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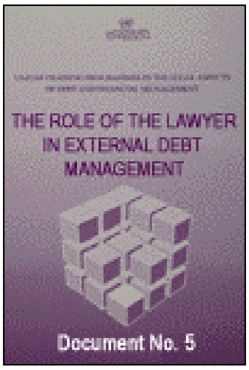
The Role of the Lawyer in External Debt Management



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INTRODUCTION

This document forms part of UNITAR's debt and financial management training programme which aims at meeting the needs of debt, economic, and financial managers in the legal aspects of financial management as identified by a high-level expert meeting held in Geneva as early as April 1987.

Since the on-set of this programme in 1987, training activities have been undertaken both in East, West, and Southern Africa on the one hand and in the Middle East, South and Central Asia (including Azerbaijan) on the other.

A wide range of sub-regional and national seminars and national follow-up workshops have already taken place with a view to sensitizing and/or training senior officers, middle-level managers, law professors, lawyers, and economists. UNITAR has developed an expertise in conducting training needs assessments, high-level awareness seminars/conferences, sub-regional seminars, follow-up in-depth workshops, "a la carte" training programmes, training of trainers workshops, and distance learning training packages in the field of debt and financial management. To date, 39 training activities have been conducted benefitting over 1400 participants from different sub-regions.

The UNITAR programme on the legal aspects of debt and financial management is predicated upon a modern vision of the lawyer as an advisor rather than as an advocate called upon to resolve problems or controversies only after they have occurred. The lawyer as an advisor must, in fact, be prepared and capable to assist his client in all phases of a transaction - strategic planning, choice of sources of financing, negotiation, implementation, management - helping him to formulate his position in clear terms, weigh alternatives and assess the implications, rights and obligations flowing from a particular provision, and of course deal with legal clauses such as those relating to constitutionality, legality and authority. More often than not, a lawyer must operate as a member of a team.

While many factors have led to the current debt burden of many developing countries, the underestimation and neglect of sound debt and financial management practices and the legal aspects thereof are among the most important. In the countries surveyed by UNITAR, a lack of awareness of legal procedures in debt and financial management prevails which has negative effects on their ability to repay their debts.

It is UNITAR's firm belief that considering the specific qualities that lawyers can contribute to international financial negotiations and the important role they must play at all stages of the procurement/ borrowing process, it is highly desirable to bring them in at a very early stage in a government's preparation for a particular loan operation - and keep them involved throughout as full members of the team. We hope that this document will point towards the centrality and importance of the legal aspects and of the role of the lawyer in external debt management.

Marcel A. Boisard
Acting Executive Director

THE ROLE OF THE LAWYER IN EXTERNAL DEBT MANAGEMENT

by Mr. Lee C. Buchheit

Any lawyer who has practiced hi the field of international financial law can recount stories of term sheets for major financings that arrived on his or her desk with a note reading, "Counselor, enclosed is the term sheet for the XXX Project that the [Minister of Finance] [Chief Executive Officer] signed yesterday. Kindly prepare the appropriate documents." These notes usually call forth a deep, world-weary sigh from the chest of the lawyer. A common variation of this note, however, can produce an audible gnashing of lawyerly teeth: "Counselor, enclosed is a fully executed copy of the credit agreement for the XXX Project signed by the [Minister] [Chief Executive Officer] yesterday. Kindly transmit soonest your legal opinion that the agreement is a legal, valid, binding and enforceable instrument of the [Republic] [Company]."

The first of these messages serves to remind the lawyer that he was not invited to participate in the negotiation of the terms of the financing for Project XXX; the second reveals that the client even found it possible to dispense with legal advice when negotiating the actual credit agreement. In the case of a borrower, this usually means that the client's review of the draft credit document - if indeed that review ever extended beyond the interest rate formula and the repayment schedule - was guided solely by the light of natural reason.

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I. The Fallacies

Why are lawyers so often relegated to an ancillary role in the negotiation of important external financing arrangements? After all, the medical profession has had at least some success in persuading people to consult their physicians before they become ill, on the theory that it is far easier and cheaper to prevent disease than it is to cure it. Why then has the legal profession not made similar progress in convincing its clients of the virtues of preventive legal advice? The reluctance of some clients to consult their lawyer before making important financial commitments can result from a misunderstanding about the appropriate role of legal counsel in external borrowing transactions. Here are some of those misunderstandings:

Fallacy One: These are business issues

Some clients believe that the sole purpose of a term sheet is to record the understandings of business people about business issues. Why ever, they ask themselves, would one invite the views of a lawyer about obviously commercial matters? The fundamental error motivating this question is a belief that the universe of potential issues in a financing transaction divides neatly between business points and legal points. It doesn't.

A great many of the so-called "legal issues" in a financing transaction are matters of such significance that a lender or a borrower would be well-advised to reconsider its position on the pricing of the credit depending on how those legal issues are resolved. For example, should the interest rate be 7% p.a. with a full tax gross-up, or 8% p.a. without such a gross-up? The lender might accept a facility fee of 0.50% if it receives a satisfactory indemnity from the borrower for potential claims of third parties, but demand a fee of 1 % in the absence of such an indemnity. A borrower might happily pay an extra 50 basis points on the interest rate for a loan if it could thereby avoid the inclusion of tight financial covenants or a paralyzing negative pledge clause in the credit agreement.

Many of the legal provisions in a standard financial contract can have pricing consequences for one side or the other. Lenders have always understood this. The lender's draft of the term sheet or mandate letter will therefore typically be crystal clear as to the interest rate, fees and expense reimbursement, while dismissing all other matters with the phrase "representations, covenants, events of default and jurisdictional provisions standard for this type of financing." Such a term sheet deliberately locks-in the financial terms, while allowing the lender full scope to negotiate the other provisions of the credit agreement in accordance with the lender's own understanding of standard market practice.

The very best time - often the only time - for the borrower to negotiate significant legal issues is before a mandate has been awarded. Only at this stage can the borrower advocate a particular approach to important legal issues and force the lender to consider whether that approach really will have pricing consequences for the deal. Until they are clutching a signed mandate, many lenders will be reluctant to increase their price quote for fear of losing the business to a competitor institution. A well-advised borrower may thus be able to win, at the pre-mandate stage, some important documentation points which would have been rejected by the lender out of hand had they been raised after the mandate was signed. Even if the lender does seek a change in the pricing of the credit in light of the borrower's proposals regarding significant legal issues, the borrower can at least then make an informed decision about the relative significance of those issues to it in light of the additional cost they will entail. Naturally, there are some contractual provisions (such as the governing law clause) about which many lenders feel so strongly that they would not be prepared to continue with the transaction in the absence of a customary treatment of the matter in the credit agreement. But most issues do not rise to that level. Unless the borrower seeks legal advice before the mandate or term sheet is signed, however, it may forfeit its moment of greatest negotiating leverage[1].

Fallacy Two: Legal issues don't really matter

Fortunate indeed is the borrower that has never had to forgo a new financing opportunity because this would violate the borrower's existing agreements, or had to seek a waiver or amendment of a troublesome provision in a loan agreement only to find that the lenders want something (money or otherwise) in return for giving the waiver, or had to send a notice to creditors reporting on some embarrassing situation that could, with the passage of time or the giving of notice or both, constitute an event of default. Blessed is the borrower that has never had to face the threat or the reality of a lawsuit by an aggrieved creditor, or seen its assets attached, or had to move its assets outside the reach of potential plaintiffs, or watched new investors be frightened off by the prospect of hostile creditor actions under existing loans. Happy is the borrower that has never paid more than it should have for a loan because it overlooked some nuance in the interest rate definition, the broken funding indemnity, the increased costs clause, the capital adequacy indemnity or the tax gross-up. Only borrowers in this position are likely to say that legal issues in credit documents don't really matter.

Fallacy Three: Lawyers are such quibblers

To the extent that a client views his lawyer as a necessary, but barely endurable, evil in a financing transaction, this may be more the fault of the lawyer than it is of the client. The truth is that some lawyers richly deserve then1 reputation as pig-headed, persnickety and pettifogging pencil-pushers. No sensible client would subject himself, the counterparty or the transaction to the ministrations of such a lawyer until the last possible minute.

When the lawyer is performing his function properly, however, the transaction will be facilitated, not hindered, by the active involvement of a lawyer from the earliest stages. It is true that the professional training of lawyers leaves them with a profound horror of imprecision. They are taught that a graceful ambiguity in a term sheet or mandate letter can result in heated accusations of bad faith and sharp dealing down the road, and that a gentle equivocation on some important issue in the final agreement serves merely as the prelude to an expensive litigation.

[1] This is not to say that issues cannot be raised with a lender after the mandate or term sheet is signed. One must recognize, however, that the burden of persuasion rests heavily upon a party seeking to renegotiate an issue that has already been addressed in the mandate letter or term sheet.

It is part of the lawyer's job to ensure that the business people are fully understanding each other when they negotiate a transaction. The lawyer is also responsible for seeing that the writing which memorializes that understanding is clear and comprehensive. These are skills that the client should seek in a lawyer and should honour when they are present. The desire for clarity is not quibbling, it is professionalism.

It is equally the lawyer's job, however, to help business people structure and implement the transaction without raising unnecessary drafting distractions or wandering off on legalistic tangents. In practical terms this means distinguishing, and helping the client to distinguish, between the important issues and the trivial or inconsequential points. In most business discussions, the negotiating capital of each party must be husbanded and carefully applied to issues that really matter to that party. It can be sad to watch a lawyer or a client expend this capital on insignificant points only to find, when an issue of some importance is encountered, that the counterparty is too exasperated to give any ground.

Fallacy Four: Lawyers are too aggressive

This complaint may also contain a grain of truth in certain cases. Some lawyers seem to have difficulty in determining where commendable zeal in the pursuit of a client's business objective ends and where gladiatorial excess takes over. This too is something of an occupational hazard for lawyers. From the moment they begin training for their careers, lawyers accept a responsibility to preserve, protect and defend the interests of their clients. Any client in trouble and any client burdened with a vexing problem will find this a particularly charming trait of lawyers.

The question is how this endearingly partisan instinct should be harnessed in connection with commercial transactions and document negotiation. An experienced lawyer knows that the bludgeon is rarely the instrument best suited to accomplishing a client's objectives in a commercial setting. Contract negotiation is, after all, an exercise in persuasion. Lawyers who rely too heavily on testosterone as their principal motivational hormone are often unsuited to commercial negotiation, particularly in a cross-cultural setting. An effective lawyer must convey a sense of reasonableness, equanimity and honesty. Most lawyers engaged in an international commercial practice understand one of their functions as being to reduce, not to exacerbate, friction and misunderstandings between the principals.

Fallacy Five: What do these lawyers know about financing, anyway?

The answer often is, quite a lot.

An active borrower may go to the international capital markets five or six times a year and think itself, on the basis of that experience, highly sophisticated in the ways of the financial world. Outside counsel to that borrower, however, may work on 25 or 30 deals a year in different countries with different types of lenders and for different clients. Over time, the lawyer develops an intimate familiarity with many financial institutions and with many types of financing techniques. It is the depth of this experience that can make outside counsel so useful to a client in analyzing both the commercial and the legal merits of proposed new transactions. A client that deliberately circumscribes the role of its legal adviser to drafting documents upon request or issuing legal opinions after deals are signed may thus be squandering a particularly valuable asset.

In-house legal advisers frequently develop a similar expertise. They also, of course, enjoy the additional advantage of having a thorough knowledge of the client's business, policies and prior transactional history. Indeed, it is not unusual to find that the institutional memory of some organizations resides principally in their legal departments. There is something of a self-fulfilling prophecy at work here. A client that wants its in-house legal advisers to contribute in a meaningful way to the evaluation of financing proposals needs to be diligent in ensuring that those lawyers are consulted at an early stage in all such transactions. This exposure will gradually strengthen counsel's familiarity with external borrowing issues and that familiarity will hi turn fully justify the client's continuing consultation.

II. The Usefulness of Lawyers

Once the client overcomes any inhibitions about using its lawyers, it is likely to find that legal advice is helpful throughout all stages of an external debt management program.

Borrowing Guidelines

Many governments like to establish borrowing guidelines that set out the approval procedure for incurring external indebtedness by the state (acting in its own name) and by public sector entities. In some cases, these guidelines may also apply to private sector borrowers[2]. Borrowing guidelines can be used to regulate the timing of external borrowings, the ceiling amounts, minimum tenor/grace periods, maximum interest margins and fees payable to the lenders and any other matters that the government feels are important[3]. The jurisdictional basis for promulgating borrowing guidelines can often be found in the government's authority to give foreign exchange remittance approvals for external borrowings, or in the government's authority to tax and regulate inward investment.

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[2] The history of the sovereign debt reschedulings in the 1980s and early 1990s demonstrates that no government can afford to ignore the borrowing practices of its private sector. Even though many private sector loans during the 1970s were originally incurred without the benefit of any type of government guarantee, the lenders were usually successful once the debt crisis started in forcing the governments to guarantee the rescheduled obligations or to assume the indebtedness entirely upon the payment to the government of the local currency equivalent (sometimes at a subsidized exchange rate) of the amounts originally due. The lenders' theoretical argument in support of this request focused on the common practice of forcing all foreign exchange in the country to be sold to the central bank following the on-set of the debt crisis. If the government wanted to centralize ownership of foreign exchange at the level of the central bank, the lenders argued, then the government must also assume liability for repaying the private sector's foreign currency obligations. The lenders' practical argument lacked subtlety: if the government wanted the lenders' cooperation in restructuring public sector debt, then the government must satisfy those same lenders regarding the treatment of their private sector exposure in the country. See Walker and Buchheit, Legal Issues in the Restructuring of Commercial Bank Loans to Sovereign Borrowers, in M. Gruson, R. Reisner (eds), Sovereign Lending: Managing Legal Risk, 139,141-42 (1984).

[3] See Wessel, "IMF Urges Developing Nations to Study Controls on Inflows of Foreign Capital", Wall St. /., Aug. 22,1995 at A2, col. 2.

Borrowing guidelines applicable to public sector borrowers may also set out policies regarding standard legal/documentation issues that arise in external borrowings. For example, the government may instruct that any cross-default clauses in credit agreements for public sector borrowers not pick up obligations of entities (such as the state itself or other public sector obligors) that are not a party to the loan in question. This is done to avoid the risk that all public sector indebtedness may be placed in jeopardy of acceleration should one public sector borrower fall out of compliance with one loan agreement. The guidelines may establish policies on matters such as negative pledge exceptions, acceptable grace periods on payment and covenant defaults, the scope of waivers of immunities and so forth. The important point for the government to bear in mind when establishing borrowing guidelines that address documentation issues is that the announced policies should not be so out of line with market practice that lenders refuse to do business in the country altogether[4]. The notion of "market practice", however, encompasses a fairly wide range of alternatives on most issues.

There is no doubt that borrowers sometimes regard guidelines of this kind as paternalistic and, for obvious reasons, they are not popular with lenders. The justification for such guidelines is that both the business and legal terms of cross-border financing transactions can be highly infectious. If a public sector borrower agrees to pay a facility fee of 3% or accepts a sweeping negative pledge clause in one loan agreement with one lender, for example, those precedents will almost certainly become the benchmark for all of its subsequent deals[5]. Moreover, all public sector borrowers in the country may have a direct interest in what each of their sister entities is prepared to accept by way of credit terms and documentation. If even one public sector borrower - out of laziness, inexperience or an unwillingness to consult competent counsel - agrees to a lender's first draft of a credit agreement, this will significantly increase the pressure on all of the country's other public sector borrowers to accept equivalent terms and similarly-worded clauses in their own external borrowings. Lenders in subsequent transactions for other entities will seize upon the most favourable precedents and purport to see in them standard market practice for deals involving Ruritanian public sector borrowers. This is a very hard argument for a borrower to resist when one of its sister entities has just accepted the clause in another deal.

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[4] A case in point was the policy of certain Latin American countries during the 1970s not to accept foreign law or submission to foreign courts in their external debt contracts. The reaction of many financial institutions was to cease lending to those countries until the policies were changed. See Shapiro, "Who Has Jurisdiction If a Government Is Sued?", Institutional Investor, April 1977 at 56.

[5] It is no use asking, by the way, how subsequent lenders always seem to know about a borrower's prior agreements. The international financial community is a surprisingly small village in which information and documents rarely stay confidential for very long

The infectious nature of these precedents justifies, in the minds of some governments, the promulgation of borrowing guidelines whose purpose is to standardize documentation practices throughout the public sector on important business and legal issues that arise in cross-border financing transactions. Some countries monitor these issues by requiring credit documents to be submitted to the central bank or the ministry of finance for review after negotiation by the parties but prior to signature. It is obviously more efficient, however, for the government to signal in advance what its policies are in this area and allow the parties to negotiate within the prescribed policies rather than wait to be told that their agreed deal trespasses upon some undisclosed government guideline.

Vetting Proposals

Legal advisers should be actively encouraged to participate with their business counterparts in reviewing financing proposals received from lending institutions. The purpose of such a multidisciplinary review is to ensure that the decision-maker fully appreciates the significance of different financing structures and terms. The days when governments financed themselves in the private markets solely through syndicated commercial bank loans are long gone. A government borrower today will face a bewildering array of financial products designed to tap different markets in different currencies. An experienced financial lawyer will bring to this evaluation the inestimable benefit of having seen and worked on a wide range of financing transactions with many clients.

Every one of these financing techniques has its own benefits and drawbacks. To raise $50 million, for example, a borrower may consider the alternatives of an unsecured bank loan, a private placement, a Eurobond issue, a repurchase arrangement involving an asset or something even more exotic. The money might even be borrowed in Swiss Francs, Japanese Yen or Deutsche Marks and swapped back into U.S. Dollars. Each instrument and each market involves very different legal and business consequences for the borrower. With respect to each technique, for example, the decision-maker will need to know how much disclosure is required about the borrower's business and prospects. Will the relevant market accommodate fixed or floating interest rates and for what term? Are multicurrency or revolving facilities available? How difficult will it be to restructure the obligation if this becomes necessary down the road? What type of legal liability will the issuer/borrower incur and how extensive are the financial covenants likely to be? No single professional adviser will be able to assess the full significance of all of these factors and, in the absence of such a full assessment, the decision-maker cannot intelligently compare the merits of proposals to raise money in various markets using different instruments.

Drafting the Mandate Letter

As noted above, the importance of this stage of the borrowing process cannot be overstated. Virtually everything of significance will, or at least can, be won or lost in the mandate letter or the term sheet. Unfortunately, because this document is usually presented to the borrower at a time when a sense of bonhomie still prevails among the business people who have just struck the deal, it is often not shown to the borrower's lawyer until the ink on the client's signature is drying.

By way of illustration, consider just one small nuance in the drafting of the expense reimbursement sentence in a mandate letter. Three alternatives for this sentence are:

(A) "The Loan Agreement will contain a clause by which the Borrower shall reimburse the Lender for all expenses incurred by the Lender (including, without limitation, fees and disbursements of counsel to the Lender) in connection with the preparation and negotiation of the Loan Agreement."

(B) "The Borrower shall reimburse the Lender for all expenses incurred by the Lender (including, without limitation, fees and disbursements of counsel to the Lender) in connection with this transaction regardless of whether the transaction is ever consummated or the Loan Agreement is signed."

(C) "The Borrower shall reimburse the Lender for all expenses incurred by the Lender (including, without limitation, fees and disbursements of counsel to the Lender) in connection with the preparation and negotiation of the Loan Agreement up to an aggregate amount of $75,000."

Now suppose the lender runs up $150,000 worth of expenses in trying to launch the transaction but, for whatever reason, fails to do so. It is usually at this moment that the mandate letter gets dusted off and sent to the lawyers. If the borrower has signed a letter containing alternative (B) above, the borrower should begin looking for its checkbook. It owes the lender $150,000. If the letter uses alternative (A), however, the lender will have no claim for reimbursement because the Loan Agreement containing the actual reimbursement covenant was never signed. Alternative (3) is ambiguous as to whether such reimbursement is necessary in the face of a "busted deal", but at least those expenses will be capped at $75,000.

This one small drafting nuance in a mandate letter could therefore cost, or save, the borrower $150,000 in the context of a deal that did not go forward. This nuance is easily overlooked in the flush of mutual congratulations that can accompany the securing of a large lending commitment from a private financial institution. Given the high mortality rate of certain types of transactions, the drafting of this sentence in mandate letters will almost certainly have practical consequences for a borrower sooner or later, and probably sooner.

Negotiation of the Credit Agreement

Some negotiation of the credit agreement will almost certainly be necessary and the involvement of experienced counsel in that negotiation is very desirable. A lender's first draft of a financial agreement, however standard in form, can be slanted by an experienced draftsman to favour the lender in various subtle or not-so-subtle ways. It is difficult to assess the gradient of the slant in any clause, however, unless one has carefully studied dozens of similar clauses in other transactions. Without this comparative expertise, the borrower will be unable to resist or to challenge the lender's assertion that the clause is "in standard market form"; an assertion that is often a negotiating show-stopper.

Lawyers can perform a variety of other useful services in contract negotiations. The lawyer may act as the spokesperson for his or her respective team (thus allowing the client to maintain a distance from the warmth of the verbal exchanges at the negotiating table) or as the master of ceremonies (ensuring that the parties move through the discussion efficiently and in some logical order)[6]. Naturally, the lawyer's presence in the room will also help to ensure that the business people do not settle on solutions to issues that are ineffective or invalid from a legal standpoint. If the lawyer will be assigned the task of drafting or of reviewing the eventual credit agreement, his or her presence in the negotiating room is essential if the draft document is to reflect faithfully the business understandings reached by the principals.

Some sovereign borrowers seem to worry that the negotiation of a draft credit agreement will offend the financial institution that is proffering the document. They may believe that openly questioning the contents of the document will somehow suggest that a mistake has been made in its preparation. In the author's experience, the epidermal layer of any international financial house is certainly thick enough to withstand this type of questioning. The lender will quite naturally prepare a first draft of the financial document that is favourable to itself. The lender will expect the borrower to look out for its own interests through a careful review and negotiation of the document. Indeed, it is when the borrower begins to show an overly passive acceptance of whatever is put before it that the lender should begin to worry. Apathy hi the act of borrowing money may presage apathy in the act of repaying the money.

Conditions Precedent

Once a credit agreement has been negotiated and signed, the borrower's lawyer will be expected to oversee the preparation of the various documents whose delivery to the lenders will be a condition precedent to the borrower's ability to draw down funds under the agreement. Among these documents may be certificates from officers of the borrower, copies of appropriate borrowing authorizations and approvals and, most probably, counsel's own legal opinion concerning the agreement. In a properly handled transaction, the borrower's counsel will have been given an opportunity to review and comment upon the forms of these condition precedent documents long before the credit agreement is finalized. A borrower that neglects to consult its lawyer until after the agreement is signed runs a significant risk that when the condition precedent documents come to be prepared, problems will appear that prevent the documents from being executed in their prescribed form. These problems may range from inaccurate representations and warranties in closing certificates to substantive problems hi the form of counsel's legal opinion. The embarrassment that this situation causes for the borrower may be endurable; the resulting delay in processing a drawdown of funds may not.

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[6] See L. Buchheit, Haw to Negotiate Eurocurrency loan Agreements (1995) at pages 145-47 for a discussion of the various roles that a lawyer can be asked to play in the negotiation of a financial contract.

Post-Closing Monitoring

Even after a credit is signed and fully disbursed, the services of a lawyer may be required hi connection with the post-closing monitoring of the agreement. It is not unusual for a borrower to be required to provide periodic certifications about financial or other matters under a credit agreement. Waivers or amendments of the agreement may be required. Events of default may occur that require a skillful presentation to the lenders describing the situation and the borrower's proposed response. New transactions may be considered that are inconsistent with covenants (negative pledge covenants are the obvious example) hi the borrower's existing agreements.

III. Some Advice for the Lawyers

What follows is intended as avuncular advice to younger lawyers, whether in-house or outside, that practice regularly in the field of international financial law.

Expertise

The purely academic content of international financial law is relatively small. What clients principally want from their legal counsel is experience. "How was it done last time?" "How is this issue typically addressed?" "Are there any precedents for this approach?" These are the questions that lawyers receive most often. It is extremely unusual to be asked whether the Drago Doctrine had any precursors in the Code of Justinian.

By its nature, this type of expertise can be derived only from the experience of participating in actual transactions and reviewing actual documents. A young lawyer should be constantly on the lookout for opportunities to broaden his or her exposure to different types of cross-border financing arrangements. Documents - even those benumbingly dense agreements that are used for certain types of deals - should be studied with a comparative eye and a retentive memory. In this field of law precedents are not important, precedents are tremendously important. Agreements therefore need to be read with a wakeful attention to drafting techniques and variations. The ability to tell a client that "it's always done this way" or even that it was *once* done this way is a precious gift when the client is struggling to justify making a proposal to the other party or accepting a proposal advanced by the other party.

Assertiveness

There are some types of legal practice in which lawyers can sit back and wait to be consulted about jurisprudential matters by their clients. This is not one of them. A lawyer in a cross-border financing transaction is expected to participate actively in developing and implementing the client's borrowing strategy. If one sits passively at the table and waits for a legal question to arise, one will have very little to say and even less of any practical help in completing the deal. As noted earlier, the lines between business issues and legal issues in this area are very blurry and no lawyer can effectively do his job by drawing an artificial ring around what he perceives as the purely legal issues. This is not to suggest that the lawyer should attempt to displace the function of his financial or economist colleagues. It is to suggest, however, that each professional must be actively involved in evaluating the financing project as a whole, while taking special responsibility for those aspects that fall within his or her special expertise.

Deportment

Lawyers, particularly when they are acting in a cross-cultural setting, must adjust their behaviour to the requirements of the client and of the situation. What may seem sheepish hi one context comes across as positively truculent in another. A lawyer who cannot calibrate his or her deportment to the needs of the client at a particular time is at a grave disadvantage. Any single style - whether aggressive, accommodating, inflexible or indecisive - can grow monotonous hi one negotiation and nearly intolerable for the client in any longer-term relationship.

Creativity

A good lawyer will spot problems. A better lawyer will help to overcome the problems. After all, no physician would practice medicine for long if all his consultations ended with the single message "you're ill". The patient will no doubt appreciate the diagnosis, but will be even more grateful for a prescribed cure. In the financial setting, this often means creatively searching for alternative legal structures that avoid the problem but still accomplish the client's business objectives.

Professionalism

This is not just a personal imperative. Business people recognize professionalism in legal advisers, whether their own or the counterparty's. With this recognition comes a sense of trust and reliance that, when absent from a financing transaction, is instantly and painfully apparent.

Mutual respect between opposing counsel in a project and between the lawyers and the other members of a negotiating team is the oil that allows a transaction to proceed smoothly. After making some reasonable allowance for the theatrical aspects of any negotiation, this respect allows the parties to have confidence in the truth of what they are being told. It permits a review of only those portions of complicated documents that have been changed as a result of the most recent round of discussions, rather than a word-for-word study of each new draft to ensure that unauthorized revisions have not been made. It allows clients to have confidence hi the judgments of their legal advisers without feeling it necessary to obtain to second opinions on every point.

IV. Conclusion

For many countries, the management of an external borrowing program is one of the most important responsibilities of the government. When it is handled properly, the benefits for the country can be very gratifying. When it is handled badly, the consequences can be equally visible - contraction of living standards, inflation, devaluation, unemployment and so forth. The massive sovereign debt problems of the 1980s and early 1990s are eloquent testimony to the terrible price that countries must pay when their external debt problems get out of hand.

Even at the level of individual credit transactions, the difference between a well-negotiated agreement and a poor one can be very significant. A reduction of 50 basis points in the interest rate margin can mean millions of dollars in savings over the life of the loan. A skillfully negotiated negative pledge clause can mean the difference between having access to secured financings in the future rather than having to pay very high rates for unsecured facilities.

The importance of a country's external borrowing program should drive the seriousness with which it recruits and trains the professionals that will be in charge of implementing the program. Because all credit facilities are, in the final analysis, legal relationships between the lenders and the borrower, lawyers must participate in this process to some extent. The prudent borrower, however, will rely upon its legal advisers as an integral part of its debt management team throughout the entire borrowing process.

About UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on:
- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: www.unitar.org/dfm.

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