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INTERNATIONAL LOANS TO THE KINGDOM
OF SPAIN AND TO THE PUBLIC SECTOR

Alfonso Ojeda Marín

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BY

ALFONSO OJEDA MARIN

UNIVERSIDAD COMPLUTENSE
(MADRID)

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INTRODUCTION

These pages are a preliminary study of another one of bigger proportions. At present we would want to make some reflexions about the state and public sector borrowing in Spain and from a basically juridical point of view.

The "eloquence of the figures" will show us, first of all, the level of the external indebtedness in Spain. In the last ten years the volume has grown to about 725 per cent. Today the external debt is nearly \$ 29.000 million. The above mentioned debt (around fifty fifty public sector and private sector) is enormously concentrated in a few borrowers. Let us see how.

In the private sector, 50 enterprises absorb 80 per cent of this kind of financing. As far as the public sector is concerned, the concentration is even bigger because among the State, R.E.N.F.E. (Railway Company), I.C.O. (governmental agency of credit) and I.N.I. (holding company 50 per cent of external public debt is gathered and, therefore, 25 per cent of the total external debt (1).

International Loans to the kingdom of Spain

The terminology used to design them is a little varied: loans to the Spanish State, loans to the kingdom of Spain, loans to the Treasury.

(1) Source: Boletín del Departamento de Extranjero. Banco Español de Crédito. October, 1983, page 35.

The skilful distinction of the classical economists between ordinary and extraordinary incomes (public indebtedness included in the latter) and the belief that the public foreign indebtedness was a resort "in extremis", principally useful in order to deal with extraordinary events (war, natural calamity, great crisis of the public treasury) have changed at present. This thought is seen through the old Act of Administration and Public Finance of 1911 that allowed the public external indebtedness only under extraordinary circumstances.

Nowadays external credit has a great quantitative and qualitative importance. It depends on a complex number of reasons such as need for foreign currency, insufficiency of domestic credit, domestic credit in worse conditions than the external one, the possibility of covering the deficits of Balance of Payments, the external aid to economic development, and so on.

Taking into account the last 30 years we see in Spain the following phenomenon. The external indebtedness has served for financing partially the economic development. So, the International Bank for Reconstruction and Development loans (2), some of the kreditanstalt für die Wiederanfbau (3) and of the Export-Import Bank (Eximbank) (4) helped the development of the economic activities. The result is quite positive. By means of these loans construction and repairing of roads, improvement of harbours, construction and equipment of school, the growth of industrial technology and growth of livestock, were partially-financed.

(2) From 1977 Spain is classified by the Bank as a "graduated" country.

(3) See Decreto-Ley 42/1962 de 18 de octubre y Decreto-Ley 8/1970 de 16 de julio.

(4) See Decretos-Leyes 3/1959 de 17 de marzo, 5/1959 de 9 de abril; 6/1959, de 3 mayo; 7/1959 de 13 mayo.

However the economic prosperity was over. From 1973 the Spanish economy endures the effects of the crisis. In 1979, with the second shock of the petroleum price rise, the State continued increasing its external debt in order to reduce the public deficit and to decrease the Balance of Payment deficits.

Once we have outlined some of the most notable consequences of the recent history, we will examine some constitutional aspects connected with government indebtedness. In our opinion article 135 of the Spanish Constitution determines two principles about it:

a) The principle of legality. As a general rule article 133.3 establishes that the Public Administration will only be able to get financial obligations and carry out expenditures according to the Acts. More specifically, according to the article 135.1 the Government needs to be authorized by Act of Parliament to contract credit. Usually the annual Acts of Budget allow a maximum limit of indebtedness (internal and external) so that the Government can negotiate the conditions and terms of the contracts at the adequate moment and with flexibility.

b) Article 135.2 determines that the amounts to pay on the interest rates and the debt ("servicio anual de la deuda") included previously in the Budget will not be able to be changed or amended in the future. In our opinion that is an important guarantee to those lenders who are distrustful of receiving the amount lent. As a matter of fact, this principle corresponds to what is called "charge on the Consolidated Fund" in the United Kingdom, "permanent appropriation" in United States of America, or "services votés" in France.

Concerning the sovereign immunity, we have not any like "Foreign Sovereign Immunities Act" (1977) in the U.S.A. or the "State Immunity Act" (1978) in the U.K., but rather a series of Acts (Ley General Presupuestaria, Ley de Patrimonio del Estado, Reglamento del Patrimonio) in order to regulate the State responsibility, the execution of foreign judicial sentences, the possibility of resolving disputes by foreign arbitration and the waiving of immunity.

It is convenient to add that according to the State Patrimony Act (article 18) and also the General Act of Budgeting (Ley General Presupuestaria) no one judge will be able to exercise the embargo on the public properties. Normally loan contracts elude the embargo clause, although they provide other security.

The way to obtain these loans is basically as follows: General subdirection of External Financing (Subdirección General de Financiación Exterior), which is the representative institution and in charge of negotiating, needs to coordinate its policy's indebtedness in relation to the general planning made by the commission C.I.F.E.X. (Comisión Interministerial de Financiación Exterior) Afterwards the Cabinet of Ministers will close this process with the final authorization on contracting the loans.

LOANS TO THE SELF-GOVERNING COMMUNITIES

We think that after the 1978 Constitution Spain is a constitutionally structured State between the Italian regional State and the Federal State. The old centralism is today only a historical relic. This trend towards decentralisation is nowadays evident even with the traditional

centralist country like France (administrative decentralisation but not political).

The regions, called Self-Governing Communities (Comunidades Autónomas) possess financial autonomy (article 156 Constitution) and one of its financial resources consists of the credit operations (153.1, e. Constitution). Nevertheless the Constitution only admits its use but nothing more. Fortunately the regulation of such an operation was made by an Act (Ley Orgánica de Financiación de las Comunidades Autónomas) in order to avoid a complete separation between State finance and autonomous. This Act requires the confirmation of two requisites to obtain credit and an additional one for external credit.

- The first one concerns the purpose of the credit. So, credits must only be assigned to take care of the investment expenses and not ordinary expenses.

- The second one is, in reality, a quantitative limit: the amount of annual service of debt (servicio anual de la deuda) can not surpass 25 per cent of the ordinary incomes of such a region.

We think that it should not include in this percentage the self-liquidating credits; credits which finance investment generating a quick amortization and then good profits. As we can see, such a percentage (25%) can control and limit the level of indebtedness, but also can -in some cases- delay the viability of regional development.

- A last requisite (for external borrowing) is the authorization from the Central Government. Some authors have criticised this requisite because with it the financial autonomy is more apparent

than real. However we do not agree with them because of some reasons that justify a higher authorization: currency reserves, problems in the balance of payments, rate of exchange and its risks, best information on the foreign capital market comes from the Central Government and the troubles of a hypothetical "cross-default".

As first experiments put into practice we can mention a syndicated loan negotiated in the Euromarket for Catalonia. The second loan was granted by the European Investment Bank to Andalusia in order to finance a specific project. With the future entry into the Common Market some less developed Communities like Andalusia, Extremadura, Galicia, will profit from the aids and loans given by the European Institutions.

LOANS TO THE PUBLIC CORPORATION

Although there are also several systems of control and authorization, the public corporations are able to use international loans with more flexibility than the regions. Foreign currency borrowing will be permitted if the borrower can prove that a rise in foreign currency finance for its normal commercial business is needed.

As a general rule the Treasury does not give an exchange rate guarantee to the borrower.

Assuming that it is impossible to explain the general aspects of the whole corporations, we prefer to examine one of the most important corporations: the INI.

"Instituto Nacional de Industria" (INI) is a semi-governmental entity organized as a holding company destined primarily to support national interest in the industrial and service sectors (energy and petrochemical, steel and metal, shipbuilding and aeronautics, car and tank manufacturing, air and marine transport, capital goods).

With regard to international financing, the Ministry of Economy and Finance must authorize the global financing requirements, then INI distributes the global authorization among the different companies, according to the financial needs previously outlined through the Finance Programme.

Also companies belonging to INI can obtain international credit. here it is necessary to distinguish two cases: those companies which tap the market without an INI guarantee, taking into account their solid financial structure with enough cash-flow capacity to meet the payment of their liabilities, and secondly another group of companies formed by those which need a guarantee from INI to tap the foreign market. In this last supposition, INI's activity ranges from negotiating conditions up to selecting bids, negotiating loan agreements and performing other necessary functions leading to a successful outcome of the operation.

SOME JURIDICAL ASPECTS OF THE CONTRACTS

The influence of the Anglo-American system by laying down the stipulations is quite intense, above all in relation to Eurocredits.

In spite of the position of the lenders' supremacy, all clauses must be elaborated and agreed to by the lenders and borrowers. In other words, we cannot speak about a com-

plete "standard contract" where a borrower only accepts a previously determined content, otherwise the interpretation of the uncertain ("darks" clauses would endanger the lenders according to the rule "contra proferentem", a rule that, by the way, is accepted in the British and Spanish juridical order (3).

Such contracts usually have a first clause consisting of a series of definitions which amplify, explain and define the meaning of some terms and expressions. Its usefulness will be evaluated specially with regard to future problems of contractual interpretation.

- The Prepayment clause is outlined as follows:

The Borrower shall be entitled to prepay the Advances in whole or in part (such part being a whole multiple of \$25,000,000 and in a minimum amount of \$50,000,000 on the last day of any Interest Period, provided that the Borrower gives to the Agent not less than thirty days' prior irrevocable authenticated cable or telex notice, confirmed by letter, of the aggregate principal amount to be prepaid together with evidence that all necessary consents (if any) for such prepayment have been obtained and, in the event of such notice being given, the amount so notified shall be due and payable on the said day together with accrued interest thereon and any other sums then due and payable hereunder. Each such prepayment shall be applied to the payment of the instalments due on the Advances in inverse order of maturity. Amounts prepaid may not be reborrowed.

(3) See, CASTAN TOBEÑAS; J.: Derecho Civil Español, común foral. Tomo III (derecho de obligaciones), Madrid, 1978 págs. 552-562; BRICKS, H.: Les clauses abusives. Librairie Generale de Droit et de jurisprudence, Paris, 1982; CHITTY ON CONTRACTS. Vol. I. Twenty-fifth Edition. London Sweet & Maxwell, 1983, pages 793-795.

As we can see, here we have a right acquired by practice and through it the State can eliminate a future risk of value increase of the currencies borrowed or even to profit from a good level of its reserves.

Some international institutions stimulate the prepayment. That is the case of the International Bank for Reconstruction and Development:

The Borrower shall have the right, upon payment of all accrued interest and of the premium specified in said amortization schedule, and upon not less than forty-five days' notice to the Bank, to repay, as of a date acceptable to the Bank, in advance of maturity (i) all of the principal amount of the Loan at the time outstanding, or (ii) all of the principal amount of any one or more maturities, provided that after such prepayment there shall not be outstanding any portion of the Loan maturing after the portion to be prepaid.

It is the policy of the Bank to encourage the repayment prior to maturity of portions of its loans retained by the Bank for its own account. Accordingly, the Bank will sympathetically consider, in the light of all circumstances then existing, any request of the Borrower that the Bank waive the payment of any premium payable under paragraph (b) of this Section on prepayment of any portion of the Loan which the Bank has not sold or agreed to sell.

- Covenants and Undertakings are some clauses where one contracting party (usually the borrower) is bound to make some future activities or to assure the truthfulness of some past activities.

- Governing Law. Eurocredit Agreements usually say that the contract will be governed by and construed in accordance with English Law, or with the laws of the State of New York.

Why those choices?. Perhaps both Laws are quite flexible, not very fond of red tape and more adaptable to the changing circumstances. At any rate, they are the Laws accepted internationally and the Banks know it very well.

In Spain there are no problems with regard to the choice of English Law or foreign Law according to the article 10.5 Civil Code:

"The Law that the parties are expressly submitted to will be applied to the contractual obligation, whenever it has some connection with the transaction" (4).

- waiving Immunity. Over a long period of time the States could use the Sovereign Immunity principle in front of any foreign Court. But at present Montesquieu's thought as "le prince ne doit pas faire le commerce" is abandoned because of the increase in the economic public sector.

If the State makes a commercial transaction it will be in the same position as the other party to the contract. It carries out activities "jure gestionis" but not "jure imperii".

So a typical clause about it can be as follows:

(4) "Se aplicará a las obligaciones contractuales la ley a que las partes se hayan sometido expresamente, siempre que tenga alguna conexión con el negocio de que se trate".

The Borrower's obligations under this Agreement are of a commercial nature and are subject to civil and commercial law. The execution and delivery of this Agreement, the Letter Agreement and any other document provided for hereunder constitute both the Borrower's exercise of its rights and performance of and compliance with its obligations hereunder and thereunder will constitute commercial acts of the Borrower. Save as provided by Article 44 of the General Budgetary Law, in any proceedings taken in Spain in relation to this Agreement, the Letter Agreement or any other document provided for hereunder, the Borrower will not be entitled to claim for itself or any of its assets immunity from suit, execution, attachment or other legal process.

Depending on the article 44 General Budgeting Act the State properties are not submitted to embargo. Actually, this provision has been kept in every agreement to which the state is party.

International Banking practice is trying to contract by standard-contract the loan contracts. Contracting States will have to accept this reality one day... perhaps sooner than we think.