ibid clause 2.2.

⁵⁷Ibid clause 10.

⁵⁸See below part IIIC.

⁵⁹Loan Market Association, above n 50, clause 10.2.

⁶⁰Ibid clause 18.1.

⁶¹Ibid.

⁶²The sufficient condition is the valuation of the enterprise; cf. below part IIIE1(b).

⁶³See above part IIIB1.

⁶⁴Loan Market Association, above n 50, clause 3.1.

⁶⁵See, e.g., Charles Proctor, *The Law and Practice of International Banking* (Oxford University Press, 2010) 23.18.

⁶⁶For example if the senior lenders or the mezzanine lenders have taken any action under any of the acceleration provisions of the relevant credit documentation; see Loan Market Association, above n 50, clause 4.3(a)(iv)(A)(1) in conjunction with clause 4.9(a)(iv).

⁶⁷Typically, a default is deemed to be continuing if it has not been remedied or waived.

⁶⁸Ibid clause 4.3(a)(iv).

⁶⁹For example if the hedging transaction was terminated in order to comply with restrictions on over-hedging, see *ibid* clause 4.3(a)(iii) in conjunction with clause 4.9(a)(iii).

⁷⁰Ibid clause 4.3(a)(iii).

⁷¹Ibid clauses 5.1 and 5.2(a)(i)(A)(1).

⁷²Mann, above n 51.

BENEFITS OF INTERCREDITOR AGREEMENTS IN CROSS-BORDER RESTRUCTURINGS

⁷³Loan Market Association, above n 50, clauses 5.1(b) and 5.2(a)(i)(A)(1).

⁷⁴Mann, above n 51.

⁷⁵See above part IIIB1 and above n 67.

⁷⁶Loan Market Association, above n 50, clause 5.2(a)(i)(A)(2).

⁷⁷Ibid clause 5.2(a)(i)(C) and above n 67.

⁷⁸Ibid clause 5.3(a).

⁷⁹See *ibid*.

⁸⁰According to Hanrahan and Mehta, above n 41, 51, the blockage period is typically co-extensive with a payment default under the senior credit documentation and of a duration of 120 days during each year whilst certain other material events of default under the senior credit documentation are continuing.

⁸¹See Loan Market Association, above n 50, clause 5.3(d).

⁸²Hanrahan and Mehta, above n 41, 51. The senior lenders would typically seek to disallow payments of fees incurred in connection with disputing any aspect of a proposed restructuring.

⁸³So-called 'equity cures'; Cohen, Bridge and Vaz, above n 17, 5.

⁸⁴See above part IIIC1(c).

⁸⁵Loan Market Association, above n 50, clauses 6.1, 7.1 and 8.1.

⁸⁶Ibid clause 6.2.

⁸⁷Ibid n 66.

⁸⁸Mann, above n 51.

⁸⁹Ibid.

⁹⁰Loan Market Association, above n 50, clause 3.3.

⁹¹Ibid.

⁹²Ibid.

⁹³See *ibid* definition of 'Senior Headroom' in clause 1.1. According to Cohen, Bridge and Vaz, above n 17, 4, the senior headroom typically amounts to 10 per cent of the total commitments of the senior lenders.

⁹⁴See *ibid* definition of 'Senior Yield Headroom' in clause 1.1.

⁹⁵Ibid clause 4.6.

⁹⁶Ibid clause 5.8.

⁹⁷See *ibid* clause 5.8(b)(iii).

⁹⁸Ibid clauses 7.5 and 8.5.

⁹⁹I.e. in addition to the common security package.

¹⁰⁰I.e. in addition to the guarantee and indemnities contained in the senior facilities agreement, the intercreditor agreement or the relevant mandate letter.

¹⁰¹Loan Market Association, above n 50, clause 3.6.

¹⁰²Ibid clauses 4.7 and 5.10.

¹⁰³Ibid clauses 6.5, 7.6 and 8.6.

¹⁰⁴See *ibid* definition of 'Enforcement Action' in clause 1.1.

¹⁰⁵Ibid clauses 6.7, 7.8 and 8.8.

¹⁰⁶Mann, above n 51.

¹⁰⁷Loan Market Association, above n 50, clauses 5.12(b), 6.7, 7.8 and 8.8. The security agent would typically act on instruction of the then most senior creditors when doing so; see *ibid* clause 9.7.

¹⁰⁸See above part IIIB1.

¹⁰⁹However, some restrictions apply to ancillary lenders and issuing banks; see Loan Market Association, above n 50, clauses 3.8 and 3.9.

¹¹⁰*Ibid* clause 4.8.

¹¹¹*Cf.* above part IIIC1(b).

¹¹²For example if the senior lenders or the mezzanine lenders have taken any action under any of the acceleration provisions of the relevant credit documentation; see Loan Market Association, above n 50, clause 4.9(a)(iv).

¹¹³*Ibid* clause 4.9(a)(vii).

¹¹⁴*Cf.* above n 67.

¹¹⁵*Ibid* clause 4.9(b).

¹¹⁶Mark Campbell, Caroline Jury and Toby Mann, 'LMA Intercreditor Agreement: What's New?' (2009) *Butterworths Journal of International Banking and Financial Law* 278, 278.

¹¹⁷Mann, above n 51.

¹¹⁸See Loan Market Association, above n 50, clause 4.10.

¹¹⁹See below part IIIE1(a).

¹²⁰Acting through the mezzanine facility agent; see Loan Market Association, above n 50, clause 5.12(a)(ii)(A).

¹²¹*Cf.* above n 67.

¹²²*Cf.* above n 67.

¹²³Further restrictions apply to the taking of enforcement action against a debtor (or its holding company) where the shares of that member of the debtor group are part of the security package and that part of the security package is being enforced; see *ibid* clause 5.13.

¹²⁴*Ibid* clause 5.12(a)(ii).

¹²⁵*Ibid* clause 5.12(a)(ii)(B).

¹²⁶Mann, above n 51.

¹²⁷*Cf.* Hanrahan and Mehta, above n 41, 50–51, regarding the typical length of mezzanine standstill periods.

¹²⁸*Cf.* Loan Market Association, above n 50, clause 5.14.

¹²⁹*Ibid* clause 5.12(a)(iii). Further restrictions apply to the taking of enforcement action against a debtor (or its holding company) where the shares of that member of the debtor group are part of the security package and that part of the security package is being enforced; see *ibid* clause 5.13.

¹³⁰*Ibid* clause 5.12(a)(i). Further restrictions apply to the taking of enforcement action against a debtor (or its holding company) where the shares of that member of the debtor group are part of the security package and that part of the security package is being enforced; see *ibid* clause 5.13.

¹³¹See above part IIID1(d)(i).

¹³²Loan Market Association, above n 50, clause 5.12(b).

¹³³See below part IIIE1(a).

BENEFITS OF INTERCREDITOR AGREEMENTS IN CROSS-BORDER RESTRUCTURINGS

¹³⁴Loan Market Association, above n 50, clauses 4.9(c), 5.12(b), 6.7, 7.8 and 8.8.

¹³⁵Cf. Hanrahan and Mehta, above n 41, 51.

¹³⁶See above part IIIA.

¹³⁷Loan Market Association, above n 50, clause 12.7.

¹³⁸Ibid clause 12.2(a).

¹³⁹Cf. ibid clause 12.2(b).

¹⁴⁰Cf. ibid clauses 12.2 and 12.3.

¹⁴¹Ibid clauses 12.2(b) and 12.3(a).

¹⁴²Ibid.

¹⁴³Ibid clause 12.2(c).

¹⁴⁴Ibid clause 12.3.

¹⁴⁵Mann, above n 51.

¹⁴⁶Hanrahan and Mehta, above n 41, 51.

¹⁴⁷The disposal of liabilities will often be more tax efficient than their release; see ibid 51.

¹⁴⁸Loan Market Association, above n 50, clause 14.

¹⁴⁹See, e.g., Richard Hooley, 'Release Provisions in Intercreditor Agreements' (2012) 3 *Journal of Business Law* 213, *passim*.

¹⁵⁰See above part IIIB1.

¹⁵¹See also Hooley, above n 145, 214.

¹⁵²Leeds Ruby, Thompson and Steinberg, above n 43, 60–61.

¹⁵³See, e.g., Cohen, Bridge and Vaz, above n 17, 5; Hooley, above n 145, 233–234.

¹⁵⁴Loan Market Association, above n 44, 3.16(c).

¹⁵⁵Loan Market Association, above n 50, clause 14.4.

¹⁵⁶Cf. ibid.

¹⁵⁷Hooley, above n 147, 233; Loan Market Association, above n 44, 3.16(c).

¹⁵⁸Dworkin and Holland, above n 6, 30.

¹⁵⁹Cf. above part IIC2.

¹⁶⁰Leeds Ruby, Thompson and Steinberg, above n 43, 60

