
CHAPTER 4

Negotiation

*In business, you don't get what you deserve, you get what you negotiate.*⁴⁶
Chester L Karrass, author and negotiation expert

If lawsuits should always be a last resort, what action can countries take to avoid them? Loan negotiation is an essential option at every stage during a loan cycle until all obligations are met and fulfilled. This chapter looks at what is meant by negotiation, and at when and how it can be used to obtain the best possible terms and conditions in a loan agreement with a view to avoiding lawsuits in the long term. It also provides an introduction to negotiation techniques for the purposes of capacity building among government officials in HIPC countries.

4.1 When is negotiation possible?

Clearly, negotiating the best terms and conditions before concluding a loan agreement is a preventive measure that can avoid costly litigation later on. But negotiation is also possible at later stages for different reasons, such as avoiding the effects of litigation. For example, Cameroon settled with several litigating creditors through negotiation, even after lawsuits had already been lodged in court. Negotiation is an option even during the performance of obligations in the event of any difficulties arising. It is usually when countries do not take any action after they have defaulted that the creditor opts for litigation. Even in the case of Zambia, Donegal International Ltd was willing to negotiate the terms of repayment, but Zambia refused.

It is true that in the case of most loans contracted with multilateral and bilateral creditors there is very little scope for negotiation, as the sovereign state is made to sign a 'standard' loan agreement (see Chapter 2). But even in the case of standard loan agreements, the Commonwealth Secretariat Legal Debt Clinic seminars emphasise that the formulation of the terms and conditions must be negotiated. In court, interpretation is essential. Hence, knowledge of the standard issues to be inserted in a loan agreement is important. In addition, negotiating techniques help with commercial creditors, especially now that sovereign states are flooded with different

sources of finance. Negotiation with creditors also arises when a default in payment is due to occur for economic or other reasons, or when the country has to negotiate the restructuring or rescheduling of a loan.

It is important to be aware of the scope for negotiation at all stages. While legal officials may be primarily responsible for the legality of terms and conditions in loan agreements, finance officials engaged in public debt management will be involved mainly in negotiating and looking for the best formulation in relation to finance principles. Lawyers make good negotiators, but they are not always involved during the negotiation of a loan. The point at which lawyers are involved in the loan cycle varies from country to country, as the Legal Debt Clinic noted when participants shared their experiences. The failure to involve lawyers is a problem that most sovereign countries are suffering from today.

In addition, the role of lawyers in the phases leading up to the negotiation is vital. Usually in the past, in most indebted countries lawyers did not take part in the final discussions, although now, after much awareness raising, this is changing. This has been very harmful for many indebted countries. The lawyer's role during negotiations and the conclusion of a loan deal is helpful in identifying and avoiding risky clauses which place the sovereign borrower in a disadvantageous position. In addition, it makes the creditor's lawyer careful about its actions.

However, from the very lively debates in the workshops organised by the Legal Debt Clinic over the years, which at times verged on the argumentative, it should be highlighted that both lawyers and financial officers need to work together, be cautious and pay careful attention to financial, policy and legal issues.

On the basis of these experiences, the Legal Debt Clinic realised how important it is to impart knowledge of negotiation techniques to all the officials concerned – in the debt department, finance ministry or legal department. HIPC countries lack such skills and capacity building is necessary. Negotiating techniques are universal and can be applied at all stages. Once acquired, these techniques can be developed over time and in every circumstance.

4.2 What is negotiation?

Negotiation is often defined as a discussion intended to produce an agreement or as a means of resolving disagreements. In the plural, negotiations describe sessions of one or more meetings at which attempts are made to reach an agreement through discussion and compromise. Put simply, negotiation is a process undertaken to resolve a situation of conflict or disagreement in order to achieve one party's main interests.

The disagreement or conflict is not always negative. The factors that give rise to conflict can be complex. In the context of borrowing, it should be noted that the parties involved in negotiation have unequal bargaining power: the borrower has less power and the lender is always in a dominating position.

Negotiating skills, like any other skills, can be acquired with time and experience. Based on repeated requests to the Legal Debt Clinic seminars, this chapter aims to provide an insight into what to do and what not to do during a loan negotiation, offering understanding and skills to equip public officials to meet the challenges of financial negotiations. A properly negotiated contract will always give an edge in court to the sovereign debtor.

It is worth first considering the dynamics of negotiation. The act of negotiating is a means to achieve an end. Negotiation helps a party achieve its interests. The art of negotiation comprises a number of aspects which all lead towards this single goal.

Negotiation is a process of give and take. The act of negotiating is not always an argumentative one. Once the parties have signalled their willingness to talk with each other, it can be a platform for sharing information and reaching a satisfactory agreement. It opens the doors to dialogue to solve any problem that is preventing the parties from agreeing with each other.

Unless there is give and take, negotiations may end in deadlock. So while there is often a situation of subordination and an obvious need for the borrower to submit to the demands of the creditors, there is always an element of give and take. It was often said in the Legal Debt Clinic's seminars that 'the sovereign debtors are in dire need of money, but the creditors are also in dire need of making a return on their investment, and they have to part with their money'.

There is always an element of power bargaining in negotiations, as they involve conflicting interests and risks on both sides. The sovereign countries have to be aware that whilst they need the loan, the creditor also needs to invest its money and will eventually lend. Seeking the best option for the debtor state is therefore very important, while understanding the balance of risks involved. The borrower receives the money immediately, but the lender will only obtain repayment in the future. So there is a greater risk to be borne by the creditor in the event of default than on the part of the borrower. Disagreement arises because on the one hand the risks appear higher for the creditor, while on the other the terms and conditions appear too expensive for the borrower. It is these conflicting circumstances which negotiations must explore, discuss, manage and bring to a workable and acceptable conclusion to the satisfaction of all parties.

In addition, the act of negotiation is subject to other influences, such as the political,

economic and social context in which both parties are operating. On a personal level, negotiators may become psychologically and emotionally involved in the discussions, and lose sight of their main goal. Becoming emotional is a normal reaction, but emotional issues must be properly managed, to avoid tempers flaring. Otherwise the parties may walk away from a very good deal or agree to a badly negotiated contract.

Each loan transaction has unique features. As already explained, while loan agreements with multilateral institutions have a basic structure and clauses which cannot be negotiated (the 'standard' agreement), in the case of bilateral and commercial creditors, the terms included in a loan agreement can always be negotiated. Even the settlement agreement with a vulture fund creditor after it has purchased the loan from the original creditor can be negotiated by the sovereign debtor.

4.3 Negotiation methods

A proper negotiation for a loan agreement does not start when the parties finally meet around a table to discuss terms face-to-face. It usually starts earlier at the pre-contractual stage, when decisions are made on whether or not to enter into negotiations with a particular creditor. It must again be emphasised that negotiating techniques can be used at any stage during a loan cycle – pre-contractual, contracting and post-contractual.

This section highlights a set of operational tools and methods that will allow a smooth negotiation, whether around a table, via video conferencing or by any other means. These practical methods are based on the experiences of participants in the Legal Debt Clinic. They are an introduction to the skills needed, presented in the form of checklists which can be used as reminders or as training and preparation for negotiating teams.

Before beginning any negotiation, it is essential to clarify the steps of the process through which a loan is negotiated.

These steps are basic, but essential. Different countries have different processes. Laws and procedures differ from country to country. In some HIPC countries the laws that govern the procedure through which a loan can be contracted are outdated. A recent development has been that only the minister of finance is vested with the power to contract a loan, whereas previously any minister or ambassador was empowered to do so.

Figure 1. Negotiating a loan

STEP 1

Identify loan project and check if it is viable

A request is received for a loan or the implementation of a project. The Finance Department analyses the project's viability.



STEP 2

Get clearance

It is vital to obtain the necessary institutional clearance to proceed. In some countries, approval from Parliament is required before a loan agreement can be signed.



STEP 3

Form team

The negotiating team is set up.



STEP 4

Negotiate

Now the team can negotiate for the best terms and conditions and carry the loan project through to completion.

The negotiating team should include members with different expertise – officers with technical knowledge of the project, debt managers, legal advisers and other senior officials. This team may be the final team that will negotiate the loan agreement or the loan may be negotiated by a smaller unit from this team. All team members need to know and apply negotiating techniques, not just one individual or the legal adviser. They need to apply them at all stages of the loan-contracting process, whenever the opportunity to forward their interests arises.

A robust methodology to ensure effective negotiation involves preparatory work by this team of officers. This involves several stages which many countries overlook. The stages are:

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1. Analysis of issues
 2. Setting out aims
 3. Preparation
 4. Planning
 5. Negotiation
 6. Implementation and review

Before undertaking any negotiation, the team needs to understand what aspects they should be negotiating. As observed by the Legal Debt Clinic, they need to identify areas where research is needed. Time to prepare for the negotiation is often short because creditors do not always give advance notice to the sovereign debtor's office.

Here we highlight some basic issues. This account of the preparation needed by the negotiation team may appear obvious, but it is essential. If followed properly, it will ensure that a safe loan agreement is reached.

This series of simple checklists gives an overview of methods and basic issues. It is based on the Legal Debt Clinic seminars and can be used as an aide memoire or as a training resource.

1. Analysis of issues

- What is the central purpose of the loan project? Has it been analysed and fully explored? (For example, the loan may be for the building of a hospital.)
- What are the secondary issues? (For example, it may be that, given the interest rate at which the loan is being repaid, the country cannot take out another loan.)
- Is the proposed manner of borrowing the best way to meet the need? (For example, has the country first explored the possibility of obtaining a concessional loan or grant?)
- Is the proposed source of funding the best source?
- Have all access to finance options been explored?
- Has the project satisfied debt management committee prerequisites?
- Are there any laws or regulations that need to be dealt with before starting the borrowing process and has this been done? (For example, does the law require any procedure to be met before the contract becomes valid?)

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- What are the country's interests?
 - Has the level of state indebtedness, revenue and expenses been taken into account?
 - Who are the parties to the negotiations?
 - What are the interests of the other party or parties?
 - What is the common ground among all parties?
 - On what basis are the interested parties working together?
 - What information is needed from the other party or parties?
 - What is the best alternative to a negotiated agreement (BATNA)?

2. Setting out aims

Not all the aims are analysed here. These are just examples of the kind of detail needed in setting out the aims.

- What is the purpose of the negotiations? The aims must be:
 - clearly set out
 - specific (not general)
 - practical
 - realistic in terms of time
- Precisely how much funding is needed?
 - What will be the exact interest rate – agreeing on an exact figure, for instance 2 per cent, instead of less than 8 per cent?
 - What about market rate fluctuations?
 - Have all expenses and revenue, as well as unforeseen circumstances, been taken into account?

3. Preparation

The team members should have a range of skills to ensure effective preparation. This will help them meet the other party with confidence. Most countries fail to prepare effectively, as they are handicapped by lack of information, poor logistics or a badly chosen team. Preparation should cover points such as the following:

- How much time is needed for preparation?

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- What information is needed about:
 - the project?
 - the background of the parties involved?
 - the negotiators?
 - facts and assumptions?
 - Where can the information be found?
 - from research?
 - from information available on the borrower's side?
 - from the parties themselves?
 - What information can be obtained before the negotiation?
 - What information has to wait for the face-to-face meeting?
 - What are the strengths and weaknesses of the parties involved?
 - What are the political or commercial interests of the parties involved?
 - Are there any cultural or background differences?
 - What type of guarantee will be needed?

4. Planning

Planning how the negotiations themselves will take place is also critical and means thinking through when, where, what, who and how.

- When and where will the negotiations take place?
- What constitutes a friendly setting?
- What is the timetable for the negotiations?
- In what order should the issues be negotiated? Is it better to start with easier or more difficult issues?
- Who will speak on which issue?
- How are tasks on different issues allocated?
- What issues can be conceded?
- What issues must be agreed at the end of the negotiations?

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- When will be the right time to walk away – depending on your BATNA?
 - How will the negotiations start and finish?
 - What is the contingency plan?

5. Negotiation

During a negotiation, it would be wise not to take anything personally. If you leave personalities out of it, you will be able to see opportunities more objectively.

Brian Koslow, US author and entrepreneur

Around the negotiating table, it is important to be aware of the other party's tactics, remembering that they too will have prepared and planned. A successful negotiator will always keep emotional and psychological issues out of the negotiating strategy. This checklist outlines key skills and behaviour to adopt (or avoid) in any negotiation.

Listening and communicating

- Display positive behaviour – agreeing and understanding
- Be polite, diplomatic, respectful and calm
- Be attentive to facial expressions
- Listen attentively and ask questions at the right time

Giving information

- Offer information
- Make propositions
- Build on their points
- Cover one issue at a time

Seeking information

- Ask questions
- Ask for propositions
- Let the other party speak first
- Study counterproposals

Leading

- Restate positions to clarify
- Ask questions to be certain
- Summarise and check
- Create rapport
- Seek clearance

Working as a team

- Discuss with team members before reaching final agreement
- Give due notice before making last minute additions to the contract

Behaviour to avoid

- Negative behaviour – being defensive, unco-operative, argumentative or disagreeable
- Speaking at the same time as the other party or interrupting
- Bullying
- Distracting behaviour such as reading papers or fiddling with documents

6. Implementation and review

Negotiation does not end with the signature of the agreement or contract. Points to keep in mind after signature are:

- The minutes of the negotiation should be signed.
- The responsibility and undertaking of each party to fulfil their part should be well outlined.
- Any conditions precedent should be met, such as finalising the agreement in accordance with the law.
- Follow up the implementation of the contract.
- Check if there are any further conditions to be met.
- Look into issues such as repayments and the right time for rescheduling or buy-back of the loan.

Conclusion

This chapter has examined what is meant by negotiation, and when and how it can be used to obtain the best possible terms and conditions in a loan agreement with a view to preventing lawsuits in the long term or to dealing with them when they do arise. It has offered practical guidance about negotiation methods for the purposes of capacity building among members of negotiating teams drawn from different professional backgrounds, both legal and financial.

This is just an introduction to negotiation. When embarking on a loan negotiation, team members may need to seek further training, building on an awareness of what is involved. Such training can be expensive: not many organisations run free seminars. The Legal Debt Clinic conducted its seminars in collaboration with other partner organisations. Two useful organisations which offer such training for a fee are UNITAR and the Crown Agents.

To recap the main messages of this chapter:

- It is important to involve a lawyer from a very early stage in the borrowing process.
- There is an ongoing need for capacity building for both legal and financial officers involved in negotiations.
- Negotiating or renegotiating a sound loan agreement is the most effective way of avoiding lawsuits.
- The negotiating team should include different professionals, with a range of technical, financial and legal expertise, who need to collaborate and share their understandings.
- While there is always power bargaining in a loan negotiation, there is also always an element of give and take.
- Negotiations are subject to other influences, such as the political, economic and social context within which both parties are operating.
- The formulation of clauses and their interpretation is very important and should be matters of concern during a negotiation.
- Understanding the basic concepts of negotiation and using them effectively is to the advantage of the borrower.
- Negotiating techniques can be used at any stage during a loan cycle – pre-contractual, contracting and post-contractual.
- Negotiation does not end when the loan agreement or contract is signed, but continues during the implementation and review stages. This mainly involves issues of debt management; these are covered in the next chapter.

Further reading

- United Nations Institute for Training and Research (UNITAR), <http://www.unitar.org/>