ELEVATING THE BAR:
An Appeal for the Legal Profession in Developing Countries to Become Active in Contract Negotiations and for Legal Education to Embrace Training in Transactional Practice

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With the advent of the global economy, the nations of the world are becoming increasingly interactive and interdependent. No nation operates in isolation, most clearly demonstrated by the continuing global economic recession which is impacting both the developed and developing economies. While there was a time when the nations of the developing world may have been sheltered from certain global events, that time has passed. Many developing countries possess valuable resources necessary to the growing global economy, and developing nations are increasingly looking for assistance from developed nations and foreign corporations to obtain necessary components for, or investment in, growing developing local economies. With growing interdependence, coupled with increased international trade and the developing nations’ growing needs for foreign exchange to obtain those components necessary to develop their local economies, developing nations find themselves increasingly involved in international business transactions.

The increase in potential international business transactions has occurred more rapidly than the development of the legal skills in many developing nations for handling the new wave of transactions. This is not particularly surprising, as legal education in most countries, including the developed nations, has been slow to adapt to changes in the legal world in which lawyers increasingly find themselves. Legal education world-wide, which has historically focused on statutory and litigation-based instruction, has not been designed to provide students with the skills necessary to function as effective transactional lawyers capable of negotiating and drafting workable business agreements.

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In developed countries, this void in legal education has generally been filled through on-the-job training in law firms, corporations and government where lawyers are engaged in the negotiations of business transactions. Through inclusion on legal teams involved in negotiations of business joint ventures, purchase agreements, supply contracts, licensing agreements, mergers, acquisitions, financings, and other significant business transactions, the lawyer develops background and experience in business negotiations, document preparation, and general elements of successful business transactions, including the business realities for which, and the business culture in which, each agreement is being crafted.

While this collaboration between formal and informal legal education has served as an effective, albeit imperfect, means of training transactional lawyers in developed economies, it is a system that meets significant obstacles in much of the developing world. In Ethiopia, for example, the legal profession historically has not generally been involved in business negotiations involving contract preparation. While lawyers are consulted in business disputes, i.e., business transactions that have gone awry and thereby landed in the courts or alternative dispute resolution contexts, lawyers are not generally consulted at the outset of a business negotiation to prepare the contractual agreements. Since teaching at law schools traditionally concentrates on learning through statutory analysis and legal precedent developed through dispute resolution, and since Ethiopian lawyers are generally not involved in the crafting of business agreements, the Ethiopian bar is neither trained in, nor exposed to practical experience in, the skills of negotiating and documenting business transactions. With the absence of formal training and the absence of experience and opportunity to learn through practice, the lawyer is ill equipped to assist in the structuring and negotiating of transactions.

This absence of educational and practical training focused on basic business negotiations skills places developing economies, and the businesses and governments involved in transactions

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1 This criticism is not limited to law schools in developing countries. For a summary and critique of various methods by which US law schools have historically taught transactions, as well as a summary of much of the literature regarding such methods and alternatives thereto, see Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, Colombia Business Law Review, (2002), p. 475; see also Stark Debra Pogrund. *See Jane Graduate. Why Can’t Jane Negotiate a Business Transaction?*, ST. JOHN’S Law Review Vol. 11 (1999), p. 477 The issue in developing countries is exacerbated by the absence of transactional practice by lawyers, so there is no exposure to transactional practice at all.
within such economies, at a distinct disadvantage at the very time that they are confronted with growing opportunities for international transactions. Local enterprises currently owned by governments are being privatized, infrastructure deals are being negotiated, raw materials are being sold, and other foreign investment is being attracted to developing countries, but these countries, including Ethiopia, often lack legal counsel with the training to guide the legal process for such transactions. Whether through the desire to appear receptive to foreign investment or the eagerness to access new markets for local industry or obtain needed infrastructure, financing, or other investment, the absence of trained legal negotiators leaves developing countries exposed to the very exploitation which such nations have long sought to overcome.

Negotiation of a business transaction is part art and part science. There are formal texts teaching the skills and describing the strategies that can train a lawyer or business person how to negotiate. More than theoretical techniques, however, the negotiation of a business negotiation involves an in-depth understanding and assessment of the particular transaction, the nature of the respective parties, the goals that each party seeks to achieve from the transaction, and the range of alternatives and compromises that may be discussed in order to achieve the desired goals. No business transaction has a single potential outcome; many different results, each within a range of fairness acknowledged by the parties, are possible to address a particular objective. No transaction will occur unless both parties feel that a level of fairness has resulted from the negotiations. Nevertheless, parties may feel different levels of power or control within a particular situation which may affect their interpretation of their ability to negotiate or make demands, thereby altering the perception of what can be achieved and what is a fair result. Accordingly, a party that is not well trained to enter a negotiation may underestimate what can be achieved and accept less than an optimal result, even though that party perceives the concluded transaction as “fair.” In other words, not fully appreciating the potential to be achieved from the negotiation, the party settles for less than could have been attained.

2 One of the most renowned texts is, ROGER FISHER & WILLIAM URY. GETTING TO "YES": NEGOTIATING AGREEMENTS. Bruce Patron ed. (2nd ed. 1991)
Psychology is a key component to every negotiation. It is critical to understand the respective party’s perceptions of their power as they enter the negotiation, and how important the particular transaction is to each party. In many instances where a developing country is entering into a negotiation with a foreign party, it is the developing country, which is perceived as, and may perceive itself as, the weaker party. The developing country may appear to be eager to conclude the transaction, thereby weakening its negotiating position. In addition, the foreign party in the negotiation may either perceive itself as providing great benefit to the developing country or may sense it is the only party with whom a deal may be made. Consequently, the combined result is that the developing country enters the negotiation at a disadvantage, which may often result in a poorly negotiated result.\(^3\) When combined with an apparent absence of experience in international negotiations, the perceived psychological differences may further impair the ability of a developing nation to attain favorable international agreements.

It is no secret that many developing nations have been victims of commercial exploitation.\(^4\) This article is not intended to perform a detailed analysis of actual contracts entered into between developing nations and foreign partners, but it is safe to state that substantial business transactions, many involving valuable natural resources, have often resulted in little benefit for the contracting developing nation as a whole. The purpose of this piece is to advocate for developing nations taking an expansive view of such contracts and for legal education to train lawyers to be involved in business negotiations, thereby both expanding the role of the legal profession in contractual negotiations, generally, and with foreign parties in particular, and by taking a more informed, and possibly aggressive, approach to such agreements, achieving greater social benefits for the developing nation.

Each contract between a developing nation and a foreign partner starts with an objective. There may be something that will be sold (e.g., a raw material or an industry to be privatized), or a right will be granted (e.g., the opportunity to engage in a developed enterprise, such as a hotel),

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\(^4\) There has also been other significant forms of exploitation through colonization, slavery, and cultural subrogation, but those are not topics to be addressed here.
or something may be purchased (e.g., the construction of a new road, hospital, or other public facility or infrastructure). Assuming that the government is involved in most of these negotiations, either directly as the seller or purchaser or, indirectly as a grantor of tax or other statutory rights or benefits to encourage and facilitate the transaction, each such contract is also an opportunity to garner additional economic, social and political benefits for the nation as a whole. No opportunity should be lost to include those benefits in each such agreement. Rather than a simple focus on the particular objective of the transaction at issue, all such contracts should be addressed through a framework of broad social considerations and should be used for economic advancement of the economy as a whole by including such items as local ownership participation through joint ownership, local employment requirements, technology transfer through training or broader support for educational initiatives, and other social benefits.

There is nothing novel about using contractual arrangements, particularly involving the government, to achieve broader social objectives, or “externalities.” External requirements in contracts are commonplace in developed nations. Land use permits in the United States have often required that developers improve surrounding roads or build a social improvement (e.g., a school, a theater, low-income housing, or a community center) as a condition to obtaining other rights to development a commercial property. Government contracts in developed nations may include a requirement of participation by minority owned companies. These additional requirements are outside the actual business transaction, but their inclusion achieves social and political objectives and are part of the cost to be incurred by the other party for proceeding with the deal. As a result, the local economy and the broader populace benefits from the private or government transaction.

In developing nations, these additional contract requirements should include not only local ownership participation and possible civic improvements, but should also be focused on preserving and creating employment opportunities, accessing training for skilled and management positions, and obtaining technology transfer. Development projects should require employment of local labor, a privatization project may include requirements, in addition to some retained local ownership, that the acquirer introduce new training programs for workers or fund new housing or schools. These additional contract requirements could include opportunities for
local employees to serve as shadow managers and supervisors or receive training in the foreign entity’s other operations through secondment opportunities or otherwise. Alternatively, if these concepts are not practical under the specific circumstances, a funding program for educational scholarships, a new university faculty chair, or even a new university building may be negotiated. The general funding or “pay to play” requirement may substitute where no particular “externality” is appropriate. With such requirements, the country is positioned to improve and modernize its economy by bringing new training, new technology and new opportunities; thereby deriving continued benefits from the negotiated transactions. The effort will also further involve foreign partners with the local economy so that there becomes a partnering effort that provides a continuity and mutuality of interest between the parties.

To avoid actual and perceived exploitation, negotiators in developing nations need to understand the power of negotiating external requirements in contracts and become creative in “the task.” Perceived weak positions in negotiations may not be actual, particularly when involving raw materials, and many of the suggested additional requirements add minimal cost to a transaction, particularly when coupled with tax relief or other government-granted benefits. “Pay to play” is not a new concept, and savvy foreign partners will be familiar with this obligation from other negotiations.

A key element in moving toward improved contracts is to improve the training of negotiators. Lawyers can serve a key role as their general training provides background for skilled negotiation. Their experience in actual problems encountered through dispute resolution and the means for resolving such problems, including knowledge of problems caused by poor contract drafting which could have been avoided through better transactional structuring, provides valuable experience in anticipating problems and crafting agreements to avoid the disputes or to provide a more reasoned approach to their resolution. The lawyer experienced in negotiating settlements can readily apply such skills to negotiating and documenting agreements ab initio. The important point, however, is that legal training, and the legal profession, must embrace an expanded role for lawyers by actively moving towards the involvement in contract negotiations and not just contract disputes.
The legal profession, particularly in Ethiopia, is ready for this transition, and the need is acknowledged. The author has had the privilege of teaching introductory international business negotiations courses at Addis Ababa Law School, but was forewarned at the outset about the challenge of teaching negotiations where the legal profession is not generally involved in structuring business transactions and where law students are predisposed to lecture classes and not class participation exercises. Nevertheless, the first class of LLM students at Addis Ababa Law School involved in the international negotiations training surpassed all expectations of enthusiasm and involvement in the subject matter, demonstrating the ability to address the task of moving the legal profession in a new direction. Conversations with faculty, students and members of the bar confirmed the need to move the legal profession towards active early involvement in negotiating business transactions. The legal community is ready; education and utilization must follow.\(^5\)

The author has long advocated for enhanced legal transactional skills training in the United States where legal education has historically focused primarily on litigation-based learning. There has been recent movement in US law schools to add transactional based courses and new emphasis on practical aspects of legal practice.\(^6\) Training in negotiations must be coupled with academic analysis of business transactions and their structures and components, as well as the techniques of drafting agreements.

Training in negotiations must include both theory and practice. Based on the author’s experience, among the most effective means of introducing the concepts of negotiation while teaching the analysis, assessment and structuring of transactions is to utilize simulation exercises. The concept involves class lectures regarding the process of negotiating, including explanations and analyses of a detailed simulated fact pattern. After a general introduction of the simulation,

\(^5\) It should be noted that new legal curriculums are being developed in Ethiopia. One such project is headed by Professor Norman Singer.

including the party’s interests in the transaction and their respective strengths, weaknesses and objectives, the class is divided into two teams, taught by two professors in parallel for the balance of the simulated negotiation. The teams identify the issues to be sought by their respective parties in the negotiation, prepare their strategies, assess the other side, negotiate face to face with the opposing team, analyze the results of each phase of the negotiation, and repeat the process through four rounds of negotiation. All students are given the opportunity to lead a negotiation to obtain the experience of being “front and center.” The exercise absorbs the student in the negotiation process and encourages the utilization of all legal and practical skills to achieve a successful negotiated result. The class concludes with a joint analysis and evaluation of the experience.  

The principal elements of a negotiation are to understand the goals of the transaction, assess the strengths and weaknesses of the parties, anticipate problems, effectively manage the negotiation process, and prepare documents to avoid disputes, all while achieving the best negotiated results for the client. A simulation exercise, using a well-tailored set of facts that includes the problems, difficulties, challenges and dilemmas experienced in real negotiated situations involving developing economies, enables the student to engage in and experience the process by assuming the role of negotiator, identifying the issues, proposing solutions and obtaining and addressing reactions, all in a controlled environment where the student learns from, and no one suffer by, mistakes. In addition, the perspectives of the foreign partner are explored during the process, as well as the psychology underpinning such negotiations and alternative means for controlling and impacting the negotiation process. This “learning by doing” allows the teaching of theory while engaging in practice, thereby making the theory “real.” The student learns through the effort of thinking and applying the law, which creates a memorable pedagogic result in a short period of time because the student has not only read and heard about the process but has experienced an actual negotiation, albeit in a controlled environment. With each step in the negotiation being analyzed and discussed in class, the process is both evaluated and de-mystified while it is

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ongoing, the nuances are reviewed and the strategy is crafted. The students quickly assume the personality of their roles in the simulation, and the negotiations between teams approximate closely the intensity of feeling and commitment one witnesses in actual negotiations among business parties. Similar to the medical student who conducts surgery on a cadaver to understand what will need to be done on the living patient, the law student who practices negotiating skills and techniques in a simulated environment is better prepared for dealing with the real business transaction.

The success of this method of teaching is confirmed by the reactions of students. As one student who recently completed a semester-long negotiations simulation class in the US commented: “Looking back on the [simulated] negotiations, I really do believe that we learned so much more about negotiations by doing it than by reading about it. You don’t know how rules play out until you’re face to face with the other side.” And another student in the class confirmed: “The most important thing is that we learned the art of negotiating deals through doing it, not by reading a guide. A guide cannot cover every single issue in the negotiation process because sometimes unexpected issues come up. . . . In such situations, a good negotiator must be prepared and react in favor of his/her business’ interests according to the new circumstances. . . . The purpose of the [simulated] negotiation process is to feel the adrenaline come up, which makes the whole process more exciting. It is much more intense when I am involved directly in the negotiations.”

Based upon the initial efforts in using the simulation methodology for teaching negotiations at the Addis Ababa Law School, the success of the method and its potential for enhancing legal education in Ethiopia has been ratified by the response of Ethiopian students to the intense simulation exercise.8 Two students from the class taught in 2008 are quoted below:

Student A: "Up to now I personally understand and defined negotiation [as] an attempt to reach an [agreement with] the disputant party without the assistance of the [court]. I try to correlate negotiation with dispute resolutions. I [took] this course with such mind, but

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8 The class in Ethiopia was taught in an intensive, two week module using 10 class sessions of two to three hours each. While four face to face rounds of negotiation were maintained, the class would likely be improved by offering it over a longer period of time.
I was highly inspired with the lesson of business negotiation transaction. I found the course very interesting and moving the law profession from dispute resolution to the business transaction as dispute prevention mechanism. . . . I have learned more from this course [than] I have words to express."

Student B: "I have seen . . . and experienced what negotiation is all about and the techniques and ways of coming into negotiation. This is really of great importance not only for my professional capacity but also for my daily life. . . . The way you mold us with the required skills of negotiation need to be praised. I believe we have acquired the fundamental skill in the field. Above all, the fact that the learning teaching process has been practice oriented is a great blessing to us since this is unusual in Ethiopia. . . . I can say that you have accomplished your mission successfully."

By focusing on training in law school, the lawyer can become an informed and effective negotiator capable of assessing potential business transactions and working to avoid problems and improving the performance of business agreements. Furthermore, being involved in sensitive negotiations of business transactions confronting developing nations, trained lawyers will help identify the externalities that can be requested and incorporated into business agreements and will understand how to test and evaluate responses to particular proposals. Rather than being concerned if a transaction may be derailed by overly assertive requests, the trained lawyer negotiator can press and measure responses, utilize multiple negotiation techniques and tailor positions while moving toward agreement. A new generation of lawyers has the potential to redefine the role of the legal bar and achieve better social results through their efforts.

In a nation where lawyers have traditionally been used principally in dispute resolution, the use of lawyers as negotiators of business transactions is likely to begin with the government. As the government moves toward increased use of lawyers in transactional matters, the business community will follow suit. And by avoiding problems through early involvement and careful drafting of agreements, courts will become less burdened and business will generally progress more smoothly.
In conclusion, there is a significant role for lawyers in developing nations to play in avoiding exploitation through skilled negotiation of transactional agreements. Achieving this role will require a new focus on teaching transactional law at universities and increased involvement of lawyers as negotiators of key business agreements. The legal profession will need to expand its focus from dispute resolution to early involvement in negotiating and documenting business agreements, which will also require the business community to acknowledge the need for lawyers to be so involved. Lawyers may promote this issue through interaction with clients (suggesting that a dispute could have been avoided if the lawyer had been involved earlier in the drafting of the agreement), but a major step forward would be through lawyers being involved in government contracting efforts. Everyone stands to benefit from the improved results in agreements that should inevitably follow from avoiding exploitative agreements. It is time for the legal profession to advocate for an expanded role in business negotiations and to demonstrate that it is ready to assume this responsibility.