M E M O R A N D U M

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Acting as Lender's Counsel for Ship Finance Transactions

Introduction

Watson Farley & Williams LLP specializes in asset finance, particularly for the international shipping and offshore industries. We represent both lenders and borrowers involved with building, purchasing and owning and operating ships. In addition, we work with shipowners and underwriters on capital market transactions and we also advise on structured lease finance transactions.

A unique aspect of our ship finance practice when acting for lenders is that we use a Loan Market Association (LMA) style of loan agreement, which was developed in London, instead of the "New York" style loan agreement which is more commonly used by New York based law firms for bank lending transactions. The LMA-style loan agreement is more commonly used worldwide and the bank syndicates we tend to work with are more familiar with it as a result. As such banks prefer the LMA-style agreement, our solution was to "bridge" the two styles by removing the purely British elements from the base LMA form while adding customary representations, warranties, covenants and defaults from the New York form. This provides our European and international clients with a unique hybrid product that they are familiar with while retaining the elements of a New York style loan agreement that one would expect to find in a New York law governed loan agreement.

Best Practices: Client Management

The Importance of Relationship Management

We all like to believe that our work product stands out like a shining star compared to the work product of our competitors. In fact, clients are unlikely to distinguish between your work product and another well-qualified attorney's work—even as you progress in your career and gain experience and wisdom. The truth is that the nuances which may distinguish your work product and make it better than the work product of a competitor are just not likely to be noticed by your clients.

So how does one build a practice? Many new graduates coming out of law school seem obsessed with resume-building, text messaging and e-mail. We would suggest that time is better spent on answering your own phone, promptly returning calls and attending conferences and other functions where you can introduce yourself and let your personality shine through. You do not have to be a red flag in a room full of white sheets, but a little color goes a long way.

How to Handle Clients Effectively

The keys to working well with a client are ensuring that:

- you understand the terms of the proposed deal;
- the client (especially a new client) understands what the documentation package includes and what the individual documents represent; and
- everyone has realistic expectations as to timing.

Understanding the Terms of the Deal

Take a close look at the client's term sheet and make sure that you understand what they have in mind. While businesspeople think they have an agreement a lawyer may see many important components missing from a legal perspective. Worse yet, the agreement portrayed on the term sheet may make no sense in some respects and, as a result, the lawyer may have to "dig down" a bit to understand what the parties were really trying to achieve.

Lack of clarity becomes even more of an issue when your client does not use English as a first language. Although such an individual may speak and write English very well, their written work may nevertheless lack the precision that an attorney uses to draft a document. That is why it is critically important to go back to the beginning and be certain that you understand the intent on the term sheet. In addition, related documents, such as mandate letters and commitment letters, integrate with each other and the term sheet. For example, there may be market-flex provisions—the ability to change agreed-upon terms and conditions for syndication purposes—that are not stated in the term sheet but show up in the commitment letter or the mandate letter. It is thus important to have a clear understanding of these instruments as well as the term sheet.

Counsel also needs ensure that everything in the term sheet is covered properly in the loan agreement. The most effective approach we have found to accomplish this is to require associates to put a check mark by every item on the term sheet and provide the corresponding clause or section number of the loan agreement in which it appears. These steps enable us to understand what the associate did correctly and incorrectly in drafting the document s and allows us to discern when an associate has seen something as an "apple" instead of an "orange."

Another useful step is to put together the closing checklist at the outset rather than just before closing. We find this helps attorneys to "see" what documents are needed, where they need to be, and when the parties will be expecting them. The logistics of a closing for a finance transaction can be complex. For example, a ship finance transaction quite frequently will involve the delivery and/or registration of documents in multiple locations worldwide and while the ability to transmit documents over the internet is very helpful, there are times that original documents need to be in certain places at certain times and this cannot be done by computer. Understanding such logistics at the outset will help prevent last minute disasters from occurring.

A classic example of this situation occurs with a frequently-used device in shipping circles called a "payment letter". When a transaction is going to take place in another time zone, especially if there is a difference of a day (between New Orleans and Singapore, for example), the time difference causes a chicken-and-egg situation in which the existing lender will not release its security until it gets paid; and the new lender does not want to fund unless it gets a vessel free of any encumbrances. The payment letter is a negotiable instrument in which the new lender states that it irrevocably undertakes to pay the existing lender a certain amount with value on a certain date. In return for delivery of the payment letter, the existing lender will release its security so that the vessel can be delivered without encumbrances. Junior lawyers often forget that one needs to actually have the original of the payment letter delivered to the existing lending bank because a payment letter is somewhat like writing a check and a copy will not suffice. In short, an electronic means to deliver the instrument is useless.

Knowing Your Documents

When working with a new client, an important piece of information to learn at the outset is whether they have prior experience with the specific transaction at hand and the documentation for it. For example, while lenders are generally familiar with asset-based lending practices, ship finance brings a different approach to the documentation than one would ordinarily see in a financing transaction. This is simply a result of the fact that the assets (the ships) move internationally and bring with them a unique and ancient body of law stretching back in some respects for more than 2000 years (the concept of a ship mortgage having been developed in ancient Greece). Thus, while a general security agreement is a common feature of asset-based financings,

collateralization instruments for ship financings are far more specific: there are assignments for insurances, charter parties and earnings and if it is construction financing, there is a pre-delivery security assignment that assigns the borrower's rights in the shipbuilding contract and associated refund guarantee or standby letter of credit. It is critically important that the lawyer understands how his or her documents work and be able to explain them clearly to the client.

Timing Issues and Precedents

It is important to understand the parties' expectations as to timing. Arriving at a common understanding of the timing helps to fend off unrealistic demands from the bank and the borrower, especially if prior transactions have been conducted at a different pace.

Quite frequently the bank will have done a series of transactions with the borrower, so understanding their history and being aware of the issues that will cause the borrower and its counsel to kick up a fuss is helpful. For example, if you know that a standard provision on collateral maintenance is going to cause trouble with the borrower, then you may want to ask the bank to provide you with the form of a collateral maintenance covenant that was agreed by the bank and the borrower in a prior deal.

Likewise, it is important to set realistic expectations for clients regarding the amount of time a transaction will take to complete. Most lawyers are way too timid to alert their client that the deadline may be unrealistic. Instead, they will wait until just before the client's unrealistic date arrives and then announce it cannot be done by that date. That approach is very annoying to the parties and before committing to a frantic sprint to an arbitrary date, it helps to understand the justification for the deadline. For all these reasons, we think a better approach is to tell the parties upfront when they are selecting what may be an unrealistic closing date. Even if you state that your firm will do everything possible to make that date happen, share the reasons why, in your experience, that date probably will not work. It is always preferable to have a couple extra days to get everything buttoned down than risk ending up with a weaker result because people are trying to push the envelope for no sound business reason.

Understanding Bank Funding

Many junior attorneys do not understand how banks obtain funds for lending purposes and will often blissfully go along with the lending mechanics in the loan agreement without ever learning what actually happens "behind the scenes" at the bank. This lack of understanding can be harmful when events like the credit crisis of 2008 strike.

While a bank can self-fund a lending transaction using money in its treasury, the more common practice is for the bank to borrow the money from another bank. In the fall of 2008, the credit crisis brought inter-bank lending to a standstill and, in turn, this meant the banks were unable to obtain funds generally or, if they could obtain funds, they were able to do so only at a very much higher cost than they had been able up until that point. In other words, in the absence of any provisions in the loan agreement to adjust the lending rate for "actual cost of funds", the bank's profit margin could be significantly impacted. Understanding this mechanical element of a lending transaction will allow the attorney to draft language into the loan agreement that should overcome this problem.

Documentation for Shipping Transactions

The documents used in a ship finance transaction are fairly standard. There is a loan agreement and various security instruments that typically include but are not limited to assignments for insurances, charter parties and earnings and if it is construction financing, there is a pre-delivery security assignment that assigns the borrower's rights in the shipbuilding contract and associated refund guarantee or standby letter of credit.

The path to a smooth transaction is to ensure that the lawyers have a clear understanding of who the parties are, what documents are being used in the deal and how everything fits together. The process of answering those questions is a bit trickier than it sounds, especially for junior associates, and a little thinking can go a long way toward producing better documents in less time and for a lower cost. For these reasons, we would encourage lawyers to spend 5 or 10 minutes talking to their more experienced colleagues about something they don't understand rather than wasting one or more hours trying to solve it on their own. We would also encourage taking time to draft carefully to avoid wasting everyone's time on cleaning up the ordinary, which time would be far better spent on dealing with more complex issues that may arise in the documentation process.

Strategies for Clearer Communication with Institutions

The best practice is to keep the institution well-informed on a real-time basis. Being prompt with your responses to phone calls and e-mails is the best way to go. By "prompt" we mean that if you are working on something and you see an e-mail arrive from your client, take the time to stop, read the e-mail and if action is called for, reply as quickly as possible. If you let the message sit for hours, you may find yourself buried under an avalanche of subsequent emails and phone calls when a quick and short response would have avoided such a time-consuming problem from developing.

Another recommendation to younger lawyers is to pick up the phone. While writing e-mails allows for organizing thoughts and clear expression, sometimes picking up the phone will save you a lot of trouble. It will take less time because you can speak far faster than you can type. A conversation that lasts five minutes also often provides a clearer picture of your client's needs than back-and-forth e-mails that consume the better part of an hour or a day.

Key Transactional Challenges

Issues that Stall Transactions

If a borrower has counsel who knows what she or he is doing and with whom you have worked before it makes life a lot easier. There is an element of trust between the lawyers and they are more apt to take a lawyer at his or her word if they have worked together successfully on prior occasions.

It is important, however, to not have lawyers take over a transaction and there must be always a balance between the lawyers and the business people. Sometimes, as counsel, you must step back and be comfortable that you have warned your client about the relevant risks if the client tells you not to fight any further over a particular point. Younger lawyers often overlook this important point because they are nervous about changing "standard" documentation, or they get so locked into the fight that they cannot step back and understand that it is no longer their decision to make.

Advice for New Attorneys

Our recommendation to our newer colleagues: if there is a difficult issue that you need to discuss with the client, discuss it internally with your colleagues but don't be afraid to pick up the telephone and speak to the client directly. If you are still unsure of what to do, tell the client that you will have to confer further with a your colleagues before the idea becomes actionable, but do not be afraid to think suggest a solution, even if it is conditioned on speaking again with your colleagues and reverting to the client with confirmation about how to best proceed. If you avoid the situations that go outside of the standard and predictable, you will never acquire the client management skills you need to advance in your career.

We also strongly recommend that you learn to express yourself concisely and clearly in writing. If a sentence can be interpreted two or three ways, it is neither good business nor good legal practice.

Frequently, the urgency to get something out the door quickly conflicts with the need to slow down and be accurate. Many junior associates fall into the trap of wanting to get things done quickly and check them off their list. The most important thing you can produce is very high-quality work product and this takes time. In short, there is a balance that needs to be reached between taking the time you need and dealing with the workload in a timely manner.