

## [Newsletter] Hong Kong Court casts doubt on the ability of minority lenders to enforce independently

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It has long been considered that lenders under a syndicated facility retain a right to seek to recover their portion of a loan directly following a payment default, typically by seeking the winding up of obligors. This is based on the several nature of the rights of finance parties which appears in clause 2 of the standard LMA terms.

However, a recent first instance decision of the Hong Kong court in *Charmway Hong Kong Investment Limited and others v Fortunesea (Cayman) Ltd and others (unreported)* found that a syndicated facility based on LMA standard terms creates an aggregate loan, rather than individual loans due to the lenders.

The result of this interpretation is that, other than in specified circumstances such as illegality or change of control, where the facility includes an express right of the individual lender to recover, lenders will be required to proceed through the collective action mechanism of instruction to the lenders (whether majority or all lender). This would leave a dissenting minority unable to take action where a majority is not willing to do so. This weakens the ability of holdout lenders to seek to apply pressure. Equally, it could be used as a mechanism for minority oppression.

To avoid the risk of such minority oppression, other financing structures such as US bonds bind holders into collective action via the trustee, but typically expressly preserve the right of holders independently to enforce a due debt following a payment default. Going forward, lenders will need to consider whether it is appropriate to make express provision for individual enforcement in facility documentation.

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