government itself) insolvent, is adjudicated a bankrupt or is dissolved or liquidated.[96]

However there are instances in which a default under one loan is linked to another loan by what is known as a *cross default clause*.[97] A *cross default clause* defines an event of default under one loan agreement as an event of default under another loan agreement. The primary purpose of the clause is to assure equal treatment for all creditors of the same class when a general default appears imminent.

The main purpose of a lender negotiating this clause is to use the clause to place himself as nearly as possible in the same position as another lender whose loan has been defaulted upon by the borrower. Thus, this is a method to search for over protection adding to the difficulties of the borrower.

It is said that some basic precautions are warranted when approaching these provisions.[98] *Firstly* the clause should contemplate only matters which are imputable to the borrower, not to the lender or third party. Borrowers should also make sure that default is declared by the majority banks in order to be valid. *Secondly* the possible sources of default should be explicitly distinguished in the provision and mark the difference between '*technical default*'[99] and '*administrative or blatant default*'[100] and the remedies should be worked out proportionately.[101]

With respect to cross default clauses the borrowers should strive for clauses in which cross default can only be declared when the borrower fails to pay other loans to any of the banks participating in the operation at hand, a default to a non participant in the loan should not be enough to invoke this clause. This is called "*limited*" cross default as against the "*open*" cross defaults.[102]

Finally, borrowers should avoid omnibus clauses such as *material adverse change*.[103] Moreover, phrases such as "*may be declared*", "*capable of being declared*" "*in the judgement of the banks*" should also be avoided because they expose the borrower to a situation where political and ideological considerations may outweigh strictly economic and financial realities.[104]

Applicable Law and Jurisdiction

An international loan agreement invariably involves the laws of more than one country, particularly in the case of syndicated loan, it is the general practice of the parties to make an express choice of the law to govern in the agreement itself instead of leaving the question to be resolved by courts according to local rules on conflict of laws. However, much attention has been paid in both *case law* and *legal literature* to the issue involved in deciding what law applied to transnational loan contracts and what effect an applicable law clause in the contract has on the obligations of the parties.[105]

It is said that there are at least two reasons for lenders wish for loan agreeents to be governed by a law other than a developing (invariably) debtor country's law.

(a) that the agreements involve complicated financial and banking practices and a sophisticated and familiar body of law should be applied to the contract. And in the opinion of the lenders most of the developing countries do not meet this standard.

(b) What is more, lenders do not want a borrowing country to be able to change its law after the agreement has been signed in a way that would change the oligations of the borrower under the agreement.[106]

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96. Lester Nurick, n 80, p. 62.
97. *Ibid* see also Venkachari, n 4 p. 96.
98. Jose Angel Gurris Trevino, *op cit* n 6 p. 41.
99. Such as non-compliance with a covenant.
100. Non-payment of amounts due under the agreement.
101. Jose Angle Qurria Trevino n 6
102. *Ibid*
103. A clause is sometimes found in this section which states that a loan can be accelerated if there has occurred a situation which constitutes a "material adverse change."

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104. Jose Angel Gurria Trevino, n 6 p. 41.
105. It is interesting to note that according to an article in the *Wall Street Journal* (22nd Oct. 1982) the French Govt. in negotiating $ 4 billion syndicated credit, strongly objected to three clauses in a loan agreement proposed by the lending banks. These three clauses were *pari passu* clause, the *cross default clause* and the clause providing for the *right to sue in case of default* in courts other than those of France (The jurisdictional clause). The newspaper article characterised, these clauses "*as usual in most international loan syndications*". After discussion started to be bitter, the article stated that the French Govt. compromised *pari passu* clause and *cross default clause* but not on the *jurisdictional clause.*
106. See for example, P. Wood, Law and Practice of International Finance 1980; p.Coogan, W.Hugan and D.Vagts *Secured Transactions under the uniform commercial code* (1982) quoted in Lester Nurick n 80 footnote 4

Be that as it may, most of the transnational agreements prescribe the applicable law as that of State of New York or United Kingdom, French, Swiss, Germany, Japan or Luxembourg. The Law of these jurisdictions are applicable without prejudice to the creditors always having the option of claiming his rights before the courts of the borrowers' country. There are only a few examples wherein the applicable law was that of the borrower as in the case of Colombia and Venezuela. However, when colombia succeeded in having its agreements governed by Colombian Law, several United States major banks have refused to participate in Colombian syndicates. American banks are more firm on this point whereas Japarese banks are flexible.[107]

The question of jurisdiction or forum for settlement of disputes is related to choice of law issues. Like the choice of law issue, the lenders generally feel that disputes should be settled in a forum other than borrowers local courts. Sovereign borrowers must be extremely careful to negotiate law and jurisdiction with which they are familiar. However, another alternative would be to grant jurisdiction to the courts where the parties have their place of business, or, if unavoidable the courts where the borrower has assets. That would be better than yielding to the stipulation of the lenders choice of jurisdiction. However, it would appear that the current market practice, which reflects the superior bargaining power of the lenders, is to choose the governing law and jurisdiction in accordance with the wishes of the lenders.[108]

Although the lenders insist that the applicable law and jurisdiction should be of their choice, there are instances wherein they have accepted for local law and jurisdiction. It seems to be a question of how strongly a borrower, particularly a sovereign, feels about it. Moreover, the question of appliable law and jurisdiction is one of non-financial policy matter and has been governed by public policy and international law applicable to international contracts, with certain amount of practice. Hence the borrowers instead of agreeing for the so-called non-exclusive jurisdiction should strive to pursuade the lenders to accept a mutually acceptlable law and jurisdiction.

Waiver of Soveign Immunity

107. Lester Nurick *ibid* n 80 p. 72.
108. Qamar S.Siddiqui n 80 p. 54.

It is for the same reasons that the lenders require their choice of law and jurisdiction, they also require that sovereign borrowers waive their immunities from jurisdiction and enforcement of judgement. This is due to the fact that there have been statutory changes in some countries such as U.S.A. and England relating to sovereign immunity,.[109] According to these statutes, sovereigns, with certain exceptions, are not immune from suit, judgement and execution of judgement for claim arising out of their commercial activities. For instances, under the English Act, loan transactions are defined as "*commercial transactions*" and therefore not entitled to sovereign immunity.[110]

The issue of demanding the waiver of sovereign immunity of a state has wider connotations. Of late, it has been a topic for serious consideration by all concerned, particularly the developing countries.[111] Denying immunity purely on the ground that nature of transaction is of contractual character would raise the question whether a State is entitled to place all contractual transactions of another State, outside the sphere of governmental activity.[112] It would also amount not only to a value judgement on the part of a State regarding what other states do in the exercise of their governmental capacity but also takes no cognisance of differing social political systems of other States.[113]

Thus, the issue of waiver of immunity is being sought to be incorporated in loan agreements based on the strength of such legislations. However, it is to be noted that practice relating to this question differs from country to country. While countries such as U.S. and U.K. seek to provide restrictive interpretation. There are several countries where a broader interpretation is provided. In the immediate context of the loan agreements, there are instances where explicit waiver of sovereignty has been omitted. Nevertheless the lenders have

109. Foreign Soveign Immunities Act 1976 of U.S.A. and State Immunity Act of 1976 of England.
110. Lester Nurick n 80 p. 73.
111. For instance the matter has been under consideration by the Commitee since November 1983. For detailed analysis on Jurisdictional Immunities of States in the context of the US. and UK Statutes see Doc No. AALCC/im/87/1. A meeting of the legal advisers of the member governments of the committee was held in New York to consider this topic. for the report of the legal advisers meeting see the report of the secretary general to the curent session. Jurisdictional immunities of states has also been a subject of examination within the International Law Commission since 1977 with a view to its progressive development and codification. On first reading, the ILC has provisionall codification. On first reading, the ILC has provisionally adopted a set of Draft Articles.
112. AALCC/.IM/87/1 p. 29
113. *Ibid.*

done what they could to ensure the submission of the borrowers to English or New York Law.[114]

3. Settlement of Disputes Relating to Commercial Loans

i) *Adjudication and its Limitations*

It would seem that the prevailing trend relating to commercial loan agreements do not provide a broader framework for the settlement of disputes that may arise in the course of transactions between the creditors and sovereign borrowers. The issue of *applicable law, jurisdiction* and *waiver of immunity* is settled in tune with the lender's choice and it would indicate that in the event of a dispute the lender would like to bring the defaulting sovereign borrower to litigation by a creditor suit. However, such an assumption has proved to be tough when tested in few default cases. Instead of facilitating such course smoothly the creditor suits have come to be felt as obstacles due to the defense advanced by the debtors in terms of both procedural and substantial law. The suit may be initiated by a lender under the following circumstances. Many smaller banks have participated in syndicated loans to sovereign borrowers. Upon a declaration of default by a debtor state, one of those banks may refuse to go for renegotiation, which is the normal practice in the event of a default in a syndicated loan. Moreover, the relatively small international exposure and the favourable provisions in the agreements would encourage the banker to bring a suit in its domestic court. However, there are certain legal problems wherein such expectations were dashed due to the defense available to sovereign debtors.

The mere waiver of immunity by debtor sovereigns from suit does not automatically solve creditor's problems. In fact, it would seem, paradoxically though that the filing of the suit is the beginning of a creditor's problems. Although for instance, the Foreign Sovereign Immunities Act 1976 of United States strengthens the hands of private creditors, it also suffers equally from deficiencies. It is said that the absence of a definition of "*commercial activity*" is of fundamental concern and it has given rise to uncertainty which may be an obstacle to a private claimant in depriving a foreign State of its defense of immunity and subject it to the jurisdiction of the local courts.[115]

114. Lester Nurick n 80 p.74

115. See Georges R. Delaume, "Public Debt and Sovereign Immunity: The Foreign Sovereign

Moreover, such statutory vagueness seems to have been compounded by the paucity of case law which makes it further difficult for the creditor bank to prove that the defaulting State was engaged in commecial activity in the U.S.[116] Even if the creditor succeeds in bringing a suit in U.S. Court under FSIA, the debtor sovereign then has a strong defense in the form of Act of State Doctrine. Unlike the doctrine of sovereign immunity, the act of State Doctrine is not concerned with whether the foreign State can be sued in domestic courts, but focusses upon whether actions of foreign states are justifiable in the U.S. courts. Again, the very obtaining of a creditor judgement does not solve the problem for the creditor because it may face obstacles during its enforcement. The creditor may find the debtor State's assets within the jurisdiction of the forum court inadequate to satisfy the judgment amount and some of the assets might already have been moved out in order to evade attachment.

In order to realise the full value of its claim the creditor bank may have to enforce the judgment in foreign courts wherever the debtor's assets are situated. State practice relating to this question differs from country to country. What is more, the issue may contradict the public policies of the foreign states, because they may not force their courts to choose one sovereign against another.[117] There are other practical consequences of such creditor suits leading to a situation where things may not be different from an outright default by a debtor state.[118]

There have been certain creditor suits which have become land marks in this regard. They are *Frankel; Libra Bank* and *Allied Bank* cases. [119] These cases arose from Latin America and bear almost similar facts. In all these cases the claim is made by a creditor who demanded payments of the debt contracted by a public entity which has defaulted on one or more payments because of certain enactment, by its government, of monetary control measures which have prevented it from obtaining foreign exchange to make payment.

Immunities Act of 1976." *American Journal of International law*, Vol. 71, 1977 pp 399-422 at p. 421.

116. Barry C. Barnet, Sergio J. Calvis, Ghislain Gouraise, Jr., "On Third World Debt", *Harvard International Law Journal*. Vol 25, No.1, 1984 at 102.

117. *Ibid* p. 112.

118. *Ibid* p. 113.

119. For a brief discussion relating to law and facts on these cases see Gonzalo Biggs n 69 pp. 183-185.

When the suits were formally instituted, the defendants who were national banks of the debtor sovereigns invoked the concepts such as Act of State and Sovereign Immunity, etc. in their favour. Although the defence of sovereign immunity did not find much support in the U.S. courts (forum courts) the defense of Act of State was accepted. While accepting this defense in *Allied* case the judge added that questioning the act of *Banco de cartaga* would bring the U.S. judiciary into conflict with a foreign government and that would upset the relations between the executive branch of the U.S. Government and the Government of Costa Rica, because *Banco de Cartaga* is a national bank. Such a decision by the trial court in *Allied Bank* case made the parties to abandon the suit with a view to rescheduling Costa Rican debt. It may be pointed out here that although the decision in this case was later reversed by a U.S. superior court, the lenders were generally advised to seek other methods for dispute settlement rather than a creditor suit.[120]

(ii) *Arbitration : Is it an Alternate?*

International community has always been able to work out alternate methods of dispute settlement relating to disputes between international persons themselves as well as between international persons and private parties of other States. The immense growth in international economic transactions after Second World War particularly between private parties and Sovereign States have had the effect of inventing novel methods of settling economic disputes. In that sense the growth relating to International commercial arbitration is significant and it covers almost all the areas of international economic transactions such as trade, construction, industrial cooperation, licencing, brokerage contracts, agency, joint ventures and others.[121] Such an increasing resort to arbitration is due to its comparative advantages over litigation.[122]

120. Ettore A. Santneci "Sovereign Debt Resolution through International Monetary Fund: An Alternative to the Allied Bank Decision" *Denver Journal of International Law and Policy* Vol. 14 No.1, 1985 pp. 1- 34.

121. See Oscar, A. Ruiz Del Rio, "Arbitration in International Loans" *Journal of International Arbitration* Vol. 4 No.3 September 1987 pp 45-70 at p. 45.

122. For an account of the advantages of arbitration over judicial adjudication see Hans Smit, "The Future of International Commercial Arbitration: A single Transnational Institution" *Columbia Journal of Transnational Law* Vol. 25 No.1 1986, pp. 9-34 at pp 9-12; also M. Domke, Domke on Commercial Arbitration in G.Vilner (ed.) *The Law and Practice of Commercial Arbitration 1984;*

However, it is to be noted that the field of international banking and financing does not have any enthusiasm for arbitration as a method of dispute settlement.[123] There are several reasons for such an attitude ranging from time factor to psychological factors. For instance, lenders seem to think that arbitration involves the risk of delay which may affect the early collection of the money from the borrower.[124] Domke, one of the pioneers of *international arbitration*, viewed that the lenders were afraid of the possibility that awards might be based on equity and not on strict legal principles.[125] Historically also, the lenders have been resorting to litigation as far as their money claims were concerned.

The international loan agreements between commercial banks and sovereign banks have clearly avoided arbitration as a dispute settlement mechanism. This was possible because of the superior position that the lenders enjoyed in their relationship with borrowers which enables them to impose clauses relating to applicable law, jurisdiction and sovereign immunity. However, there are instances which make it clear, as seen before, that the lenders have tried the effectiveness of these clauses only in smaller cases.

There are instances where the lenders are compelled to insert arbitration clauses in their loan agreements against their normal preference for litigation. This happens when the borrower's legal system prohibits the nation from submitting to litigation before other courts. Brazil is a classical example in this regard for the simple reason that it also happens to be one of the biggest debtors. Brazilian legal system provides for the arbitration of State Loans.[126] Thus while the lenders are not for arbitration, one of their biggest customers insists on arbitration. However, the effectiveness of Brazilian preference for arbitration has not yet been tested in any notable manner.

Ole Lando, "The Lex Mercatona in International Commercial Arbitration" in *International and Comparative Law*, Quarterly Vol. 34, 1985 pp 747-768. Lucian Tiburuha Inernational Commercial Arbitration: Establishment of a Regional Commercial Arbitration Centre for the P.T.A. *Asian African Legal Consultative Committee* (1987), pp 5-12.

123. Oscar A. Ruiz Del Rio n 123, p. 45.

124. Lester Nurick n 116 p. 72.

125. Oscar A. Ruiz Del Rio p. 48.

126. Decree Law 1312 of February 1974 provides in Article 11 "The national treasury acting directly or through a general agency may agree to such clauses and conditions as are usual in transactions with international financing organizations, and general agreements in advance to settle doubts and controversies arising from the respecive agreements by arbitration shall be valid".

The method of arbitration, however, has its weaknesses too. For instance, unlike Brazil, States may prohibit arbitration because State Contracts are not arbitrable. Besides, there may be serious problems relating to the enforcement of arbitration awards. Such a difficulty may arise due to the concept of public policy (*odre public)* of a State in whose jurisdiction the award might be sought to be enforced.[127] This is because of the reason that every legal system is built upon particular principles and values. However, a recent definition on public policy runs as follows "the legal (both public and private), political, economic, moral and even religious principles that are mandatory for the preservation of social order in one nation at a given historical time".[128] For instance, in several Arab legal systems the international loan contracts by public entities are non-arbitrable .[129] However, it is also true that it is difficult to find an instance where the public policy exception was used to defeat an award.[130]

It would not be out of context, if an analogy is brought in relation to the context of international loans between commercial banks and sovereign borrowers. That is the dispute settlement machanism available regarding investment disputes between a foreign national of one State and another State. This seems to be the closest analogy in the present context. The investors mostly from the industrialized nations while desisting from national court solutions relating to nationalisation disputes, have found an alternate method in the form of arbitration. The Convention on the Settlement of Investment on Disputes is an outcome of such a trend and it would appear that it has notable features which would serve the purposes of arbitration relating to a dispute between a private lender and a sovereign borrower.[131] Nevertheless, seemingly it had not occured to the lenders that they should use a similar mechanism regarding their dispute with sovereign borrowers. Instead, the insistance on litigation remains as a continuing puzzle.

There is no dearth of institutions and procedures that could be resorted to for the purpose of arbitration in this regard.

To name only a few : Court of Arbitration of the International Chamber of Commerce (ICC); London Court of Arbitration; American

127. See n 127 pp 63-66.
128. Interpretation by the Supreme Court of Span.
129. *Ibid* p. 64.
130. *Ibid* p. 66.
131. *Ibid* see pp 58-60 also see Delaume, n 117, pp 420-422.

Arbitration Association; Permanent Court of Arbitration in Hague and Regional Arbitration Centres such as Regional Centre for Arbitration in Kuala Lumpur and the Regional Centre for Arbitration in Cairo (under the auspices of the Asian African Legal Consultative Committee). In terms of procedural aspects some of these institutions provide their own rules as in the case of International Chamber of Commerce. However, the rules of arbitration established by the United Nations Commission on International Trade would be less controversial in this regard.

However, in view of the lenders' current preference for litigation it remains to be seen as to when it would be the time of arbitration. In this regard what Delaume observed seems to be true; "the choice between one or the other means of settling loan disputes is, to a large extent, a matter of taste".[132]

(iii) *Multilateral Settlement. The need for political will*

The proven futility of the litigation process and overwhelming hesitation regrding arbitration would put the parties concerned, at least, in future to search for new methods of settling disputes relating to international loans. That would be necessary in view of the demand made by the debtor nations for political settlement of debt crisis for sometime now. It would also seem to be essential in the context of the recent consensus that emerged between the debtors and creditors during the seventh session of UNCTAD, namely the shared responsibility for the resolution of the debt crisis. Hence the need to search for precedents of a settlement through a method which was neither litigation nor arbitration but entirely different.

Although rare, there is one concrete example of a comprehensive settlement of all the foreign debts both private and public, or a single state through political negotiations. That is the London Debts Agreement of 1953 between the Federal Republic of Germany and victorious powers such as Franch, United Kingdom and United States and some others.[133] It arose from the German desire to resume payments on the German external debt and participate with the three powers in the formulation of a plan for the settlement of public and private claims against Germany and German citizens.[134] Such a desire

132. Delaume, n 117, p 417.
133. For a detailed information see Georges R. Delaume "Legal Aspects of International Lending and Economic Development Financing" (Oceana Publications 1967) pp 338-344.

paved the way for the restoration of German credit-worthiness as well as the re-establishment of normal economic relations between Germany and others. [135] In the course of the negotiation it was realised that the combined amount of pre-war debts and post-war economic aid for exceeded Federal Republic's capacity to pay. It was also clear that achieving a satisfactory settlement of German pre-war debts was of remote possibility. However, the three Allied powers agreed to modify the priority accorded to their claims, provided an equitable settlement could be reached regarding pre-war debts. All three powers also declared a reduction in their respective claims.[136] The Conference of London was attended by the representative of 26 creditor nations and private creditors along with the German Government. Despite difficulties relating to certain issues the conference was able to issue a report containing detailed proposals for each category of debt and a few guiding principles applicable to all debts in general.[137]

In view of this, the Agreement emphatically prohibited any discrimination or preferential treatment. However, it may be pointed out that it was possible to formulate the general terms of a settlement plan which would preserve the rights of Germany's creditors in the light of Germany's capacity to pay and her existing foreign exchange resources.[138] Further, the Agreement provided for the reduction of the amount of interest arrears.[139] The reduction of interest rates, extention of maturity dates[140] and the post payment of a amortization payments. It should be noted that all these reductions were prompted essentially to account for Germany's capacity to pay and were not included in the interests of individual debtors.

The German debt settlement due to its realistic approach led to other instances of settlement of external debts such as the external debts of Italy, Japan and Austria.[141]

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134. *Ibid* p. 339.
135. *Ibid.*
136. France and the United Kingdom declared themselves to reduce their claims by 25 per cent i.e. from $ 15.7 million in the case of France and from 562.8 million to 420 million in the case of United Kingdom. United States was ready to reduce by 62.5% i.e. from 3.8 billion to 1.5 billion.
137. For further information see "Simpson, the Agreement on German External Debts" 6 ICL Q 472 (1957).
138. Delaume n. 135 p. 341.
139. One third of unpaid interest was waived in all private debts.
140. The maturity period averaged on nearly 20 years extension.
141. These debts were sought to be settled by conciliation process. See Delaume n. 135 p. 344.

In each case efforts were made to balance the claims of creditors with the debtors capacity to pay and their foreign exchange resource.

Thus, the foregoing would show that the German Debt settlement was a case nearer to the present external debt crisis of developing counties, in several dimensions with the exception of the war and its consequences. As far as the problems of default, capacity to pay and foreign exchange resources are concerned the German debt and the present developing countries debt would present a similarity. What is more striking is that the German Debt Settlement is the perfect precedent to the present crisis because the London Conference was attended by representatives of creditor governments, debtor governments and private creditors. Thus, it would be clear that the international community is not without a precedent regarding the settlement of external debts, what is needed now is the political will to convene a similar International Conference.

(iv) *Emerging norms*

The fact that there is a vacuum relating to the dispute settlement machanism of loan agreements particularly the commercial, does not prevent an attempt to examine the legal consequences of certain measures that the creditors and debtors are applying to overcome a non-payment crisis which in other words would mean the dispute settlement machanism for non performance of contractual obligations.

The first non payment crisis occurred in 1982 when Mexico declared its unilateral moratorium on debt repayments. In technical terms it was an act of non-performance which could have given rise to legal actions on the part of the creditors. While that could have been the natural course, the creditors voluntarily came up with an idea of restructuring the loan terms, and kept a low profile regarding the legal consequences of the restructuring. Since then, much water has flown down. There have been a number of defaults in various forms. For instance, Peru, unilaterally declared, despite agreements, that it would limit its debt obligations to a maximum of 10% of its export earnings. Peru has sought to apply such a limit on the principle that the Peruvian government's first obligation was to its people and not to the foreign creditors. The creditors, both World Bank and Commercial Bank have accepted such unilateral repudiation of contractual obligations without any fuss. Peru continues to apply its policy of 10% ceiling. Brazil stopped paying interest on its commercial debt in February 1987. Ivory Coast halted payments in May. A month earlier Zambia broke up with IMF austerity plan; Argentina announced moratorium on its $ 68 billion commercial debt. It may be pointed out that in many countries, new coalitions built around demands for drastic reductions in debt service are gaining mass support and political support.[142]

The response of the international creditors would illustrate the chaos that they have landed up in relation to payment crisis. They tried in one or two small cases the course of creditor suits, but when big debtors such as Mexico, Brazil and Argentina declared unilateral moratoriums, the lenders were in dilemma. Instead of going for implementation of the contractual obligations through adjudicatory process[143] the lenders, both multilateral institutions and the Commercial banks offered more money to enable the debtor to keep the debt services going on. Such a measure may amount to economic and policy pragmatism but in legal terms would seek to break new grounds. Such responses under these situations would indeed amount to accepting the reality of changing circumstances of economic and political nature and thus indirectly altering the earlier loan agreements. Thus, it would seemed quite logically as well, to ask whether the creditors have legally accepted the international legal concept of *ribus sic standibus*. By repeated netotiations the creditors seem to have only stressed the question.

The persistance of unilateral moratoria and guarded conciliatory response by the creditors would indicate that in the absence of viable settlement machanism the present course of negotiation and conciliation which, at present, seem to be better course than creditors' suit or arbitration. This would also mark the emergence of a completely new dimension in the area of settling international financial disputes. For all practical purposes the negotiations relating to rescheduling would mean that they are the customs and usages prevailing currently. Coupled with the general principles of public international law, various municipal legal systems and consensual decisions and resolutions of various international organisations, they may have the effect of establishing a *Lex marcatoria* relating to the field of international finance.[144]

142. Robin Brad, "Now for a serious response to Third World Det" in International Herald Tribune, September 28, 1987.

143. According to the existing loan agreement that is the only course opened for them.

144. A general understanding of lex mercatoria is given by ole Lando. "Judicial process, which is partly on application of legal rules and partly a selective and creative process, is called the application

IV General observations and tentative suggestions

The central question regarding the legal aspects of international loan agreements is : whether the terms and conditions of various loan agreements in terms of law and policy are in conformity with certain broader desires of the world community such as the developmental objectives of the debtor nations and the imperative of international economic cooperation. It would also be pertinent to ask whether the trends and practice of international lending are in consonance with the emerging principles and norms of international law relating to new international eonomic order. Such questions would only be logical as far as an analytical perception is concerned. Viewed in this background the following could be discernible.

Regarding the policy of international lending it could be seen that the bilateral/state loans under ODA/DAE consensus seem to be positive in terms of conditionalities. However, the progressive decline in quantity seem to be a matter of concern for poorer nations bceause such decline has pushed them to the multilateral and commerial borrowings which are not in tune with their expectations. The loans from the multilateral source such as World Bank is not encouraging either. That is largely due to its limited capital base and restrictive conditionalities coupled with political controversies relating to its decision making process. Viewed against the desires of the developing countries relating to multilateral resources, it seems that the World Bank is not doing a commendable job.

As far as the commercial borrowings are concerned, it appears to be the crux of the on-going crisis. There were several factors that have contributed to such a situation. The entanglement of the market place and sovereign borrowers would appear to have reached a point of no return, unleashing multiple obstacles for resolving the debt crisis. Although the international community has accepted the basis of shared responsibility for future dialogue in this regard, it is not clear at this juncture, as to what could be envisaged to strike a balance between the market motives and developmental objectives. Given the fact that major share of the loans are increasingly owed to private banks it could be pondered whether regulation of the commercial market is a possible step, and if with what macro and micro policy measures? The fundamental objective of such regulation would be to set off the combined might and calculations of the

of the "*Lex mercatoria*" ole Lando, op. cit. p. 747.

Defining the various terms used in an agreement and wherever necessary giving certain phrases a due interpretation or construction, are normal and typical features of any agreement. A provision for definitions is, therefore, generally found in Eurocurrency loan agreements as well. It does not appear necessary to refer here to all the terms that are normally defined. However, certain terms are special to these agreements and it would be worthwhile referring to these.

Banking Day is defined to mean a day which is both a Business Day and a day on which banks are open for business in New York or any other place where a payment is required to be made for any of the purposes under the agreement.

Business Day means a day on which the relevant London financial markets are open for the transaction of the business contemplated in the agreement.

These two definitions are particularly necessary to make specific provision with regard to computation of interest, drawdowns, payments, repayments and repayments.

Commitment: Commitment in relation to the lender would mean the obligation of the lender to make the loans under the agreement up to the aggregate principal amount agreed upon.

Commitment period means the period from the date of the agreement until close of business on the day on which the last instalment of the loan could be drawn by the borrower.

Commitment Termination Date is also defined where a commitment period is not, and this is defined with reference to a specific date.

These definitions would be necessary to specify in the agreement the available commitment of the loan facility by the lender to the borrower and also the period and the last date up to which such commitment would be available to the borrower. In syndicated loans, these definitions are suitably amplified to indicate the commitment of each lender bank. It is not unusual to specify the amounts of commitment opposite the names of the various banks in an apporpriate annexure or exhibit.

Indebtedness is defined to include any obligation (whether present or future, actual or contingent, secured or unsecured as principal or surely or otherwise) for the payment or repayment of money.

Borrowings is defined to mean Indebtedness incurred in respect of (i) money borrowed or raised, (ii) any bond, note, loan stock, debenture or similar instrument, (iii) acceptance or documentary credit facilities, (iv) the deferred payment for assets or services acquired, (v) rental payments under leases entered into primarily as a method of raising finance or of financing the acquisition of the asset leased and (vi) guarantees or other assurances against financial loss in respect of borrowings of any person.

External Borrowings is defined to mean borrrowings denominated or payable, or payable at the option of the debtor or the creditor in, or calculated by reference to, a currency other than the legal currency of the borrower's country or owed to any person not resident in, or whose principal or lending office is situated outside the borrower's country.

These definitions would be of use in the *pari passu* clause and the negative pledge clause while the covenants of the borrower are drafted. Considerable flexibility is practised in defining these terms depending on the actual circumstances or situation of the borrower. Very frequently the restrictions by way of these clauses on the borrower will apply only to the External Borrowings of the borrower.

LIBOR means the London Interbank Offered Rate and has been suitably defined earlier in this chapter under the heading Interest. For the purpose of ascertaining LIBOR, the definition of reference banks would be necessary.

Reference Banks would mean the principal London offices of banks specified in the agreement itself, or which may be decided on subsequently, the procedure for which will be set out in the agreement.

Loan is defined to mean in relation to each lender that part of the advances or loans which is owing to such lender. This definition may also be amplified as meaning the principal amount of each borrowing by the borrower under the agreement of each amount treated as a separate loan by virtue of provisions of the agreement or the principal amount from time to time outstanding and all collectively referred to as the 'Loans'.

Dollars Where the loan is denominated in dollars or where dollar payments are to be made, dollars are defined as the lawful currency of the United States of America and, in respect of all payments to be made under the agreement, funds for same day settlement in the New York Clearing House Interbank Payments System (or such other US dollar funds as may at the relevant time be customary for the settlement of international banking transactions denominated in US dollars).

Fees, commissions and expenses

In the single-lender loan agreement there would be provision only for commitment fee, charges and expenses and expenses on enforcement. In a syndicated loan, it may also be necessary to provide for a management fee and an agency fee.

Commitment fee A normal provision in regard to a commitment fee is that the borrower will pay to the lender or, in the case of a syndicated loan, to the agent for distribution to the lenders, a commitment fee in dollars or any other specified currency computed at the rate agreed upon on the daily undrawn amount of the total commitments during the period commencing and ending on the dates specified or during the commitment period. Provision will also be made for the accured commitment fee to be payable, usually quarterly in arrear. It is also usual to provide that the commitment fee shall accrue from day to day and be calculated on the basis of a year of 360 days and the actual number of days elapsed.

It is also not unusual to provide different rates of commitment fee for different sub-periods within the commitment period and specify the rates with reference to the available facility for each commitment sub-period.

Management fee In a syndicated loan the borrower shall pay to the agent for the account of the managers, a management fee at an agreed percentage of the total commitments. Normally, the fee is payable either on the first borrowing date or before a specified date, whichever is earlier.

Agency fee In addition, in a syndicated loan the borrower will pay to the agent, in the specified currency, for the agent's sole benefit, an agency fee which is to cover only normal administration of the loans. The agency fee is usually payable annually or semi-annually as per the agreement.

Charges and expenses The borrower also agrees to reimburse the lender or, in a syndicated loan, the agent all charges and expenses (including but not limited to the fees and expenses of its legal advisers) incurred by the lender or the agent in connection with the negotiations, preparation, syndication, execution and advertising of the agreement up to a specified agreed amount which may be treated as maximum. These charges and expenses will also be deducted from the first borrowing under the agreement or paid before a specified date, whichever is earlier.

Stamp duties The borrower shall pay or shall indemnify the lender and all other parties to the agreement against any or all stamp, registration and similar taxes, levies or charges imposed by law or any authority of the country where the agreement is executed or of the borrower's country. If such charges are payable or determined to be payable in connection with the execution, delivery or performance of the agreement or any other ancillary document. The borrower shall also indemnify the other parties for such charges, if they become payable at the time of the enforcement of the agreement or any of the ancillary documents.

Expenses on enforcement The borrower shall also bind himself to pay on demand all costs and expenses (including taxes thereon and legal fees) incurred by the lender or any other party in protecting or enforcing any rights against the borrower under the agreement or any ancillary document.

Source Venkatachari "Eurocurrency Loans. Role and content of the Contracts" in Lar Kelderan and Qamar Siddique, *Sovereign Borrowers: Guidelines on legal negotiations with commercial lenders* (Butterworths 1984) pp 106-108.