Changed circumstances and loan agreements

LARS GORTON

1. Background

1.1 Some general observations

This article is based on a lecture/seminar given at the Stockholm Center for Commercial law in September 2009. The topic for this lecture was overriding aspects on the recent financial crisis and some private law consequences thereof. In this article I shall delve mainly into one particular question which was raised in my lecture, namely the question of changed circumstances in connection with loan agreements.

During the last 20 years period there have been several events seriously affecting the financial markets regionally or even globally. These financial calamities have sometimes involved mainly the financial markets or parts of them, but in other cases, and very often so, they also affected the "real economy".[1] It is probably true to say that a serious financial calamity will always in one way or the other also have an impact on the real economy. Under all circumstances the present financial crisis, often regarded to have started in the US during 2007, has had fundamental effect on the various relations where banks are involved: the relation between banks, between banks and their customers as well as between banks and governments (public authorities). It is evident from this crisis that it is hard to find measures and methods whereby to restrain the actors and the activities in the financial markets, unless very harsh and therefore unwanted measures are taken.

[1] For an account of market failure in a historic perspective, see among others *Cassidy*, How markets fail. The logic of economic calamities. London 2009. This is a broad overview over the economic discussion from Adam Smith onwards and also partially an in depth study in certain aspects particularly with respect to economic arguments during the last 30–40 years.

I shall below mainly deal with a particular aspect related to the contractual relation between banks as lenders and borrowers, namely the question of changed circumstances in a loan agreement. Various solutions of different legal kinds may be found in respect of changed circumstances, such as general solutions developed in statutes, solutions developed through general principles and contractual solutions developed by contract draftsmen. The main focus will be on contractual clauses which are often found in loan agreements and related undertakings with respect to changed circumstances,

1.2 Some general remarks with respect to contract law

As a backbone in contract law certain principles have general recognition, one of which is the principle of *freedom of contract*, a principle with several limits. This principle is also tied to the principle of *sanctity of contracts* (pacta sunt servanda) which is similarly a principle with numerous limits. Another approach to the law of contract is based on the *clausula rebus sic stantibus*, laying down that a contract shall be performed in accordance with those conditions which were prevailing when the contract was entered into. On the one hand promises shall be kept and on the other contracts shall be performed, two ideas which are interrelated but which may not necessarily mean the same thing. The setting “promises shall be kept” (agreements shall be upheld – or whichever phrase is used) does not in the individual case have the same legal implication as the setting “contracts shall be performed”, unless this is qualified by “in accordance with the undertakings of the parties under the contract”. I wish to point out these basic contractual parameters, because they have a fundamental importance in the discussion below, and they are all found in different legal systems in varied mixtures.[2]

Contract law also recognizes certain other principles such as the principle of good faith and a principle to the effect that nobody can be required to perform what is impossible and what was not foreseeable. On top of these various principles there are also rules on the interpretation of contracts. Overall, these principles, as well as many of the rules on the interpretation of contracts, are found or at least discussed in most legal systems, but they may be recognized and applied in somewhat different ways.[3] Some of them are thus

[2] This is an observation which is well recognized in contract law since long, see e.g. *Treitel*, Frustration and force majeure. 2nd ed. London 2004 s. 1 f.

[3] During the last couple of decades much study has been used in comparing on an international and on a European level various principles leading up to contractual legislation and

not applied in certain legal systems. Thus English common law does not recognize "good faith and fair dealing" as a general principle in contract law.[4] Other common law based legal systems seem to have a slightly different approach in this respect. This means that, in spite of certain legal common ground, there are various methods to approach and deal with contractual matters.

Setting out as two basic and fundamental contract law principles the freedom of contract and the sanctity of contracts we find that not only are they principles with several limits, but there are also certain contract types where the principle clausula rebus sic stantibus rather seems to be the rational for the draftsman of the particular contract. Thus in a loan agreement the point of departure is that the agreement shall be performed in accordance with the contractual provisions but these various contractual provisions also take into consideration a number of changes occurring. Generally one may say that the performance of a loan agreement depends on the market situation and other circumstances at the time of, or during the performance of the contract as compared to those prevailing at the time of the making of the contract.

From this point of view a general distinction could also be made between *spot contracts* and *long term contracts* when comparing or balancing against each other the different contractual principles and solutions chosen. Also, it may be necessary to recognize certain specificities of various contract types such as financial agreements and in particular loan agreements to see that the contractual parameters used may appear differently. The contractual structure of a loan agreement is in this respect somewhat different from that found in many other agreements. This also becomes evident when analyzing the objects of the particular contract/contract type.

also the drafting of common principles. This is particularly illustrated through the Unidroit Principles of International Commercial Contracts (PICC), 2d. ed. Rome 2004, the Principles of European Contract Law, 1998, Parts I and II and The Draft Common Frame of Reference (DCFR). For a general discussion in English law see inter alia *Adams & Brownsword*, Understanding contract law, 5th ed. London 2007 and in Swedish law among others *Ramberg & Ramberg*, Allmän avtalsrätt, 8th ed. 2010.

4 The same is true with respect to contract negotiation.

2. Various contractual provisions

2.1 Some types of change of circumstances clauses found in different contract types

With respect to changed circumstances various problems appear depending on the type of contract involved and also depending on different occurrences. The solutions chosen may therefore differ, and the consequences tied to the different events may also vary. Below it will be apparent that various parameters will have to be taken into consideration and the solutions chosen (in law or by contract) will turn around the different parameters. Events concerned may be of a general or of an individual nature, they may relate to what happens before or upon the signing of the contract or during the performance of the contract, they may be of physical, political or economic nature, the event may lead to the ceasing of the contractual obligations or the postponement of them or sometimes to a change in the performance. The different parameters have been adopted in different ways and for different reasons in legislation, in court practice and in contracts.

Statutory solutions have been developed to some extent in regard of changed circumstances, and similar solutions may also be found in the *lex mercatoria*. There have also developed a variety of solutions in a number of contracts.[5] As mentioned the various solutions adopted may have different objectives. They may aim at *postponing* contractual obligations until a hindrance has stopped, but they may also aim at an *adjustment* in the contractual obligations or even a *termination* of the contractual obligations. The methods used, aimed at particular ends, are based on various legal doctrines and different contractual considerations.

A general observation could also be made in this connection with respect to analogy. A statutory rule may be used for analogy under certain conditions,[6] and probably the same also applies to rules developed in case law. A solution created by contract draftsmen may, however, hardly be used for immediate analogy except by inferring that the particular solution mirrors a general solution in contract law. This merits to be mentioned from a general

[5] Undoubtedly several legal questions may be raised in respect of the use of analogies and other methods to use one solution intended for one contract type to a different contract. I shall, however, not here delve into these questions except for some general comments.

[6] If a particular statute is drafted for a particular contract type a court may, however, be very cautious to use principles in that particular statute for analogy with respect to another type of contract.

point of view, since legal questions related to changed circumstances is a topic which seems to be approached in different ways in legislation or court practice as compared to the measures employed by contract draftsmen. Contractual solutions adopted thus often seem to be based on more precisely but also more narrowly formulated parameters.[7]

Depending on the type of contract but also the length of the contract various provisions may set out parameters enabling the parties under certain circumstances to amend the contract.[8] Very often they are inserted in order to ease the effects of contractual undertakings when circumstances have made the contractual obligations hard or impossible to perform in view of the situation.

As mentioned there have been developed in law certain circumstances through which the primary obligor will be able to invoke such change as a reason for not performing timely its contractual undertakings. These questions may be approached in different ways and under different headings. Thus doctrines have evolved such as impossibility, force majeure, frustration, impracticability, presupposed conditions, which have different aims and which may be used and applied somewhat differently in different jurisdictions. The legislator in some instances has introduced specific rules but in other cases also more general rules which may be applied as checks and balances in particular cases, such as "reasonableness" and "good faith".[9]

Considering the particularities of different types of contract, contract draftsmen have also been active in this respect. They have developed a variety of clauses in order to try to strike a balance between the parties and mitigate the consequences of the contractual obligation of an obligor due to certain

7 In Scandinavian law *Rodhe*, Om jämkning av kontrakt på grund av ändrade förhållanden, in NJM (Nordiska Juristmötets förhandlingar) 1951 gave a background to the then Swedish approach to these questions. With respect to changed circumstances generally but with some economic aspects see i.a. *Runesson*, Rekonstruktion av ofullständiga avtal. Särskilt om köplagens reglering av risken för ökade prestationskostnader, Stockholm 1996 with references. To-day Swedish courts seems to be more ready to adopt the doctrine of presupposed conditions than previously (see in particular, *Lehrberg*, Förutsättningsläran, Uppsala 1989), and also the so-called General clause, art. 36 in the Nordic Contract Acts may be used more frequently not only in B2C transactions. See further below.

8 Parties may, of course also without such clause make an amendment agreement with the other party.

9 As mentioned in footnote 7 the legislators in the Nordic countries during the 1970's introduced the so-called general clause, art. 36, in the different Contract acts. This article represents an opening up for the courts to observe a less restrained approach to the principle of sanctity of contracts particularly in B2C relations.

events. These clauses may have different aims, and they may be drafted differently depending on the particular object intended. They may set out various effects such as the limitation of the contractual duties of the obligor, sometimes relieving him totally from his duty to perform, in other instances postponing his duty to perform and again in other cases modifying his contractual obligations, sometimes putting on the paying party a duty to pay a higher price because the counterparty is encountering (heavy) price increases for his undertakings. Normally some of the particular clauses also set out explicitly that the obligor during the period of such event shall not have to pay compensation to the other party for its failure to perform. As a balancing factor, the other party will in many cases be entitled to cancel the contract at least after a certain time but then without any right of compensation.

Contractual clauses developed may be found under different headings: force majeure clauses (as they are still often called), hardship clauses, escalation clauses, index clauses, currency clauses, material adverse change (MAC) clauses, market disruption clauses etc. Sometimes they are also found under the heading of interest adjustment clauses, increased costs clauses etc.[10] The various clauses may be drafted for particular situations and contracts, but they may also be of a general nature frequently found in certain types of commercial contracts.[11]

2.2 The relation between some of these clauses

Some clauses are thus geared at physical (natural) changes (incl. weather restraints), others at political changes (incl. changes in legislation) and others

10 In the LMA Multicurrency term facility agreement clause 14 sets out provisions concerning “increased costs”. *Bruserud*, Hardshipklausuler, Oslo 2009, has dealt generally with related clauses.

11 There are also other contractual elements which have an impact in this connection although the rationale behind them may be somewhat different. It is thus common to find in contracts clauses exempting a nonperforming party from his liability for his failures to perform or limiting his liability for consequences thereof. This again is an example where “freedom of contract” collides with the principle that a party undertaking to do something also has a duty to perform his contractual undertaking, and one could see it as a situation where the principle of freedom of contract collides with itself (another freedom of contract). In this connection in most legal systems there is a basic understanding that up to a certain limit the freedom to limit one’s liability is regarded as more fundamental than the contractual undertaking to perform in accordance with the contract. In law therefore certain limits have been developed by some legislators and by the courts in some jurisdictions to narrow down the effects of the contractual provision exempting or limiting the liability. I here disregard from B2C contracts.

again at economic changes (interest rates, costs, currency, tax etc.), and there are also clauses considering technical changes. The various clauses may be drafted so as to relieve the parties from their contractual obligations; they may instead aim at postponing the obligations of the parties; some may be drafted so as to lead to an automatic change to the contractual duties of the parties depending on different causes (such as index clauses, currency clauses etc.) but others again rather set a method for renegotiation of the contractual terms under certain circumstances (such as hardship clauses or MAC clauses). It is largely up to the parties to determine which effect they wish to achieve and which means they wish to use.

As is well known the International Sales convention (CISG) is based on a so-called "control liability", setting out in art. 79 an exemption from the seller's liability if an "impediment" occurs which is beyond the control of the seller and which was unforeseeable at the time of entering into the contract. According to the provision the seller's duties are postponed while the impediment lasts, but there is also a need for the seller to notify the buyer of the impediment. The control liability is often recognized as replacing traditional force majeure clauses in contracts (and any "other cause beyond the control"), but it is also believed to put a somewhat higher degree of burden on that party who wishes to invoke the particular provision than many traditional force majeure clauses. Art. 79 of CISG does thus not explicitly cover hardship situations but the question has come up whether various types of cost increase events may also be covered by the provision.[12] Art. 79 in the CISG has been regarded as applicable to hardship events by e.g. German and Swiss courts, but they seem to have set the requirements for the application of this article relatively high.[13] Now, as already mentioned, hardship events practically require and often have different solutions than those covered by the traditional "force majeure".

Even if I shall not here particularly delve into the question of frustration developed in common law, it merits to be mentioned that this doctrine may set a limit to the absolute duty to perform what has been promised, but there

[12] Related questions have been dealt with by inter alia *Schwenzer*, Force majeure and hardship in international sales contracts, in (2009) 39 VUWLR p. 709 ff. and id. also in Die Clausula und das CISG, in Festschrift Eugen Bucher, 2009 p. 724 ff. See also discussion in *Mikkelsen*, Vikårene for hindringsfritak i kjøpsforhold (kontrollansvaret), Oslo 2010 p. 50 and 102.

[13] See *Schwenzer*, Force majeure p. 709 ff.

may also be various clauses in the contract limiting the basic duty. Such clauses also appear in loan agreements.[14]

ICC has introduced a standard force majeure clause, which has gradually been adopted in several ICC documents. This clause is based on "control liability". ICC then also decided to draft a separate standard hardship clause beside the force majeure clauses. Similarly there are in PICC as well as in PECL separate solutions with respect to general force majeure situations and hardship situations.[15]

In PECL these articles have been drafted as follows:

> Art. 8:108 (ex. Art. 3.108) – Excuse due to an impediment:
> "(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
>
> (2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such."

The change of circumstances clause in PECL has been drafted in the following way:

> Art. 6.111 – Change of circumstances:
> "(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.
>
> (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
> (a) the change of circumstances occurred after the time of the conclusion of the contract,

[14] For instance *Hudson*, The law of finance, London 2009 p. 474 f., *Wood*, International loans, bonds, guarantees, legal opinions, 2nd ed. London 2007 p. 101.

[15] PICC in art. 6.2.2 and 6.2.3 set out provisions concerning "hardship" and in art. 7.1.3 a provision on "impediment" ("force majeure"). The drafting of the PICC articles differ somewhat from those found in PECL. Corresponding solutions chosen by ICC as standard "force majeure clause" and "hardship clause" respectively have also been drafted somewhat differently.

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of the conclusion of the contract, and
(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:
(a) terminate the contract at a date and on terms to be determined by the court;
(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing."

Whereas the former article sets out an exception to the undertaking of the obligor due to impediments beyond its control, the latter is based on renegotiation, a significant difference in approach.

In Swedish law some Supreme court cases during the 1920's mirror a discussion on "economic force majeure" involving substantial changes in the cost and price picture in a contract. In these cases (NJA 1918 p. 20 and NJA 1923 p. 20) the Swedish Supreme Court opened up for the understanding that force majeure could also be connected to heavy cost changes.[16]

After the introduction of the general clause (art. 36 in the Nordic Contract acts) there will probably be some cases where this particular provision could be used in connection with changed circumstances, even though it is not intended to be used as a general rebalancing clause in B2B contracts.

As mentioned I shall not here particularly delve into the question of *frustration* developed in common law, but this particular doctrine may have importance also in connection with financial contracts. In some cases such clauses may be referred to as a frustration clause.[17]

16 In the Swedish then purchase act of 1905 there was one section 24 setting out very limited possibilities for a seller of generic goods to avoid liability for non-performance restricting these possibilities only in case of objective impossibility and force majeure.

17 See inter alia *Hudson* 19-77 ff. and *Wood* p. 101 f. See also *Rawlings*, Market disruption clauses in syndicated loans, Journal of International Banking and financial Law, 2009 p. 446 ff, where the author initially states: "If the lender is unable to obtain funds in the agreed currency at any price, the contract may allow the lender to refuse to advance the funds, or the contract may be frustrated, since through no fault of either party, it has become impossible to perform."

From the above we can thus see that courts in some jurisdictions may very well expand "force majeure events" or "impediments" also to cover hardship situations, whereas contract draftsmen seem to draw a distinction between them. We have also seen that PECL and PICC as well as ICC found a need to split between force majeure events and hardship events. The prerequisites for them as well as the effects of them are such that a distinction needs to be upheld, but in case the contracting parties have decided to leave hardship events outside the contract they may very well find that the "impediment" article may be applicable.

2.3 Various contractual methods concerning changed circumstances used in financial agreements, in particular loan agreements

Against the above background I shall now turn to some types of financial contracts, in particular loan agreements (but in the end of the article to some extent also bank guarantees and letters of credit) and try to give some basis for an analysis of the particularities of these agreements in relation to changed circumstances. There is supposedly in financial agreements a particular structure which distinguishes them from many other contract types. There is, however, also a difference between these financial arrangements, in so far as the legal risk structure of letters of credit and bank guarantees are not quite the same as those of the loan agreement. The two former could entail the same risk exposure as the latter, but in respect of letters of credit and bank guarantees the bank may demand that the customer pay in advance the amount involved in the particular transaction, and in such case the bank carries little financial risk visavis the customer. If, on the other hand the bank does not ask for such advance payment, the risk of the bank in connection with letters of credit and bank guarantees is similar to that of a loan.[18]

These differences also become evident directly or indirectly when studying different treaties on loan agreements.[19] There are some particularities of

[18] This being said it needs to be underlined that the documentation related to these different financial transactions vary considerably. Letters of credit are almost always governed by Uniform Customs and Practices (UCP 600), which contain a force majeure clause, financial guarantees are sometimes governed by Uniform Rules on Demand Guarantees (URDG 758) which also contain a force majeure clause. Individual financial guarantees subject to English law may contain several different clauses reminding of those found in loan agreements.

[19] See for example *Cranston*, Principles of banking law, 2nd ed. Oxford 2002, p. 299 ff., 384 ff. and 390 ff. and *Wood* p. 35 ff., 65 ff., and 69 ff.

the loan agreement which may have some interest in the perspective discussed here.

> If a loan would not contain any particular contractual provisions, then general contractual rules and principles and rules on promissory notes would undoubtedly be applied to the contractual relation between the lender and the borrower.[20] In such case there is a binding agreement when the loan agreement is entered into, but lacking particular contractual provisions in the loan agreement the lender will have a duty to perform (i.e. lend the money) in accordance with the terms and provisions of the loan agreement, and the borrower will have to repay the loan amount and perform other contractual undertakings. It is only at the moment of the drawdown that there is a loan. Changed circumstances would rarely come into the picture unless there would be a case of anticipatory breach, force majeure or other particular events which follow from the general law. Since lenders will have particular worries concerning the repayment of the debt there is in practice normally a need for several, particular contractual provisions in the loan agreement in order to protect the lender as far as possible for the consequences of unpaid debt.

Undoubtedly loan agreements are particular in their character, and this is reflected in the structure of these agreements and the particular clauses used. When the loan agreement is entered into, there is basically a balanced position between the parties. One of them undertakes to lend and the other to repay the loan on certain terms and conditions. Once the loan amount has been paid out to the borrower there is a change in the balance between the parties. One party has then received the money, and the other will have to trust that the borrower will be able to and also will repay. This imbalance requires particular contractual solutions in order to give the maximum protection to the lender. Before the drawdown the lender will make sure that no money is paid out unless the loan amount is certain (or at least reasonably certain) to be repaid. After drawdown the lender needs to be able to take steps in case the general economy or the financial situation of the borrower deteriorates.

Particular contractual provisions would normally be found in the loan agreement both related to the time before drawdown and to the repayment

[20] In the Nordic countries the Skuldebrevslagen would apply. This legislation is reasonably close to what is known in English law promissory notes, although rather to a particular instrument sometimes called “note of indebtedness”).

period. A particular clause often used in connection with syndicated loans, where the lead bank, instructed by the borrower to arrange the syndication, will often through a so-called market flex clause be entitled to adjust within limits the interest rate in order to attract banks to participate in the lending.[21]

There are almost always specific "conditions precedent" in the loan agreement setting out that if certain requirements are not met the lender is entitled to refuse to pay out the loan amount. Furthermore, particular "covenants" apply with respect to various undertakings of the borrower during the loan period. These set out particular circumstances under which the lender may accelerate the loan agreement, demand the immediate repayment of the loan and use the financial securities. Another type of clause that may be found in loan agreements concerns interest adjustment clauses which serve to compensate the lender for any change (increase?) in the general interest rate.[22]

These various conditions precedent and covenants of different types are normally aiming at the individual conditions of the borrower (e.g. "financial covenants", i.e. clauses setting out financial requirements to be met, and some other covenants also including so-called negative covenants), but there may also be clauses of more general character such as market disruption clauses, force majeure clauses, etc. These may not aim at particular situations related to an individual borrower but may be of more general market nature. MAC clauses are normally of the former type but they may also be geared at more general financial and political circumstances. Depending on the drafting the effect of the various clauses may thus be geared both at the individual and at the general perspective.

It should, however, also be recognized that loan agreements often do not give much protection to the borrower, and the present financial crisis may

[21] In respect of market flex clauses see i.a. *Mugasha*, The law of multi-bank financing. Syndicated loans and the secondary loan market, Oxford 2007 in 3.41–3.43 and *Wood* p. 5 f. and 144.

[22] In Swedish law the Supreme Court case NJA 2005 p. 142 illustrates how the court interfered in a contract allowing a lease company to change the interest rate in a lease contract. The particular clause stated in rough translation: "If the interest situation would change in that market where it is financing its activities, the lessor shall have a corresponding right to change the lease fee", a clause which is not particular clear. The lessee claimed back overcharged fees but the lessor claimed among other things that the lessee had not refused to pay in accordance with the claims sent out. The Supreme court found that the the lessor had to apply the clause loyally and put on him a duty equally to reduce the leasing fee when the interest rate went down and not only increase it when the interest rate increased.

give reason for contract draftsmen to take this into consideration further in the future.[23]

3. Various clauses in financial agreements

3.1 In general

There have been developed in loan agreements a variety of contractual methods, whereby a lender shall be entitled to refuse to advance the loan amount, or whereby it will have the right to accelerate a loan before it matures or otherwise reclaim prematurely money advanced to the borrower. All these provisions are there as a protection for the lender. They may thus be drafted so as to entitle the lender under certain circumstances to refuse to pay out the money to the borrower upon its notice of drawdown. They may, however, also be geared at events during the time of repayment. In this connection then various covenants serve as a cushion for the lender, so that he has a contractual right pursuant to the loan agreement to declare an event of default and claim repayment of the loan amount and then also to use the financial security to cover himself for the outstanding loan amount.

In the former case the lender may refuse to pay out the loan amount to the borrower if there is an increased risk that the borrower will be unable to repay, either because its business activities have become less profitable, or because there is a general decline in the market so as to affect negatively also the business of the borrower, *or* because the lender for different reasons does not have sufficient financial resources to lend (also lenders may encounter financial difficulties), or lastly there is a prohibition for banks to lend to a certain borrower, to a borrower in a certain trade or to a borrower in a certain country.[24] The situations may thus vary and are often covered in various clauses used. In the latter case the lending has become more risky for the lender and

[23] Like in other commercial contracts financial agreements also mirror the effects of economic circumstances. In a period when money is affluent lenders tend to lend with less strict contractual requirements, see for example the use of "covenants lite", see eg. *Markland*, Cov-lite – the new cutting edge in acquisition finance, International banking and financial law, p. 379 ff. A corresponding discussion is relevant in respect of interest rates where banks due to fierce competition offer unhealthily low rates.

[24] The credit crunch of the last few years has contributed to certain novelties in the drafting of loan documentation to meet new situations, see i.a. *Carver, Sexton & Barken*, Switching the focus to the lender credit risk in loan documentation, Journal of International Banking and Financial Law 2009 p. 39 ff.

the various clauses in the loan agreement may entitle the lender to demand the immediate repayment of the loan. The drafting of the loan agreement will thus be of fundamental importance.

The possible problems may therefore occur in two different phases of the loan agreement, either in the phase between the entering into the loan agreement and the drawdown of the loan, or during the phase of repayment of the loan. The risks appearing during the two phases are of somewhat different character. In the first phase the risk of the lender in case it decides to refuse paying out the loan amount, is that this may give the borrower a right to claim against the lender under the loan agreement for the money committed but not paid out, or the borrower may have a claim for compensation due to the loss of business. Generally the contractual clauses are drafted thus that there will be a basis in the loan agreement for the lender to refuse to advance the loan amount. The lender has, however, a contractual duty following from the loan agreement to pay out the loan amount following the drawdown notice of the borrower, unless there is in the loan agreement or in law a basis for refusal. Furthermore, that situation may also be covered where no money is available for the bank or only available at a higher cost than that contemplated when the loan agreement was entered into (market disruption). Some of these clauses refer both to the time before drawdown and during repayment but others are specifically drafted for the one or for the other period.

After drawdown, i.e. during the repayment phase, the situation is different because the money lent is now with the borrower, whose duty it is, to pay and repay in accordance with the terms and conditions of the loan agreement. If according to the loan agreement the lender is entitled to accelerate the loan and claim its immediate repayment, his success in having the loan amount repaid will depend on whether the borrower has sufficient money to do this (which is often not the case) or if the financial securities given to the lender are sufficient to cover the sum lent. Generally it is not in the interest of the lender to accelerate the loan, but in times of scarce money the lender may have an incentive to get its money back (and possibly relend it for more rewarding projects). The problem is, of course that once there are shatterings in the market (not only in relation to the particular borrower) there may not be an alternative less risky and better yielding project. From the lender's point of view it may though be financially safer to reclaim money early thus possibly avoiding an increased risk of the bankruptcy of the borrower.

3.2 Various contractual provisions related to the time before drawdown

3.2.1 "Conditions precedent" or "subject" provisions

"Conditions precedent" of various types are normally found in loan agreements. They have much in common with those "subject clauses" which are rather frequent also in other commercial contracts.[25] The idea behind these terms is that certain requirements shall be met before there shall be a finally binding agreement between them or before there shall be a duty to perform. It is not unusual that such requirements may be put on both parties, but in loan agreements the "conditions precedent" cover a number of duties put on the borrower to fulfill, before the lender shall be bound to allow the drawdown of the loan amount. So one may say that a conditions precedent clause in a loan agreement serves as a prerequisite for the lender to advance the loan amount in exchange for certain documentation to be presented by the borrower to the lender. Subject clauses seem to be less frequently used in loan agreements, but they may rather exist in documentation related to the underlying transaction, which may be "subject to board's approval" or "subject financing."

The conditions precedent may set out certain conditions which shall be met by the borrower, such as arranging for a legal opinion, arranging for all securities to be in place, arranging for insurance but also seing to it that all financial requirements shall have been met (such as audited financial reports) and so on.[26] In general, such conditions will have to be met before drawdown in order that the lender shall reduce as much as possible the risk that follows with "its parting with the money".

3.2.2 Material adverse change clauses (MAC)

A particular clause regularly found in loan agreements both as a condition precedent and as a covenant is the material adverse change clause (MAC).[27]

[25] There are in most treaties on contract law a discussion on the effect of such "subject" or other corresponding clauses, see in Swedish law e.g. *Adlercreutz*, Avtalsrätt I, 12th ed. Lund 2003 p. 66 ff. and 83 ff., *Grönfors*, Avtalsgrundande rättsfakta, Stockholm 1993, and *Ramberg & Ramberg* s. 95 f.

[26] See for instance *Cranston* p. 313 f., *Hudson* 19-29, *Tamasauskas*, Erhvervslivets lånoptagelse (CKK, kreditretsprojektet 11) København 2006 in particular p. 325 f. *Wenzel*, Rechtsfragen internationalen Konsortialverträge, 2006 p. 128 ff. and *Wood* p. 86 ff.

[27] The MAC clause may be drafted along the following lines: "In case there would have occurred a material adverse change the lender….."

MAC clauses are frequently used in loan agreements but they are also quite common in acquisition agreements (the purchase of shares in an enterprise), where the final payment to the seller is dependent on the value finally determined of the entity sold. If in connection with the payment for the shares, the value of the company is found to be lower than that which was first believed the buyer may be entitled to demand a reduction of the price or possibly that the contract shall be terminated. In loan agreements the MAC clause is often found as a particular condition precedent or as a clause forming part of other requirements with the same purpose, namely to shield against the borrower claiming the drawdown of the loan amount. If a materially adverse change shall then have occurred the lender may be entitled to refuse to advance the loan amount. It must, however be determined in which respect the adverse changes have occurred. Does the clause refer to the financial conditions of the borrower only or also generally to the prevailing market conditions? This depends on the drafting.

The MAC clause may also appear as a particular covenant entitling the lender to consider the MAC as an event of default and a right of accelerating the loan, if it is geared at particularities of the borrower, but on the other hand it may also under certain circumstances be regarded rather as a clause of force majeure type entitling the lender to call for the repayment of the loan, even if it is not an event of default.[28] Particularly in English law the wording of the individual clause is regarded to have fundamental importance, but (with some variations in different legal systems) other circumstances may also be taken into consideration when determining the meaning and the effect of the clause.

As distinguished from certain other conditions precedent or covenants MAC clauses are not very specific but often rather regarded as a kind of catch clause, a clause which may possibly come into use, if the requirements of certain more specific clauses are not met in a particular situation. The MAC clause is often drafted in general words, and it is not always easily applicable in that individual situation where the requirements of other, more precise clauses are not met. The question may also arise whether the MAC clause is applicable if the general economic outlook is deteriorating or only if the particular financial situation of the borrower is becoming worse. This will depend on the drafting of the clause and the events occurring. It is then also

[28] MAC clauses are dealt with in e.g. *Gorton*, "Material adverse change"-klausuler. Vänbok till Axel Adlercreutz. Lund 2007 s. 117 ff. and *Mugasha* in 3.44 ff and 5.60 ff.

obvious how different clauses together form a contractual pattern where individually oriented clauses should be seen side by side with more generally oriented clauses.

3.2.3 Force majeure clauses

It has been mentioned already that there will often be found in loan agreements a force majeure clause, sometimes as a rather precisely drafted clause serving as a condition precedent or as a clause covering an event entitling the lender to accelerate the loan and declare it immediately repayable. Frequently force majeure clauses are broader, catching more and sometimes precise circumstances although not always predictable in their application.[29] A force majeure clause may be rather close to a market disruption clause. General "force majeure clauses" seem to be used more in respect of the repayment phase, in order to meet particular problems occurring during this period.

In the LMA agreement there are several articles dealing with illegality and increased costs in art. 11, 18 and 19.[30] Art. 11 "Illegality, voluntary prepayment and cancellation" contains several subclauses dealing with various aspects of the illegality in relation to one or several banks. Art. 11.1 thus prescribes:

> ”**Illegality**
> If it becomes unlawful in any applicable jurisdiction for a Lender to perform any of its obligations as contemplated by this Agreement or to fund, issue or maintain its participation in any Utilisation:
> (a) that Lender, shall promptly notify the Agent upon becoming aware of that event;
> (b) upon the Agent notifying the Parent, the Commitment of that Lender will be immediately cancelled; and
> (c) each Borrower shall repay that Lender's participation in the Utilisations made to that Borrower on the last day of the Interest Period for each Utilisation occurring after the Agent has notified the Parent or, if earlier, the date specified by the Lender in the notice delivered to the Agent (being no earlier than the last day of any applicable grace period permitted by law)."

[29] See e.g. *Cranston* p. 306 and *Hudson* 19-45,

[30] The Loan Market Association (LMA) situated in London has drafted a number of standard model agreements to be used as a basis for negotiations between lenders and borrowers. These models are updated and amended regularly.

Art. 21 sets out an express mitigation clause setting out a duty of the Lenders to mitigate the effects of the particular circumstances. Apparently force majeure clauses are drafted in various ways considering different parameters and suggesting different solutions.[31]

3.2.4 Market disruption clauses (MDC)

In footnote 17 above, there was mention of difficulties the lender might encounter when trying to raise funds to be able to stand by its promise to lend money to a borrower. If he would incur problems when thus raising funds (i.e. borrow money in order to be able to lend) and such money is unavailable or available only at a higher cost there may then be different legal effects depending on if there is in the loan agreement a clause addressing this problem or not. Furthermore the drafting of the clause is decisive for its legal implications.[32]

There may thus be situations where funds are available but only at a higher cost than expected.[33] A market disruption clause (MDC) may set out provisions entitling the lender to refuse to advance the money to the borrower if funds are unavailable, but if there is a cost increase, the basic contractual understanding is that the lender will have to absorb the heavier cost burden unless there is in the loan agreement particular provisions dealing with such problem. The contractual solutions may vary.

In referring to the LMA documentation Wood thus makes a distinction between two situations, one where further drawdowns are suspended and the bank may demand prepayment of existing loan and cancellation of the commitment or the parties may negotiate for 30 days but failing to agree the bank may conclusively determine the interest rate.[34] He also refers to the case *Paragon Finance plc. v. Staunton*[35] where the Court of Appeal found that the lender had the right in a loan agreement to vary the interest rate provided

31 See e.g. *Cranston* s. 306 and dealing with illegality on p. 307.

32 *Hudson* 19-44 and 44-19.

33 *Rawlings* p. 446. The author here also gives an overview of various situations, where market disruptions have occurred during the last couple of decades. He also mentions situations of the application of the discretionary powers that the lender may have reserved in the loan agreement in cases of market changes. In the case *Paragon Finance plc v. Nash & Staunton* /2001/ EWCA 1466 the court of appeal used an implied term obliging the lender not to use its discretion dishonestly. See also *Hudson* 30-46 and see also 44-19 f.

34 *Wood* p. 54 ff.

35 (2001) EWCA Civ.Civil 1466, /2001/ 2 All ER (Comm) 1025.

that it did not exercise this right ", for an improper purpose dishonestly (such as getting rid of the borrower), capriciously or arbitrarily". If there would be no such clause the question will arise how to handle the upcoming situation.[36]

> The loan agreement often uses London Interbank Offer Rate (LIBOR)[37] as a point of departure when quoting the interest rate visavis the borrower e.g. X% above LIBOR plus certain administrative fees which serve to cover the credit risk and certain costs. As mentioned the loan agreement may then also spell out that in case there would be events disturbing the market conditions leading to higher borrowing costs for the lender these costs will be passed on to the borrower. In Swedish loan agreements STIBOR may be the corresponding basis.

Sometimes the particular clause sets out that any change in the interest rate available for the lender will be passed on to the borrower, but more often reference will be made to a more neutral calculation method in order to avoid that the Lender may quote a higher interest rate to the borrower just because it is less creditworthy with a worse credit rating in the market. The clause may also set out that under certain circumstances due to a certain change in the market conditions the lender is entitled to demand renegotiations of the interest rate. Again, there may be different solutions in a loan agreement with respect to such renegotiations: Failure of the parties to come to an agreement pursuant to such negotiations may thus have different consequences. If the parties cannot agree the lender may be free from its commitment. The borrower may sometimes have to compensate the lender for additional costs actually incurred. In other cases there will remain a duty for the lender to stand by its original commitment, but with an open right of renegotiation. In other situations a court may set the rate. In short the solution depends on the drafting of the particular clause in the loan agreement. If the borrower is in a position to borrow money from another bank at the originally agreed rate, the borrower may from an evidence position be in more advantageous position, but in such case the question remains, whether the borrower has then encountered a loss.

[36] Wood discusses four different possibilities: 1) no interest would be payable, 2) the court might apply the nearest alternative to give business efficacy to the contract, 3) the court may apply an interest rate as a matter of equity, or 4) the contract may be frustrated. He leans towards alternative 2 as the better solution.

[37] This is often referred to as the screen rate.

Again there may exist in different markets different solutions, and also different clauses may be used. Generally they seem to be based on various parameters but largely they take into account the particular difficulty for the lender to find financing. Then the individual financial weakness of the lender may play a role, something which is not always taken into consideration in the loan agreement. How then should such situation be handled? Sometimes the clauses used pass on to the borrower increased loan costs, and in other cases they may give the lender a right to discuss renegotiation (with different consequences if such renegotiations fail). They may also give the lender a right to declare that they are not in a position to lend the money due to the market disruption (changed circumstances). Now there is, of course a difference depending on whether there is a total disruption in the market which makes it more or less impossible for *all* banks to fulfil their undertakings or depending on whether the individual bank is no longer trusted in the market and therefore cannot obtain financing, but MDC's do not always make such distinction.

A renegotiation provision would under Swedish law probably be construed to mean that the parties shall have a duty to negotiate in good faith with the object to try to find a solution which is acceptable for both parties. The understanding of such clause is, however dependent upon its drafting. If a clause sets out that following a change in circumstances there shall be ground for renegotiation this would to my understanding only mean that the lender may call for a discussion with respect to the particular item involved but it is not thereby entitled to demand a particular compensation. If the parties cannot come to an agreement the effect of the clause will depend on the particular wording used. Each clause will have to be construed in accordance with its wording and also on the particular circumstances in which it will be applied.

3.2.5 Change of law clauses

A particular type of clause that may be found in loan agreements is a change in law clause. Such clause may set out explicitly that if there would be a change in law, the effects of such change will allow the lender to pass on to the borrower the effects thereof whether the effect would be an impossibility to perform, increased costs due change in taxation etc. In some cases such clause is a separate clause in the loan agreement, but it is not unusual that it will form part of a force majeure clause.

3.2.6 Change in circumstances and other clauses

As mentioned, clauses are used with different headings and they may be drafted widely or more narrowly often in combination but then also not infrequently to some extent covering each other. They may be found as specific tax indemnity or currency indemnity clauses, as parts in other clauses, but the clauses may also appear as broad clauses covering changes in circumstances generally.

In some loan agreements there are broadly designed clauses setting out several different parameters, in others there are various provisions each rather specific and dealing with particular problems. In spite of the existing LMA standards the individual solutions may vary.

As mentioned above there is in art.14 in the LMA multicurrency facility agreement an "increased costs" clause (beside art. 13 concerning tax and tax costs) setting certain principles concerning the dealing with increased costs.

3.3 Various terms related to the repayment period

3.3.1 Certain covenants (contractual provisions relating to the performance of the contract)

Several of the above mentioned clauses will also appear (and then drafted somewhat differently to cover the events during this phase) as covenants or as another clause related to the repayment. The various covenants in a loan agreement may be positive or negative.[38] Financial covenants are normally positive requiring the borrower to meet certain financial requirements in respect of its financial reports. If these figures are not met the lender is entitled to accelerate the loan, or it may in stead (or also) be entitled to demand better financial security from the borrower. The covenants may also cover a number of other items which are of importance for the lender, whether aimed at the maintaining of insurance of the property being financed or used as security, promises not without the prior approval by the lender to change the corporate structure of borrower or the guarantor, promises not to sell materially important property of the borrower etc.

As mentioned a covenant is a contractual undertaking and the breach of it only gives the lender an obligatory right to take certain agreed measures. The covenants are, however, within their contractual frames important tools.

[38] With respect to covenants see i.a. *Cranston* p. 313 ff., *Hudson* 19-43, *Tamasauskas* p. 388 ff., and *Wood* p. 69 ff.

Some words will be mentioned below on certain of the provisions which have already been mentioned above but which may also appear as a kind of covenants, such as MAC clauses.

3.3.2 Material adverse change (MAC) clauses

Beside the comments made above in respect of MAC-clauses in loan agreement related to the time before drawn down, it could just be mentioned that MAC-clauses are also used as "covenants" forming an ultimate protection for the lender where none of the more specific covenants will apply.[39] In this sense the MAC clause may be seen as an ultimate source for the lender, sometimes in the form of a force majeure clause. It needs to be underlined that the MAC clause is often rather wide and failing precision it may be difficult to apply it in an individual situation. A particular question concerns, as touched upon above, whether a MAC clause will be regarded to cover general causes or only specific causes related to the particular borrower. From a case such as *BNP Parisbas S.A. v. Yukos Oil Co.*[40] it follows that banks may rely on non-financial information when assessing whether or not there has been a material adverse change sufficient to allow for the acceleration of the borrower's payment obligations under a bond.

3.3.3 Markets disruption clauses (MDC)

As mentioned in 3.2.4 the MDC is a provision with a particular aim and primarily used in respect of the drawdown. MDC's may, however, also be drafted so as to be used also for the repayment period, but it may then in stead be found under the heading of force majeure or changes in circumstances. The effects of such clause may also depend on its drafting and may then have different consequences.

3.3.4 Force majeure clauses

3.3.4.1 Loan agreements

I shall here somewhat further discuss the particular use of force majeure clauses in some financial agreements. As shown the various clauses in use may give little specific room for the application of a force majeure clause. We have

[39] I.a. *Hudson* 19-44 ff.
[40] /2005/ EWHC 1321.

thus seen that there are various ways in handling matters related to changed circumstances and/or termination events. "A force majeure clause permits the parties to terminate a transaction when there is some sufficiently serious alteration to the circumstances in which the contract was made and in which it was expected to be performed."[41]

Separate force majeure clauses are found frequently in loan agreements, and generally force majeure clauses also appear in financial documents of various types. The drafting of such force majeure clauses may vary but there are certain standards which seem to be in use. Sometimes they are geared at phenomena which could possibly constitute frustration (where the commercial purpose of the transaction would cease), but the clause will often concern so-called Acts of God, war and similar. A force majeure clause may be drafted more generally so as to embrace a number of different situations (which are in many contracts covered more specifically by more precise clauses).

There seems to be a standard often used in domestic loan agreements, but similar clauses may also appear in international loan agreements. In the LMA documentation a force majeure clause may be found under another name or in a different context, and I shall below refer to some different solutions appearing in loan agreements and other financial arrangements.

Thus loan agreements often contain a force majeure clause which may either be related to the drawdown or cover the repayment phase or both periods. As an example of a force majeure clause in a loan agreement I wish to quote the following clause appearing in a ship finance agreement (20 years back in time) involving a foreign subsidiary owned by some Swedish companies. This clause was at least at the time a standard clause which used to appear in loan agreements involving Swedish banks and was really drafted to operate as an exemption of liability clause:

> "The Lender shall not be held responsible for any loss or damage resulting from a legal enactment (Swedish or foreign), an intervention of a public authority (Swedish or foreign), an intervention of a public authority (Swedish or foreign), and act of war, a strike, a blockade, a boycott, a lockout or any other similar circumstance. The reservation with respect to strikes, blockades, boycotts or lockouts applies even if the Lender itself is the subject of such measures or take such measures."

[41] *Hudson* 19-45.

This clause is to my understanding geared at the loan agreement as a whole, i.e. both the drawdown phase and the repayment phase. It is a rather traditional type of force majeure clause in financial agreements, and it could not be used as an excuse for demanding a higher interest rate, but it may from a practical point of view give rise to a renegotiation between the parties. As shall be seen this particular clause has been drafted differently from certain other "force majeure clauses" appearing in some other types of financing agreements.

3.3.4.2 Letters of credit (Uniform Custom and Practice – UCP 600)

It is common to find in different financial transactions, which are not loan agreements, corresponding clauses to meet certain changed circumstances.

The following clause is thus used in Uniform Custom and Practice related to letters of credit (UCP 600) as art. 36:

> "A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control. A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business."

This is a clause which to my understanding is similar to general force majeure clauses in several financial documents. Such clauses may, however, also be wider or more precise in their drafting.

3.3.4.3 Independent guarantees (Uniform Rules on Demand guarantees)

There is also in Uniform Rules on Demand Guarantees (URDG 758) a force majeure clause which has been drafted somewhat differently:

> "a. In this article "force majeure" means acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupt its business as it relates to acts of a kind subject to these rules.
>
> b. Should the guarantee expire at a time when presentation of payment under that guarantee is prevented by force majeure:
>
> i. each of the guarantee and any counter-gurantee shall be extended for a period of 30 calendar days from the date on which it would otherwise have expired, and the guarantor shall as soon as practicable inform the instructing party or,

in the case of a counter-guarantee, the counter-guarantor, of the force majeure and the extension, and the counter-guarantor shall so inform the instructing party;

ii. the running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the guarantor's business; and

iii. a complying demand under the guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that guarantee has expired, and in this situation the guarantor shall be entitled to present a demand under the counter-gurantee within 30 calendar days after cessation of the force majeure even if the counter-guarantee has expired.

……../corresponding in relation to counter-guarantee/."

3.3.4.3 Standby practices (ISBP 98)

A third solution within the same type of financial arrangement is found in the International standby practice related to standby letters of credit, which is a financial arrangement very close to a bank guarantee but in the clothes of a letter of credit. The standby credit developed in US banking practice as an alternative to bank guarantees: Banks were at the time not allowed to issue bank guarantees unless they were part of a financial package (i.e. not as a separate commercial undertaking). Bank guarantees were regarded as a risky business and banks should therefore not be involved in this. In order to be able to compete with banks in other countries entitled to issue bank guarantees, American banks therefore used the letter of credit thereby creating the standby letter of credit. The standby credit is regulated separately through ISBP where the force majeure clause has been drafted as follows in rule 3.14:

"Closure on a business day and authorization of another place for presentation.

a. If on the last business day for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.

b. Upon or in anticipation of closure of the place of presentation, an issuer may authorize another reasonable place for presentation in the standby or in a communication received by the beneficiary. If it does so then

   i. presentation must be made at that reasonable place; and

ii. if the communication is received fewer than thirty calendar days before the last day for presentation and for that reason presentation is not timely made, the last day for presentation is automatically extended to the day occurring thirty calendar days after the last day for presentation."

3.3.4.4 Some comparisons of the solutions mentioned

The financial arrangements mentioned in 3.3.4.2–3.3.4.4. have similar objects. Subject to certain requirements they are all with variations, undertakings to pay out an amount of money or to guarantee the payment of an amount to a beneficiary. The draftsmen behind the different rules to which these undertakings are subject have chosen different solutions in respect of force majeure circumstances. These differences are not only dependent upon the various functions of the instruments, but they seem rather to be a consequence of traditions or specific proposals. The UCP solution reminds more of a traditional exemption of liability clause often found traditionally in financial agreements whereas the draftsmen of the ISBP solution seem to have had particular reasoning between them. Also in connection with the drafting of the URDG 758 the draftsmen were considering which force majeure solution would be the better one in respect of the functions of the independent guarantee.

4. Some final conclusions

Loan agreements as well as many other financial agreements form, as we have seen, a special contract type with particular characteristics. They require particular contractual solutions in several respects including how to deal with changed circumstances.

Against the background of various legal doctrines forming the backbone of contract law we have seen that several different solutions have evolved from various ends of contract law in order that certain objectives are achieved. Legislation may provide certain solutions. Often legislation is geared at general solutions and not always adapted to particular situations, and unless there is specific legislation geared at particular contract types, legislation is often not always very easy to apply in the individual case. Such solutions often form a last limit for what could (reasonably) be required from a contractual party with respect to its performance of its contractual promises.

Solutions developed by contractual measures are often more specific and precise. Frequently they also offer a variety of solutions considering the particular cause and type of event. These contractual solutions have evolved over time and they have mostly been introduced and amended to meet the requirements of the lenders/the banks. Generally these contractual solutions mirror different questions and when introducing them into the individual loan agreement the object of the parties is to try to set certain standards to meet different situations that may occur.

In view of financial crises which have occurred repeatedly but in various shapes there have evolved certain efforts to weigh in the interest of the borrower/the client of the bank, and it may now be the time also to give some further consideration to the need of the borrower in the loan agreements. It has to be acknowledged that risks of the lenders are heavier particularly after the drawdown of a loan, but there are certain situations where the borrower needs some protection in the loan agreement. This is particularly so, where a lender for different reasons try to avoid its commitment to lend the loan amount, thus refusing without good ground to allow the drawdown. Sometimes it may also be in the interest of the lender to try to accelerate prematurely the loan for immediate payment, but this is probably not very common.

As we have seen there are several different solutions in use, aiming at drafting particular clauses in various ways to handle rather precise problems or rather geared at creating a broad solution which could apply for several problems and could serve as tools for renegotiation. It is not uncommon to find in the same loan agreement both clauses covering more precise problems and clauses with a broader voverage.