

THE ADVISORY GROUP ON APEC FINANCIAL SYSTEM CAPACITY-BUILDING

A Public-Private Sector Initiative

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Meeting Paper 5-C Asia-Pacific Informal Workout Guidelines and Model Agreement to Promote Company Restructuring by Informal Workout

Nomura Securities

- PURPOSE** For consideration.
- ISSUE** Asia-Pacific Informal Workout Guidelines and Model Agreement to Promote Company Restructuring by Informal Workout
- BACKGROUND** In 2007, the Advisory Group and ABAC endorsed a set of regional guidelines on informal workouts and a model agreement to promote company restructuring by informal workout developed by the ADB and supported by the region's banking industry. The guidelines and model agreement need to be updated to take into account new developments in the market. This represents an opportunity to promote the updated guidelines and model agreement for wider adoption not only within the region, but globally.
- PROPOSAL** Recommend the endorsement by APEC Finance Ministers of the Asia-Pacific Regional Informal Workout Guidelines and Model Agreement to Promote Company Restructuring by Informal Workout.
- DECISION POINT** Agree to recommend.

Workshop “Facilitating Finance through Legal Architecture Reforms: The Role of APEC” Organized by the Advisory Group on APEC Financial System Capacity Building APEC Business Advisory Council

9th July 2013 Kyoto

Session 2: Promoting Effective Region-wide Insolvency Restructuring Regimes by Creating Regional Workout Rules

Creation of “Asia Pacific Regional Informal Workout Guidelines” & “Model Agreement to Promote Company Restructuring by Informal Workout”

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1 Need to Create Informal Workout Rules Applicable in Asia Pacific Region to Facilitate Reorganization of Ailing Corporations With Excessive Debts at Early Stage

An informal or out of court workout is a very valuable tool in reorganizing ailing business corporations with excessive debts owed to financial creditors at early stage.

Insolvent or near insolvent business companies could be revitalized by debts restructuring.

Debt restructuring by debts-equity swaps, debts forgiveness and other means could be achieved through negotiation, which could take place out of court informally, between debtor companies and financial creditors.

Advantages of informal workouts, which are acknowledged by most experienced experts, as compared to formal reorganization proceedings under insolvency statutes or bankruptcy laws, are that the former is deemed more speedy, cost effectiveness, saving enterprise value, etc.

Even formal statutory reorganization proceedings are preceded by informal workout negotiations as in the case of British pre-packed administrations and pre-negotiated or pre-arranged Chapter 11 in the United States of America.

Majority of South East Asian countries have gained familiarity with informal debts restructuring workouts since Asian Currency Crisis in late nineties when these countries started to utilize them at the recommendation of IMF, the World Bank and OECD.

Korean KAMCO and Malaysian DANAHARTA are well known examples of government-involved organizations for the purpose of wiping out non-performing loans by means informal workout.

Hong Kong Approach, Bangkok Approach and Jakarta Initiative are such rules for informal workouts in Asian countries.

To facilitate finance early and speedy revitalization of debtor business companies by informal workout are essential. To encourage informal workouts, fair and equitable rules to be recognized officially in each countries may be helpful.

Moreover, the number of multi-national companies and their groups who owe debts to multi-national financial creditors is growing dramatically in recent years.

International or cross border informal workout rule, which is applicable in Asia Pacific Region or worldwide, would be useful to restructure ailing international business corporations.

2 Existing Asian Informal Workout Rules and Proposed Amendments to the Ruled as well as Recommendation to APEC

“Asian Bankers’ Association Informal Workout Guidelines” (GL) and the “Model Agreement to Promote Company Restructuring by Informal Workout” (MA) were approved by the Asian Bankers’ Association (ABA) at its general annual conference held in Melbourne in 2005.

The GA and MA were drafted based on Regional Technical Assistance Report (RETA 5975) presented to Asia Development Bank by experts from the United Kingdom, Australia and Asian countries.

However, the GL and MA have never been utilized because of several possible reasons including

conflict of interests.

The GL and the MA are buried treasures.

It may be possible to revive them by correcting their defects with minor amendments.

Proposed amendments to the GL and the MA could include the followings:.

- (1) Financial Creditors, who are interested parties of informal workout, would include various types of creditors such as financial institutions and banks, etc. The technical term “Financial Institution Creditor” should be replaced by “Financial Creditor” to make the point clearer that not only financial institutions but also any type of financial creditor is able to participate in the informal workout under the GL and the Rules.
- (2) According to the GL and the MA, only a financial institution creditor that holds large exposure is able to commence an informal workout process. A “Debtor Company” itself should be qualified as an applicant of the workout under the GL and the MA in addition to the “Eligible Financial (Institution) Creditor” with large exposure to the Debtor Company to avoid possible conflict of interests of financial creditors.

The APEC should aim to formulate the Asia Pacific regional rules by adopting the GL and MA adopting those amendments listed above. The APEC should then recommend that:

- (1) Ministry of Finance, relevant governmental agencies, central banks, bankers’ associations and industrial communities of each country in APEC regions should recommend and encourage financial creditors, business corporations and relevant professionals to use the formulated APEC Rules in each home country. Professionals may include lawyers, accountants, consultants, and investment bankers, etc.
- (2) The APEC should also recommend governments of member countries to enact a special statute to encourage informal workout (*ex. standstill or ring fence to stay individual collection efforts by creditors and court approval of a reorganization plan accepted by majority creditors*).

One of the possible reasons why the GL and MA have never been used could be that insolvency and restructuring professionals, who are expected to become the users of the GL and MA, have little knowledge of the GL and the MA.

During my visit to Sidney, Manila, Beijing, Hong Kong, Seoul, Bangkok, Kuala Lumpur and Singapore between November 2012 and April 2013, I had series of discussions regarding the possibility of reviving the GL and MA with top level experts of respective countries.

Most of the experts including professionals and scholars of these countries are supportive of and cooperative for our proposals.

In case of those countries where out of courts workouts are popular already with supporting established statutes may not need any of above rules for domestic informal out of workout cases, but they may still need these rules for internationally related cases.

Attachments

1. Proposed Amendments to the existing Informal Workout Guidelines (with track history).
2. Proposed Amendments to the existing Model Agreement to Promote Company Restructuring: A Model Adaptable for Use Regionally, by a Country, or for a Particular Debtor
3. Proposed Amendments to the existing Diagram (with track history).

Attachment 1

Proposed Amendments to the existing Informal Workout Guidelines

Introduction

This document contains principles which should guide financial creditors as to how they should deal with debtors in difficulties in circumstances where the customer, is dealing with multiple financial creditors as creditors (**Financial Creditors**).

It is in the interests of all stakeholders that the business of a debtor in financial difficulty should survive as a going concern if it appears to be possible to resolve those financial difficulties and to achieve the long term viability of that debtor's business.

A coordinated response by Financial Creditors to a debtor's financial difficulty provides time to manage the impact of defaults by that customer and creates an opportunity to explore and evaluate the options for consensual agreement outside a formal process. Advantages of pursuing an informal workout (as opposed to a formal court process) in most cases include:

- Cost savings;
- Simplicity;
- Certainty;
- Efficiency;
- Confidentiality;
- Flexibility; and
- A contractually based sustainable solution to a debtor's financial affairs.

In recognition of the advantages of informal workouts, the ABA has endorsed the principles below and encourages its members to apply them whenever and wherever they are seeking to resolve the financial difficulties of a debtor owing to multiple Financial Creditors.

In addition to those principles, a Model Agreement to Promote Company Restructuring (the Model Agreement) is attached. The Model Agreement can be used to facilitate an informal workout and is capable of both adaptation and adoption by some or all members of the ABA, regionally or in a particular jurisdiction or on a case by case basis. The Model Agreement is annotated and can be tailored to fit particular circumstances. A diagram is also attached detailing how the Model Agreement operates in broad terms.

THE PRICIPLES

Cooperation

Where a debtor is found to be in financial difficulties, all relevant Financial Creditors (whether they are secured or unsecured creditors) should be prepared to cooperate with each other. The initial attitude of Financial Creditors should be one of support.

Workouts need cooperation. Whilst Financial Creditors are likely to be reluctant to permit an increase in their exposure to a customer so that other facilities of financial creditors can be salvaged, they should be aware that, if they fail to cooperate in workout, the same approach may be taken against them should roles be reversed.

Breathing Space for Debtor Required

Financial Creditors should not withdraw facilities or be hasty to put the debtor in a formal insolvency administration or issue Court proceeding.

Fully Informed Creditors

Decisions should only be made based on reliable information which is shared fully with all Financial Creditors.

Involvement of all Financial Creditors in Workout Process

All Financial Creditors (other than those whose exposure is negligible) should be eligible to participate in an informal workout process. Financial Creditors means all financial creditors who extended credits

by means of loan and others including not only financial institution creditors but also bondholders, other financial creditors and purchasers who bought loans and claims from other financial creditors. Other creditors-such as trade creditors, trade financiers, insurance institutions and bondholders may also participate in a work-out.

IMPLEMENTATION

Initiation of Informal Workout

Upon an application filed by a Debtor Company and/or a Financial Creditor with large exposure, the informal workout should be commenced.

Meeting of Financial Institution Creditors Desirable

Where it has become apparent that an informal workout process may be applicable to a debtor, Financial Creditors should meet to consider whether or not to implement an informal workout process. All Financial Creditors (other than those whose exposure is negligible) should be invited to participate in such a meeting.

Standstill Prior to Meeting

Prior to the meeting of creditors, the status quo in relation to the debtor should be maintained. Financial Creditors should not take any enforcement action, other action, or reduce their exposure to the debtor until a meeting is held

Eligibility for Workout Process

An informal workout process should only apply to a debtor where it appears possible to resolve its financial difficulties and where its business is viable in the long term.

Experienced representatives required

Financial Creditors participating in an informal workout should take an active role by appointing an experienced and competent representative. That representative should ensure appropriate levels of management within the creditor organization are informed of the progress of the workout at all important stages and that the prospective and likely outcome of the workout is expected to be acceptable to the decision makers within the creditor organization.

Appointment of Representative Committee

The interests of relevant creditors are best served by coordinating their response to a debtor in financial difficulty. Such coordination will be facilitated by the selection of one or more representative coordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating as a whole.

Creditors should agree to appoint one creditor (usually the creditor with the largest exposure to the debtor or with particular expertise in managing informal workout negotiations) or an independent party to chair the coordination committee, lead negotiations with the debtor and ensure the expeditious progress of the informal workout negotiations.

Standstill Period

If Financial Creditors consider, at the meeting of such creditors, that it appears possible to resolve the financial difficulties of the debtor and to achieve long term viability of its business, all relevant creditors should be prepared to cooperate with each other to provide sufficient time (a '**Standstill Period**') to enable information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course of action is inappropriate.

During the Standstill Period, all relevant Financial Creditors should agree to refrain from taking any steps to enforce their claims (otherwise than disposal of their debt to a third party) or to reduce their exposure to the debtor, but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

The length of such a Standstill Period should be limited to the time that is reasonably required to fulfill the objective of restructuring the debtor's business if that is possible. The length of a Standstill may be difficult to estimate and in some circumstances may need to be extended.

During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collective or individually) as compared with the position of those creditors at the commencement of the Standstill Period.

Assignment of debts

Care must be exercised when dealing with sales of debt, particularly to third parties, who have not previously been involved in the workout process. Bringing buyers up to speed and ensuring their commitment can impede progress. Sellers of debts should ensure that buyers are aware of the ABA Informal Workout Guidelines and that they would be expected to adhere to them.

Priority for funding during workout

If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.

Access to Information about Debtor

During Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to all relevant information relating its assets, liabilities, business and prospects, to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

Achievable Business Plan

A restructure should be based on an achievable business plan that addresses operational as well as financial issues. A business plan should contain forecasts, based on documented and reasonable assumptions as to future events, which evidence that the business of the debtor corporation can generate sufficient cash flow and profit to meet its obligations existing after the restructure.

The underlying objective of any work out should be to obtain for Financial Creditors the best deal that can be achieved.

Costs

A careful watch must be kept on costs. Financial Creditors should take care that costs are minimized and reasonable, given that otherwise the debtor's cash flow will be unnecessarily worsened. Likewise the demands on the borrower for information must be reasonable.

The debtor should meet all reasonable costs of creditors in considering restructuring proposals. This would include the costs of professional advisers, and any costs necessarily incurred by the coordinating committee.

Restructuring Proposal

Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements, between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the commencement of the Standstill Period.

The term of any restructuring proposal must be manageable for the debtor.

Confidentiality

Information obtained for the purposes of the informal workout process concerning the assets, liabilities, business and prospects of the debtor and any proposals for resolving its difficulties, should be made available to all relevant creditors and should, unless such information already publicly available, be treated as confidential, and only be used by creditors for the purpose of determining and ascertain an informal workout proposal.

Conflicts

Any conflicts of interest should be declared openly and promptly.

Dispute Resolution

In endeavoring to determine disputes between creditors or between a debtor and its creditors, regard should be given to the possibility of referring such disputes, with the consent of those involved, to mediation.

Attachment 2

Proposed Amendments to the existing Model Agreement to Promote Company Restructuring: A Model Adaptable for Use Regionally, by a Country, or for a Particular Debtor

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Agreement to Promote Company Restructuring

DATE

PARTIES

Each of the Financial Creditors specified in Schedule 1 who bind themselves to this Agreement in consideration of the covenants given by the other parties.

RECITALS

- A. This agreement establishes a procedure for Financial Creditors in [*specify relevant jurisdiction/s or of a particular debtor on a case by case basis*] to collectively consider and negotiate workout arrangements with a Debtor Company during specified standstill periods.
- B. That procedure involves the following steps [*depending on the mode of workout used it may be necessary to amend these recitals*]:
1. a Debtor Company and/or an Eligible Financial Creditor submitting a Workout Application to the Financial Creditors of the Debtor Company and convening a First Meetings of Creditors of Financial Creditors ;
 2. an Initial Standstill Period during which Financial Creditors must not prosecute their Claims against the Debtor Company until after the First Meetings of Creditors of Financial Creditors;
 3. conducting the First Meetings of Creditors of Financial Creditors at which:
 - (a) a Workout Committee may be elected; and
 - (b) the duration of the Extended Standstill Period may be determined, being the further period during which Financial Creditors must not prosecute their Claims against the Debtor Company;
 4. negotiating an agreement with the Debtor Company under which it undertakes to :
 - (a) provide the Workout Committee and the Financial Creditors with financial and other information as they request to enable them to formulate and assess the viability of a Workout Agreement;
 - (b) preserve the status quo in relation to the conduct of its business and the management of its affairs;
 - (c) pay the costs and expenses incurred by the Financial Creditors in connection with negotiation of a Workout Agreement and the incidental matters; and
 - (d) indemnify members of the Workout Committee in their capacity as such in report of any actions, claims or demands made against them, subject to specified exclusions;
 5. the Workout Committee assessing information provided by the Debtor Company ;
 6. the Workout Committee negotiating Workout Agreement with the Debtor Company ; and
 7. the Workout Committee convening a meeting of Financial Creditors to consider and, if agreed, adopt the Workout Agreement containing the Debtor Company's business plan.
- C. That procedure is or may be terminated if:
1. the First Meetings of Creditors of Financial Creditors concludes without a resolution to establish a Workout Committee have been passed;
 2. the Debtor Company refuses to give, or breaches, the Debtor Company's Covenants;
 3. an event occurs which brings the Debtor Company under the operation of the bankruptcy and insolvency law of [*specify relevant jurisdiction*]; or
 4. the Extended Standstill Period expires without a Workout Agreement having been adopted.

OPERATIVE PROVISIONS

1. Interpretation

1.1 Definitions

The following definitions apply in this Agreement.

Business Day means:

- (a) for determining when a notice, consent or other communication is given, a day that is not

a Saturday, Sunday or public holiday in the place to which the notice, consent or other communication is sent; and

(b) for any other purpose, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in [*specify relevant jurisdiction*]

[*This definition may require modification in jurisdictions where a “weekend” falls on days other than Saturday and Sunday, for example Malaysia*]

Claim means any indebtedness or obligation owed by a Debtor Company to a Financial Creditors, including but not limited to indebtedness for or in respect of:

(a) money borrowed from a Financial Creditor;

(b) any acceptance credit;

(c) any bond, note, debenture, loan stock or other instrument;

(d) any finance or capital lease;

(e) receivables sold or discounted (other than a non-recourse basis); or

(f) any obligation in respect of any guarantee, indemnity, bond, letter of credit or any other instrument issued by Financial Creditors on account of or at the request of the Debtor Company.

[*Consideration should be given to expanding this definition to include creditor such as trade financiers.*]

[*Consideration should be given to extending this definition to include amounts owing by a debtor to a Financial Creditor, not in connection with a finance or facility document, such as amounts owing as a trade supplier or contractor to the Financial Institution.*]

Debtor Company means a company that is indebted to a Financial Creditor.

[*It may be necessary in some jurisdictions to include a reference to forms of commercial organization other than companies.*]

Debtor Company’s Covenants means undertakings to be given by a Debtor Company as contemplated in clauses 13.1 to 13.4 (inclusive), as amended and approved by the Workout Committee applicable to that Debtor Company.

Eligible Financial Creditor means a Financial Creditor of the relevant Debtor company with Claim against the Debtor Company which represents more than 10% of the total indebtedness owed by that Debtor Company to all of its Financial Creditors [*consideration should be given to allowing a number financial creditors to group their claims to get over the 10% threshold*]

Extended Standstill Period, in respect of a Debtor Company, means:

(a) the period of 60 days, or

(b) any period determined by a special resolution passed at the First Meeting of Financial Creditors (being a meeting at which it is determined that a Workout Committee is to be appointed),

as varied under clause 7.3 or 7.4 and in the case of either period commencing on the date on which the First Meeting of Financial Creditors in respect of that Debtor Company concludes.

Facility means any facility giving rise to financial indebtedness by a Debtor Company.

Financial Institution means any body that carries on a business providing financial products or financial services or any body that receives money on deposit and which is (e.g. either “licensed to carry on the business of banking in [*specify relevant jurisdiction*]” or “a member of the Bankers’ Association of [*specify relevant jurisdiction*].)

Financial Creditor means any Financial Creditors which has entered into this Agreement and has a Claim against a Debtor Company.

Financial Institution Creditor Subsidiary Accession Deed Poll means a deed poll substantially in the form of Annexure B.

First Meeting of Financial Creditors, in respect of a Debtor Company, means the meeting of the Financial Creditors of a Debtor Company held pursuant to the Notice described in clause 3.4 for the purpose described in clause 4.

Initial Standstill Period, in respect of a Debtor Company, means the period commencing on the third Business Day after the dated on which Notice of the First Meeting of Financial Creditors is sent and ending on the date on (and including) the earlier of

- (a) the date on which that meeting (allowing for any adjournment of that meeting concludes; or
- (b) (if the meeting stipulated by that Notice does not take place or the determination under clause 4 do not take place at that meeting and there is no adjournment, or any adjournment does not take place) the Business Day on which that meeting was to have been held or the day to which it was to have been adjourned.

Member Accession Deed Poll means a deed poll substantially in the form of Annexure A.

Non Financial Creditor means a creditor of the relevant Debtor Company which agrees to be bounded by the terms of this Agreement as though it were a Financial Creditor of that Debtor Company.

Notice means a written notice, consent, approval or other communication given or required under this Agreement.

Related Party means a parent company or Subsidiary of a Debtor Company.

Security Interest means:

- (a) a mortgage, pledge, lien, charge, assignment, hypothecation, title retention arrangement, right of se-off or right to withhold payment of a deposit or other money or security interest;
- (b) any other interest or arrangement of any kind that secures the payment of money or the performance of an obligation or which gives a creditor priority over unsecured creditors in relation to any property; or
- (c) an agreement to create any of them or to allow any of them to exist.

Subsidiary in respect of either a Financial Creditor or a Debtor Company means a company in which it directly or indirectly through another subsidiary owns at least 90% of the issued [voting] capital of that company.

Workout means the procedures adopted to promote the financial soundness of a Debtor Company through additional financing, release of mutual guarantees, capital reductions, selection of areas of business concentration, foreign capital and restructuring of obligations (including the conversion of short term loans into long term or medium term loan, the suspension of repayments of loan principal and interest accrued, reductions of , or exemptions from interest obligations and exemptions form other obligations).

Workout Agreement, in respect of a Debtor Company means an agreement entered into regarding a Workout between Financial Creditors and the Debtor Company which conforms to clause 9.2.

Workout Application means an application made by a Debtor Company and/or an Eligible Financial Creditor of the Debtor Company with conforms to clause 3.2.

Workout Committee means a committee of the Financial Creditors of a Debtor Company formed under clause 6.2.

1.2 Rules for interpreting this Agreement

Headings are for convenience only, do not affect interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
 - (1) legislation (including subordinate legislation) is to that legislation as amended, re enacted or replaced, and includes any subordinate legislation issued under it;
 - (2) a document or agreement, or a provision of a document of agreement, is to that document, agreement or provisions as amended, supplemented, replaced or novated;
 - (3) a party to this Agreement or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
 - (4) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person and
 - (5) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.

- (c) A word which suggests one gender includes other genders.
- (d) If a word is defined, another part of speech has a corresponding meaning.
- (e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (f) The word agreement includes an undertaking or other binding arrangement of understanding, whether or not in writing.

1.3. Business Days

If the day on or by which a person must do something under this Agreement is not a Business Day:

- (a) if the act involves a payment that is due on demand, the person must do it on or the next Business Day; and
- (b) in any other cases, the person must do it on or the previous Business Day

2. Financial Creditors

2.1 Representatives of Financial Creditors

- (a) Each party to this Agreement must appoint a senior employee or officer to represent it in relation to the matters arising under this Agreement.
- (b) That representative must have written authorization from the relevant Financial Creditor to represent that Financial Creditor and act on its behalf in relation to the matters arising under this Agreement, including to vote on behalf of that Financial at meetings held under this Agreement.

2.2 Meetings of Financial Creditors

Subject to the other provisions of this Agreement, the convening and conduct of meetings of Financial Creditors is governed By Laws governing the conduct of General Meetings of the Bankers' Association of *[specify relevant jurisdiction or if regionally may be the by-laws of ABA]*

[May need to identify set of meeting rules if this Agreement is used for workout of particular debtor.]

2.3 Chairman of meeting of Financial Creditors

After the Initial Standstill Period, the Chairman (or his or her nominee) of the Workout Committee for a Debtor Company must chair meetings of Financial Creditors of that Debtor Company.

2.4 Resolution of meetings of Financial Creditors

A resolution of a meeting of Financial Creditors must be:

- (a) unless otherwise specified, an ordinary resolution. Subject to clause 2.6, an ordinary resolution is a resolution which is passed by a *[majority in number]* of the Financial Creditors voting in person or proxy representing a *[majority of the value]* of the Claims of all voting Financial Creditors; or
- (b) where specified, special resolution. Subject to clause 2.6, a special resolution is a resolution passed by a majority in number of the Financial Creditors voting in person or proxy representing *[75%] of the value* of the Claims of all voting Financial Creditors.

[The thresholds in sub-paragraphs (a) and (b) above may be altered if it is considered that they are inappropriate in a particular jurisdiction.]

[It may be necessary to have a mechanism concerning the calculation of the value of claims and for disputes as to values.]

2.5 Representation of Subsidiaries of Financial Creditors

For meetings of Financial Creditors convened under this Agreement, the representative of a Financial Creditors is also the representative of all its Subsidiaries who have acceded to this Agreement under a Financial Creditors Subsidiary Accession Deed Poll.

[It is noted that certain Financial Creditors may need to deal with conflict issues arising from special purpose Subsidiaries established to trade in the secondary debt market and in particular the possibility that such subsidiaries may wish to acquire the debt of a related entity.]

2.6 Computation of votes at meetings of Financial Creditors

Where a Financial Creditors and its Subsidiaries each have Claims against a Debtor Company:

- (a) that Financial Creditor and those Subsidiaries have one vote collectively at meetings of Financial Creditors; and

(b) the value of their vote is the aggregate amount of their Claims.

[It may be necessary to have a mechanism concerning the calculation of the value of claims and for disputes as to values.]

3. Initiation of Workout

3.1 Workout Application

An Debtor Company and/or an Eligible Financial Creditor may dispatch a Workout Application to as many of the Financial Creditors of the Debtor as is reasonably practicable provided that the Claims of all Financial Creditors of the Debtor Company comprise at least [90%] of the Debtor Company's total indebtedness excluding indebtedness to Related Parties. *[This percentage may be too high in some jurisdictions. In some jurisdictions a percentage figure of 70% or 75% may be more appropriate.]*

[In some jurisdictions it may be necessary to obtain the consent of the debtor prior to dispatch of a workout due to confidentiality liability concerns. Whether a Workout Application procedure coupled with an initial standstill period is acceptable or appropriate in such jurisdictions may also be a relevant consideration.]

3.2 Content of Workout Application

The Workout Application must:

- (a) specify, to the extent that the Financial Creditor is aware, details of:
 - (1) the Debtor Company and its registered office;
 - (2) the Financial Creditors for the Debtor Company; and
 - (3) the indebtedness of the Debtor Company to each of those Financial Creditors (including the amount of and type of indebtedness); and
- (b) be accompanied by either the latest audited financial report of the Debtor Company or, if there is no such report, the latest balance sheet provided by the Debtor Company to that Financial Creditor. *[subject to the confidentiality and liability issues that may arise in certain jurisdictions.]*

3.3 Calculation of percentages in Workout Application

To calculate the percentages required to be satisfied to enable a Financial Creditor to dispatch a Workout Application, the information included in the audited financial report or the balance sheet submitted with the Workout Application is conclusive evidence *[in absence of manifest error]* of the relevant amounts.

[Given the lack of adequate publicly available financial information in some jurisdictions it may be necessary to use another means to determine the relevant amounts.]

[It may be necessary to have a mechanism concerning the calculation of the value of claims and for disputes as to values.]

3.4 Notice of First Meetings of Financial Creditors

The Workout Application dispatched by the debtor Company and/or an Eligible Financial Creditor under clause 3.1 shall be accompanied by a Notice of First Meetings of Financial Creditors of the Debtor Company. That Notice shall stipulate:

- (a) the place at which the Meeting is to be held;
- (b) the hour at which is to be held;
- (c) the Business Day on which the Meeting is to be held which shall be no less than [10] Business Days after the day on which the Notice was sent and no more than [15] Business Days after the Notice was sent; *[These periods can be shortened or lengthened.];* and
- (d) the identity of the Chairman of the Meeting.

4. First Meetings of Financial Creditors

The purpose of the First Meetings of Financial Creditors of the Debtor Company is to determine:

- (a) by special resolution, whether to appoint a Workout Committee;
- (b) which Financial Creditors are to be members of any Workout Committee; *[depending on the size and complexity of the Workout specialist subcommittees the Workout Committee may also be necessary.]*
- (c) the identity of the Chairman of the Workout Committee; and
- (d) subject to a special resolution to appoint a Workout Committee having been passed, the duration of the Extended Standstill Period if it is to be other than 60 days.

5. Initial Standstill Period

During Initial Standstill Period, Financial Creditors of the Debtor Company must not take any steps, to enforce Claims against either the Debtor Company or any Related Party of the Debtor Company, including:

- (a) commence or continue any a action to enforce the payment of any amount owed by any of them including steps to place any of them in liquidation, administration, insolvency, receivership, business organization or rehabilitation under any insolvency laws or any similar procedures in any jurisdiction;
- (b) make any demand for, or accelerate the due date for, or declare prematurely payable, any amount owing to it by any of them;
- (c) accept any payment from any of them in discharge of any indebtedness owed to it by any of them;
- (d) terminate or cancel any Facility;
- (e) amend any Facility documentation;
- (f) perfect, enforce or make a demand under any Security Interest or any guarantee indemnity or like commitment or similar support held by it in respect of any Facility;
- (g) take any cash collateral, cash cover, guarantee, indemnity or Security Interest in respect of any Facility; or
- (h) exercise any right of appropriation, amalgamation of accounts, counterclaim or set off in reduction of sums owing to it under any Facility;
- (i) Nothing in this clause shall prevent a Financial Creditor from taking such steps as may be necessary to avoid the circumstance that a Claim may not be pursued or enforced by reason of either a standstill or an agreement which limits the time which those steps must be taken.

[Consideration must be given to whether a secured creditor should be bound by the moratorium and therefore prevented from exercising its rights to enforce its security.]

[Consideration must also given to the status of undrawn or partly drawn facilities and revolving facilities or similar types of facilities. Consideration needs to be given to whether provider of such finance should be restrained from refusing to provide further funds during the standstill period. Cf clause 8 below which relates to priority for additional funding.]

6. Workout Committee

6.1 Application of clause

Clause 6 applies only if a special resolution is passed at the First Meetings of Financial Creditors to establish a Workout Committee for a Debtor Company.

6.2 Constitution of Workout Committee

Subject to clause 12.3, the Workout Committee for a Debtor Company is to comprise:

- (a) one nominated representative (or that representative's alternate) each from the 3 Financial Creditors who have the largest Claims;
- (b) one nominated representative (or that representative's alternate) each from three other Financial Creditors. At the First Meetings of Financial Creditors, each Financial Creditor will vote for 3 Financial Creditors. The 3 Financial Creditors with the most votes will each be entitled to nominate one representative for the Workout Committee; and
- (c) Either:
 - (i) an independent chairman appointed by the First Meetings of Financial Creditors; or
 - (ii) the nominee chairman of the Financial Creditor which has the largest Claim.

6.3 Qualifications of chairman *[only relevant if clause 6.2 (c) (i) is adopted]*

The chairman of the Workout Committee must:

- (a) have:

- (1) at least 10 years experience in the management of a Financial Institution or management in other fields relating to finance; or
- (2) at least 10 years experience as a certified public accountant or a lawyer; or
- (3) at least 3 years experience in company restructuring;
- (b) not personally owe, or directly or indirectly own 25% or more of the issued shares in a company which owes, more than US\$5,000 to the Debtor Company or its Subsidiary;
- (c) not be owed more than US\$5,000 by the Debtor Company, or not directly or indirectly own 25% or more of the issued shares in a company which is owed more than US\$5,000 by the Debtor Company;
- (d) not be an officer or employee of a Financial Creditor of the Debtor Company (otherwise than by reason of being a liquidator or administrator of the Debtor Company or its Subsidiary);
- (e) not be an officer or employee of either any mortgagee or holder of other security of property of the Debtor Company;
- (f) not be an officer or employee of the Debtor Company, or an employee or employee;
- (g) not be an auditor of the Debtor Company, or a partner or employee of the auditor.

For the purpose of this clause a reference to a Debtor Company includes a Related Party of that Debtor Company.

6.4 Role of Chairman

The chairman of the Workout Committee must:

- (a) chair meetings of the Workout Committee;
- (b) oversee the gathering of financial and other information relevant to the formation of a Workout Agreement;
- (c) be the principal representative of the Workout Committee in negotiations with the Debtor Company in relation to the formation of the Workout Agreement; and
- (d) undertake any other duties or responsibilities as reasonably requested by a resolution of the Workout Committee.

6.5 Functions and Powers of Workout Committee

The Workout Committee must perform the following functions:

- (a) oversee any negotiation between the chairman and the Debtor Company to form a Workout Agreement;
- (b) gather, collate and disseminate to Financial Creditors all financial and other information as they may require to assess any proposed Workout Agreement;
- (c) review and assess the commercial viability of any proposed Workout Agreement (including the Debtor Company's business plan contained in it) and report its opinion to the Financial Creditors;
- (d) convene meetings of Financial Creditors as in the Workout Committee's opinion are necessary:
 - (1) to review the financial and other information disclosed to the Financial Creditors;
 - (2) to consider what further information is required to assess any proposed Workout Agreement;
 - (3) to consider the formation of a Workout Agreement;
 - (4) to review the progress in forming a Workout Agreement;
 - (5) to discuss amendments to any proposed Workout Agreement; and
 - (6) to adopt any proposed Workout Agreement.
- (e) establish budgets for the operating expenditure of the Workout Committee;
- (f) appoint professional advisers to advise and assist the Workout Committee and

- Financial Creditors;
- (g) receive any Financial Creditor Subsidiary Accession Poll in respect of the Debtor Company, and provide copies on request to Financial Creditors; and
 - (h) do anything which, in the opinion of the Workout Committee, is contemplated by, incidental to or otherwise necessary or desirable in connection with, anything described in the proceeding paragraphs and may exercise the following powers:
 - (i) to approve on behalf of and so as to bind each party to this Agreement the grant by the Debtor Company to a Financial Creditor of such security as it may require in respect of the provision of any Facility by it to the Debtor Company after the appointment of the Workout Committee; and
 - (j) In any case where the Chairman of the Workout Committee is unable to act as such for any reason, appoint another person to act as such during the period of the Chairman's disability.

6.6 *Proceedings and resolutions of Workout Committee*

The conduct of the Workout Committee and the dispatch of its business are regulated by the same By Laws as regulate those matters on the matters on the matters on the part of [*the Board of Directors of the Bankers' Association of (the relevant jurisdiction) of the Asian Bankers' Association (ABA) if regional agreement.*].

6.7 *Liability for Workout Committee's expenses*

Any operating expenditure and taxes of the Workout Committee which are unpaid by the Debtor Company must be paid proportionately by each Financial Creditor according to the value of its Claim against the Debtor Company.

6.8 *Indemnify by Financial Creditors for Workout Committee members*

- (a) Subject to paragraph(b), each Financial Creditor severally indemnifies each Workout Committee member for its own account against, and must pay that member on demand the amount of, its proportion (which equals the proportion which its Claim bears to the total Claims) of all losses, liabilities, costs, expenses (including legal fees on a full indemnity basis) and taxes which that member incurs in connection with the performance of its functions as a Workout Committee member, except to the extent that they:
 - (1) have been finally paid by the Debtor Company under any indemnity given in accordance with clause 13.4; or
 - (2) are incurred as a result of the fraud, willful misconduct, misrepresentation or gross negligence of that member.
- (b) A Workout Committee may only make a claim against a Financial Creditor under paragraph (a) after the Debtor Company has failed for a period of 14 days to pay an amount demanded under an indemnity given in accordance with clause 13.4.
- (c) Before claiming against a Financial Creditor under paragraph (a), a Workout Committee member must first claim against the Debtor Company under any indemnity given in accordance with clause 13.4.

7. *Extended Standstill Period*

7.1 *Application of clause*

Clause 7 applied only if a resolution is passed at the First Meetings of Financial Creditors to establish a Workout Committee for a Debtor Company.

7.2 *Extended Standstill*

During Extended Standstill Period, the Financial Creditors of the Debtor Company must not take any steps, to enforce Claims against either the Debtor Company or any Related Party of the Debtor Company, including:

- (a) commence or continue any a action to enforce the payment of any amount owed by any of them including steps to place any of them in liquidation, administration, insolvency, receivership, business organization or rehabilitation under any insolvency laws or any similar procedures in any jurisdiction;

- (b) make any demand for, or accelerate the due date for, or declare prematurely payable, any amount owing to it by any of them;
- (c) accept any payment from any of them in discharge of any indebtedness owed to it by any of them;
- (d) terminate or cancel any Facility;
- (e) amend any Facility documentation;
- (f) perfect, enforce or make a demand under any Security Interest or any guarantee indemnity or like commitment or similar support held by it in respect of any Facility;
- (g) subject to any resolution of the Workout Committee in exercise of its power under sub clause 6.5 (i), take any cash collateral, cash cover, guarantee, indemnity or Security Interest in respect of any Facility; or
- (h) exercise any right of appropriation, amalgamation of accounts, counterclaim or set off in reduction of sums owing to it under any Facility;
- (i) Nothing in this clause shall prevent a Financial Creditor from taking such steps as may be necessary to avoid the circumstance that a Claim may not be pursued or enforced by reason of either a standstill or an agreement which limits the time which those steps must be taken.

[Consideration must be given to whether a secured creditor should be bound by the moratorium and therefore prevented from exercising its rights to enforce its security.]

[Consideration must also be given to the status of undrawn or partly drawn facilities and revolving facilities or similar types of facilities. Consideration needs to be given to whether provider of such finance should be restrained from refusing to provide further funds during the standstill period. Cf clause 8 below which relates to priority for additional funding.]

7.3 Extension of Extended Standstill Period

If the Workout Committee considers it necessary to evaluate the commerciality of a proposed Workout Agreement or to form a Workout Agreement, the Workout Committee may convene a meeting of Financial Creditors to consider a special resolution to:

- (a) extend the Extended Standstill Period; or
- (b) commence some other period with moratorium or other features to be determined by the Financial Creditors during that meeting.

7.4 Termination of Extended Standstill Period

- (a) If any of the following events occur, the Workout Committee may convene a meeting of Financial Creditors to terminate the Extended Standstill Period on a specified date, subject to any ordinary or special resolution specified below as being required for termination being passed:
 - (1) the Debtor Company does not give the Debtor Company's Covenants contemplated in clause 13.1 or 13.2 within 5 Business Days of the First Meetings of Financial Creditors and Financial Creditors pass an ordinary resolution to terminate the Extended Standstill Period; *[In this case, consideration needs to be given as whether the Extended Standstill Period should be terminated automatically or should an ordinary resolution be required.]*
 - (2) the Debtor Company does not give those Debtor Company's Covenants contemplated in clause 13.3 or 13.4 within 5 Business Days of the First Meetings of Financial Creditors and Financial Creditors pass an ordinary resolution to terminate the Extended Standstill Period;
 - (3) in the opinion of the Workout Committee, the Debtor Company breaches a material term of the Debtor Company's Covenants, and the Financial Creditors pass an ordinary resolution to terminate the Extended Standstill Period;
 - (4) any event which brings the Debtor Company under the operation of the bankruptcy or insolvency or similar laws of *[specify relevant jurisdiction.]*,

including

- (A) an order [*or an application*] being made, or a resolution being passed, for the winding up of the Debtor Company; and
- (B) an administrator, controller, liquidator, provisional liquidator, receiver or trustee for creditors or in bankruptcy being appointed to the Debtor Company or any of its property, or a resolution being passed [*or application being made*] for that appointment; or

[For these financial defaults, consideration needs to be given as whether the Extended Standstill Period should be terminated automatically or should an ordinary resolution be required.]

- (5) the Workout Committee forms the unanimous opinion that no purpose is served by continuing the Extended Standstill Period and the Financial Creditors pass an ordinary resolution to terminate the Extended Standstill Period.
- (b) If any event described in subparagraphs (a)(1) to (a)(5) occurs or the Extended Standstill Period expires without a Workout Agreement having been adopted by a special resolution of a meetings of Financial Creditors, the Extended Standstill Period and the obligations of the Financial Creditors which would otherwise apply to them during that period will terminate with effect from that date or the specified termination date as the case may require.

8. Additional Funding

If any Financial Creditor provides additional funds to the Debtor Company to maintain the Debtor Company's continuing business operations during the Extended Standstill Period, the repayment of the additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of the Financial Creditor.

[Consideration should be given to whether there should be an express subordination arrangement so as to give priority to such additional funding in any event.]

[Consideration should be given to making priority of such funding mandatory.]

[It may be necessary to expand this clause to deal with issues of partly drawn facilities and rollover facilities.]

9. Workout Agreement

9.1 Negotiation of Workout Agreement

During the Extended Standstill Period, the Workout Committee must negotiate a Workout Agreement with the Debtor Company for the restructuring of the Debtor Company.

9.2 Minimum content of proposed Workout Agreement

A proposed Workout Agreement must contain details of at least the following:

- (a) the property of the Debtor Company (whether or not already owned by the Debtor Company when it executes the Workout Agreement) which is affected by the Workout Agreement;
- (b) the nature and duration of any standstill period for which the Workout Agreement provides;
- (c) the extent to which the Debtor Company is to be released from any Claims or the extent to which those Claims are to be modified;
- (d) any conditions to be satisfied for the Workout Agreement to become effective;
- (e) any conditions to be satisfied for the Workout Agreement to continue to apply;
- (f) the circumstances in which the Workout Agreement terminates;
- (g) the order in which proceeds of realizing the property referred to in paragraph (a) are to be distributed among Financial Creditors which order of distribution should, so far as is practicable, reflect the rights and obligations of the Financial Creditors at the commencement of the Initial Standstill Period except to the extent to which they have been modified under an agreement made consistently with clause 8.
- (h) the day not later than the day that the Workout Application was sent on or before which Claims must arise under the Workout Agreement;

- (i) the Debtor Company's business plan; and
- (j) the applicable law governing the Workout Agreement.

9.3 Adoption of Workout Agreement

If the Workout Committee negotiates as a Workout Agreement with the Debtor Company, convenes a meetings of Financial Creditors to adopt the Workout Agreement and if that meeting of Financial Creditors adopts the Workout Agreement by a majority representing at least [75%] of all Financial Creditors of the Debtor Company with at least [90%] of the Claims of all Financial Creditors of the Debtor Company, the Workout Agreement will bind the Financial Creditors of the Debtor Company once it has been executed by the Debtor Company.

10. Assignment of Claims by Financial Creditors

Notwithstanding any other provision of this Agreement, a Financial Creditor, during either the Initial Standstill Period or the Extended Standstill Period, may assign, transfer, grant security, encumber or otherwise dispose of its Claim against a Debtor Company only if any assignment giving effect to that assignment, transfer, grant of security, encumbrance of other disposal provides that:

- (a) the assignee, grantee or disponent agrees to comply with the terms of this Agreement as if it were the Financial Creditor; and
- (b) that Financial Creditor holds that agreement on the part of the assignee, grantee or disponent as trustee for the other Financial Creditors of the Debtor Company and their assigns.

[It is necessary to consider the impact of this clause on the ability of creditors to sell debts in the secondary market. The countervailing consideration is that unless assigns are bound then a hold-out creditor can easily circumvent the binding nature of the agreement.]

[An issue concerns the operation of insurance policies available to Financial which, at least, limit their exposure to the risk associated with any credit. Consideration needs to be given to whether this Agreement should made any provision concerning such insurance.]

11. Breach by Financial Creditors of Standstill Provisions

- (a) If a Financial Creditor (the Defaulting Financial Creditor) breaches any part of clause 5 or clause 7, any other Financial Creditors may apply to the relevant court for an interim or final injunction or other relief as may be required to secure compliance by the Defaulting Financial Creditor with relevant clause.
- (b) Execution of this Agreement by the Defaulting Financial Creditor is conclusive evidence of its consent to the grant of that relief. *[Whilst other breaches of this Agreement may be able to be litigated in the ordinary course, a breach of standstill provisions would seem to require more immediate action to be able to be taken against the Defaulting Financial Creditor, Consideration needs to be given whether this clause in an appropriate means of dealing with breaches by Financial Creditors of this Agreement.]*

12. Accession to this Agreement

12.1 Accession by new member of Bankers' Association of *[either ABA or relevant jurisdiction]*

If a Financial Institution becomes a member of the Bankers' Association of *[relevant jurisdiction or ABA]* after the date of this Agreement, it may accede to and become bound by terms of this Agreement by executive a Member Accession Deed Poll and delivering it to the Association. *[This clause will not apply to a workout for a particular debtor.]*

[A further issue is whether this clause should be mandatory.]

12.2 Accession by Subsidiary of Financial Institution Creditors

- (a) If requested in writing by the Workout Committee for a Debtor Company, a Financial Creditors for a Debtor Company, a Financial Creditors must require that its Subsidiary specified by the Workout Committee accedes to this Agreement only to the extent that it operates in respect of that Debtor Company and any applicable Subsidiaries or parent of that Debtor Company.
- (b) That Financial Creditors must do so by causing its Subsidiary to execute a Financial Creditors Subsidiaries Accession Deed Poll and delivering it to the chairman of the

Workout Committee.

[*A further issue is whether this clause should be mandatory.*]

[*Consideration needs to be given as to what consequences should flow from a breach of this clause.*]

12.3 Accession by Non-Financial Institution Creditors

If the Workout Committee forms the opinion that it is desirable that a creditor of the Debtor Company which is not a Financial Creditors be bound by the provisions of this Agreement, it may request that creditor to execute a Non-Financial Creditor Accession Deed Poll. In the event that creditor does so:

- (a) it shall be a Non Financial Creditor of the relevant Debtor Company;
and
- (b) it shall be entitled to nominate a representative as a member of the Workout Committee.

Otherwise, this Agreement shall be read as though a Non-Financial Creditor were a Financial Creditors in respect of the relevant Debtor Company as and from the date upon the Non Financial Creditors Deed Poll was executed.

13. Debtor Company' s Covenants

13.1 Information

The Workout Committee must obtain an agreement from the Debtor Company, within 5 Business Days of the First Meeting of Financial Creditors, that it will provide the Workout Committee with at least the following information for distribution to its Financial Creditors;

- (a) Audited consolidated accounts for the most recent financial year of the Debtor Company;
- (b) Unaudited consolidated accounts for the most recent financial half-year of the Debtor Company;
- (c) Cash flow forecasts of the Debtor Company;
- (d) Profit and loss forecast of the Debtor Company;
- (e) Any information, access to personnel and other assistance as is necessary to enable the Financial Creditors to monitor the cash flow of the Debtor Company and compare it with cash flow and profit and loss forecast;
- (f) Information concerning the availability of ongoing financial support for the business of the Debtor Company; and
- (g) Any other financial and other information in respect of the Debtor Company as the Workout Committee may request.

13.2 Effect of standstill on Debtor Company

The Workout Committee must obtain an agreement from the Debtor Company and its Subsidiaries, within 5 Business Days of the First Meeting of Financial Creditors, that it will not, during the Extended Standstill Period, without the prior written consent of the Workout Committee:

- (a) Create or permit to subsist any Security Interest over any of its assets;
- (b) Dispose of all or any part of its assets except for disposals made in ordinary course of business;
- (c) Change the nature of its business or cease its business;
- (d) Enter into amalgamation, merger, demerger or reconstruction;
- (e) Acquire any assets or business or make any investment;
- (f) Make any loan or provide any credit to any person;
- (g) Declare or pay any dividend;
- (h) Open or operate any bank accounts other than for the purposes of the Workout Agreement;
- (i) Repay any indebtedness owed to its shareholders or any Related Party; or
- (j) Exercise any right of set-off.

13.3 Debtor Company to pay costs

The Workout Committee must obtain an agreement from the Debtor Company and its Subsidiaries, within 5 Business Days of the First Meeting of Financial Creditors, that the Debtor Company will

meet all reasonable costs and taxes of the Financial Creditors in connection with;

- (a) The preparation and negotiation of the Workout Agreement; and
- (b) All other matters undertaken by the Workout Committee in connection with the Workout Agreement.

13.4 Indemnity by Debtor Company for Workout Committee members

The Workout Committee must obtain an agreement from the Debtor Company, within 5 Business Days of the First Meeting of Financial Creditors, that it will Indemnify each Workout Committee member for its own account against, and will pay that member on demand the amount of, all losses, liabilities, costs, expenses (including legal fees on a full indemnity basis) and taxes which that member incurs in connection with the performance of its functions as a Workout Committee member, except to the extent that they are incurred as a result of the fraud, willful misconduct, misrepresentation or gross negligence of that member.

Confidentiality of Information Provided by the Debtor Company

- (a) Information concerning the assets, liabilities, business and prospects of the Debtor Company and any proposals for a Workout Agreement received by a Financial Creditor or Workout Committee must be made available to all Financial Creditors.
- (b) Unless that information is publicly available, the Workout Committee and the Financial Creditors must treat it as confidential, and use it only for the purpose of this Agreement and the information and implementation of any Workout Agreement.

14. Dispute Resolution

15.1 General

- (a) Any dispute, controversy or claim arising out of or relating to this Agreement will be dealt with firstly mediation. In event that the dispute, controversy or claim is not settled then the matter shall be referred to arbitration under this Agreement.
- (b) A party may initiate dispute resolution proceedings by serving a Dispute Resolution Notice for Mediation or Arbitration, as the case may be, on the other party and at the same time the Chairman of the Workout Committee.
- (c) Upon receipt of a Dispute Resolution Notice issued by one of the parties, the Chairman of the Workout Committee shall within 14 days of the date of that Notice provide to the parties a list of 3 mediators in the case of mediation or 7 arbitrators in case of an arbitration for consideration by the parties.

15.2 Mediation

- (a) In the case of mediation the parties shall agree and select one person from the list of mediators within 14 days of the date the Chairman of Workout Committee provides the list of mediators to the parties for the consideration.
- (b) If the parties cannot agree on a mediator then the Chairman of the Workout Committee will appoint a mediator within 5 days of the expiration of the time stated in clause 16.2(a).
- (c) The mediator will be neutral third party and will conduct the mediation proceedings. The mediator will, with assistance of the parties, identify the issues in dispute, develop options and consider alternatives so that the parties may reach agreement.
- (d) In the event that the dispute, controversy or claim has not been resolved within 60 days (for other period as agreed to in writing between parties) after the mediator has been appointed, dispute, controversy or claim must be submitted to arbitration which shall be administered by the Workout Committee.

15.3 Arbitration

- (a) At the expiration of the 60 days referred in clause 15.2 or upon the Chairman of the Workout Committee receiving notice that the parties
 - (i) have not reached agreement; or

- (ii) wish the matter to be referred to arbitration, the Chairman of the Workout Committee shall, within 14 days send to the parties a list of 'arbitrators.
- (b) The parties shall, within 14 days from the date of the receipt of the list of arbitrators from the Chairman of the Workout Committee, appoint one person each to the arbitral panel to act as arbitrator to hear and determine the dispute.
- (c) The 2 arbitrators appointed shall, within 14 days from the date of the second arbitrator is appointed, meet and select a third arbitrator from the list prepared by the Workout Committee to act as Chairperson of the Arbitral Tribunal.
- (d) If at any stage the parties fail to select an arbitrator from the list sent to them Chairperson then the Chairman of the Workout Committee shall appoint either an arbitrator on behalf of one or all of the parties or, in the case of the arbitrator failing to agree, an arbitrator to act as Chairperson of the Arbitral Tribunal.
- (e) The arbitration will be conducted in accordance with and subject to the laws of [*relevant jurisdiction*]. The identification of the relevant jurisdiction should be left to the parties in dispute to parties in dispute or, failing agreement, the Chairman of the Workout Committee.
- (f) The seat of the arbitration be [*capital city of relevant jurisdiction*].
- (g) The language of the arbitration shall be English.
- (h) The arbitration will be conducted in accordance with the [*insert rules*] which rules are deemed to be incorporated by reference into this clause.
- (i) The governing law of the arbitration of the arbitration agreement shall be the substantive law of [*relevant jurisdiction*].

15. Notice

16.1 How to give a notice

A notice, consent or other communication under this Agreement is only effective if it is:

- (a) In writing, signed by or on behalf of the person giving it;
- (b) Addressed to the person to whom it is to be given; and
- (c) Either:
 - (1) (mail) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
 - (2) (fax) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
 - (3) (email) sent in electronic form by email to that person's email address [*with a copy of that email being sent by fax as soon as possible afterwards*].

16.2 When a notice is given

A Notice, consent or other communication that complies with this clause is regarded as given and received:

- (a) If it is delivered or sent by fax:
 - (1) By 5:00 (local time in the place of receipt) on a Business Day on that day; or
 - (2) After 5:00 pm (local time in the place of receipt) on a Business Day, or a that is not a Business Day on the next Business Day;
- (b) If it is sent by email, 3 Business Day after posting; and
- (c) If it is sent in electronic form, on the day on which it was transmitted or, if transmitted after 5 pm (local time in the place of receipt), on the next Business Day.

16.3 Address for notices

A person's mail and email address and fax number are those set out in Schedule 1, or as the person notifies the sender.

16. Amendment

This Agreement may be amended by a resolution to which 75% of the parties to this Agreement agree at a meeting of those parties convened and conducted in accordance with the provisions of this Agreement applicable to meetings of Financial Creditors save that the chairman of the meeting shall be elected by the representatives of the parties in attendance at that meeting.

[It is to be expected that a practices in the financial sector evolve and as the operation of this Agreement is tested in practice that it will appear the amendments to its terms are desirable. An issue is whether these amendments require unanimity amongst the parties or, say, a special resolutions passed at a meeting of Financial Creditors]

17. Execution

This Agreement shall come into force and effect once it has been executed by *[all/90%]* of the persons nominated as parties.

[At least as a matter of common law if all the named parties to an agreement do not execute it, the agreement is not binding. The operation of that common law rule can be excluded by a provision of the agreement. The issue is whether the Agreement should be binding on those named parties who sign it irrespective of the number of them or should it only be operative once, say, a stipulated number of parties have signed it.]

18. General

19.1 Governing law

This Agreement is governed by the law in force in *[relevant jurisdiction]*.

19.2 Giving effect to this Agreement

Each party must do anything (including execute any agreement), and must ensure that its employees and agents do anything (including execute any agreement), to give full effect to this Agreement.

19.3 Counterparts

This Agreement may be executed in counterparts.

19.4 Attorneys

Each person who executes this Agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact of circumstance that might affect his or her authority to do so under that power of attorney.

Schedule 1
Detail of Financial Creditors

Financial Creditor	Details for notice
	Address:
	Attention:
	Facsimile
	Telephone:
	Email:

Executed as an agreement.

[Insert the appropriate execution clauses]

Annexure A

Member accession deed poll

Deed poll dated [] made by [] (the New Member)

Recitals

A. Under an Agreement to Promote Company Restructuring dated [] between []
And others (the **Agreement**), a person may become a party to the Agreement by executing this deed poll.

B. The New Member wishes to become a party to the Agreement.

This deed poll witnesses as follows,

1. Interpretation

1.1 Definitions

Unless otherwise defined in this deed poll, terms defined in the Agreement have the same meaning in this poll.

1.2 Interpretation

Clause 1.2 (interpretation) of the Agreement, with the necessary changes, applies to this deed poll as if set out here in full.

2. Accession

With effect from and including *[the date of this deed poll/ other appropriate date]*

- (a) The New Member assumes the obligations and acquires the rights of a Financial Institution under the Agreement; and
- (b) Each other party to the Agreement acquires corresponding rights against and assumes corresponding obligations towards the New Member.

3. Confirmation

The New Member confirms that:

- (a) It has received an executed copy of the Agreement, together with all other documents and information which it requires in connection with the Agreement; and
- (b) It has not relied and will not rely on any other party to the Agreement to check or enquire on its behalf into legality, validity, effectiveness, adequacy or completeness of any of those documents or that information.

4. Benefit of Deed Poll

This deed poll is given in favor of and for the benefit of each party to the Agreement and its successors and permitted assigns.

5 Notices

For the purpose of the Agreement, the details of the New Member for service of notice are:
Address:

Attention:
Facsimile:
Telephone:
Email:

6. Law

This deed poll is governed by law of [].

Each attorney executing this deed poll states that he or she has no notice of revocation or suspension of his or her power attorney.

Executed as a deed poll.

Signed, Sealed And Delivered for and behalf of [**New Member**] by its duly appointed attorney under a power of attorney in the presence of :

.....
Attorney
Name (printed):
Date of power of attorney:

.....
Witness
Name (printed):

Annexure B

Financial Creditors Subsidiary accession deed poll

Deed poll dated [] made by [] (the Subsidiary)

Recitals

A Under an Agreement to Promote Company Restructuring dated [] between []
And others (the **Agreement**), a person may become a party to the Agreement by executing this deed poll.

B The Subsidiary wishes to become a party to the Agreement to the extent that Agreement applies in respect of *[insert details of nominated Debtor Company and its relevant subsidiaries and parent]* (*[each an]* **Applicable Debtor**)

This deed poll witnesses as follows,

1. Interpretation

1.3 Definitions

Unless otherwise defined in this deed poll, terms defined in the Agreement have the same meaning in this poll.

1.4 Interpretation

Clause 1.2 (interpretation) of the Agreement, with the necessary changes, applies to this deed poll as if set out here in full.

2. Accession

With effect from and including *[the date of this deed poll/ other appropriate date]*

- (a) The Subsidiary assumes the obligations and acquires the rights of a Financial Institution under the Agreement to the extent that Agreement applies in respect of each Applicable Debtor; and
- (b) Each other party to the Agreement acquires corresponding rights against and assumes corresponding obligations towards the Subsidiary to the extent that Agreement applies in respect of each Applicable Debtor.

3. Confirmation

The Subsidiary confirms that:

- ① It has received an executed copy of the Agreement, together with all other documents and information which it requires in connection with the Agreement; and
- ② It has not relied and will not rely on any other party to the Agreement to check or enquire on its behalf into legality, validity, effectiveness, adequacy or completeness of any of those documents or that information.

4. Benefit of Deed Poll

This deed poll is given in favor of and for the benefit of each party to the Agreement and its successors and permitted assigns.

5 Notices

For the purpose of the Agreement, the details of the Subsidiary for service of notice are:

Address:

Attention:

Facsimile:

Telephone:

Email:

Law This deed poll is governed by law of [].

Each attorney executing this deed poll states that he or she has no notice of revocation or suspension of his or her power attorney.

Executed as a deed poll.

Signed, Sealed And Delivered for and behalf of [**Subsidiary**] by its duly appointed attorney under a power of attorney in the presence of :

.....
Attorney
Name (printed):
Date of power of attorney:

.....
Witness
Name (printed):

Annexure C

Non Financial Creditors accession deed poll

Deed poll dated [] made by [] (the Non Financial Institution Creditor)

Recitals

A Under an Agreement to Promote Company Restructuring dated [] between []
And others (the **Agreement**), a person may become a party to the Agreement by executing this deed poll.

B The Subsidiary wishes to become a party to the Agreement to the extent that Agreement applies in respect of *[insert details of nominated Debtor Company and its relevant subsidiaries and parent]* (*[each an]* **Applicable Debtor**)

This deed poll witnesses as follows,

1. Interpretation

1.5 Definitions

Unless otherwise defined in this deed poll, terms defined in the Agreement have the same meaning in this poll.

1.6 Interpretation

Clause 1.2 (interpretation) of the Agreement, with the necessary changes, applies to this deed poll as if set out here in full.

2. Accession

With effect from and including *[the date of this deed poll/ other appropriate date]*

- (a) The Non Financial Creditors assumes the obligations and acquires the rights of a Financial Creditor under the Agreement to the extent that Agreement applies in respect of each Applicable Debtor; and
- (b) Each other party to the Agreement acquires corresponding rights against and assumes corresponding obligations towards the Non Financial Creditor to the extent that Agreement applies in respect of each Applicable Debtor.

3. Confirmation

The Non Financial Creditor confirms that:

- (a) It has received an executed copy of the Agreement, together with all other documents and information which it requires in connection with the Agreement; and
- (b) It has not relied and will not rely on any other party to the Agreement to check or enquire on its behalf into legality, validity, effectiveness, adequacy or completeness of any of those documents or that information.

4. Benefit of Deed Poll

This deed poll is given in favor of and for the benefit of each party to the Agreement and its successors and permitted assigns.

5 Notices

For the purpose of the Agreement, the details of the Subsidiary for service of notice are:

Address:

Attention:

Facsimile:

Telephone:

Email:

6 Law

This deed poll is governed by law of [].

Each attorney executing this deed poll states that he or she has no notice of revocation or suspension of his or her power attorney.

Executed as a deed poll.

Signed, Sealed And Delivered for and behalf of **[Non Financial Creditor]** by its duly appointed attorney under a power of attorney in the presence of :

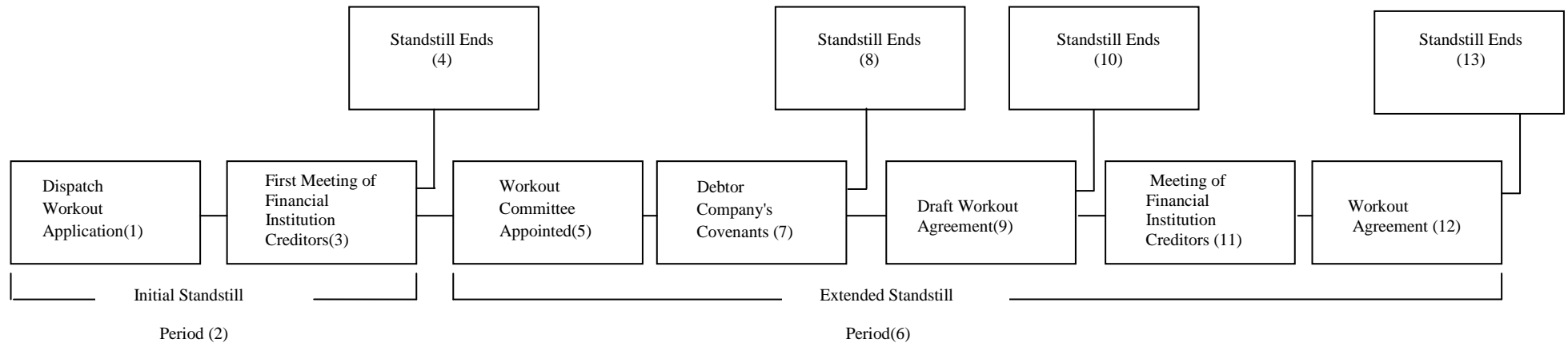
.....
Attorney
Name (printed):
Date of power of attorney:

.....
Witness
Name (printed):

Attachment 3

Diagram

Proposed Amendments to existing Model Agreement to Promote Company Restructuring_



1. A Debtor Company and/or a Financial Institution Creditor of the Debtor Company may give a Workout Application to all Financial Institution Creditors of the Debtor.
2. Dispatch of a Workout Application automatically initiates the Initial Standstill Period during which there is a moratorium on the prosecution by Financial Creditors of their Claims against the Debtor. The moratorium continues until the end of the First Meeting of Financial Creditors.
3. The First Meeting of Financial Creditors can appoint a Workout Committee. If it does so, there is an extension of the moratorium or standstill period for 60 days or such other time as the First Meeting of Financial Creditors may determine.
4. If the First Meeting of Financial Creditors concludes without a Workout Committee having appointed the moratorium comes to an end and the Agreement otherwise ceases to apply.
5. The Workout Committee is made up of an independent chairman, a representative from each of the 3 Financial Creditors with the largest Claims and representatives from other 3 Financial Creditors.

6. The duration of the Extended Standstill Period is agreed at the First Meeting of Financial Creditors. It may terminate at various “decision points” depending upon the progress being made towards the formalization of a Workout Agreement.
7. The first task the of the Workout Committee is to undertake negotiation with the Debtor for the purpose of securing its agreement under which:
 - (a) It will provide financial information to the Workout Committee.
 - (b) It will, in effect, maintain its business and not grant any security interests or otherwise prefer the claims of any of its creditors.
 - (c) It will pay the costs of the Workout Committee.
 - (d) It will indemnify the members of the Workout Committee.
8. In the event that the Debtor fails to give those Covenants, the Extended Standstill Period may be brought an end and the operation of the Agreement otherwise terminated. The same is the case if the Debtor either breaches a material term of any of those covenants or becomes subject to an insolvency proceeding.
9. The Workout Committee, having reviewed the financial and other material provided to it by the Debtor, negotiates the terms of a draft Workout Agreement with Debtor in terms which the Committee would be prepared to submit to a meeting of Financial Creditors for adoption.
10. If the Workout Committee forms the unanimous opinion that no purpose is served by continuing the Extended Standstill Period it may convene a meeting of Financial Creditors for consideration to terminate the moratorium.
11. Once a draft Workout Agreement has been settled as between the Workout Committee and Debtor is submitted to a meeting of Financial Creditors of consideration and adoption.
12. If the draft Workout Agreement is adopted its terms will then regulate the rights and obligations of Financial Creditors.
13. If the Workout Agreement is not adopted the Extended Standstill Period ends.

ABAC Kyoto Meeting Workshop on Legal Architecture

Session 2

Promoting Effective Region-Wide
Regimes By Creating Regional
Informal Workout Rules

July 9, 2013



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& ASAHI**

Proposal to Create Informal Out of Court Workout Rule Applicable in Asia Pacific Region & Model Agreement to Promote Company Restructuring

Shinjiro TAKAGI, *PhD*
Advisor, Nomura Securities, Co.,Ltd.

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- 2 Workouts in Europe, North America & Asia**
- 3 Existing Asian Informal Workout Guidelines (GL) and its Model Agreement (MA)**
- 4 Proposal to APEC to adopt amended GL & MA**
- 5 Proposed Amendments to the GL & MA**
- 6 Recommendations to APEC**

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Need to Create Informal Workout Rule Applicable in Asia Pacific Region and Model Agreement to Promote Company Restructuring

- 1 Number of restructuring cases of multinational enterprises which owe to multinational financial creditors is increasing.
- 2 If we are able to have an informal workout rule applicable in Asia Pacific Region or worldwide, it may be useful.
- 3 The rules should be created and respected by international financial and business communities.
- 4 INSOL 8 Principles of 2000 is a model for domestic rules.
- 5 Asian Bankers' Association (ABA) Informal Workout Guidelines (GL) and Model Agreement to Promote Company Restructuring (MA) were approved in 2005.
- 6 We are able to revive the GL & MA with a few amendments and make them applicable in wider Asia Pacific Region.

5

Workouts in Europe, North America & Asia

- 1 Pre-arranged/Pre-negotiated Chap.11 in **USA**
- 2 Pre-pack Administration, Scheme of Arrangement (SA), Company Voluntary Arrangement (CVA) in **UK** (2000/02/06)
- 3 Safeguard in **France** (2005/09)

In 2 & 3 proceedings, a court approves a workout plan which agreed by majority creditors which owe more than 75% of debts by debtors, and the plan binds holdout creditors.

- 4 Pre-packed Insolvency Plan, Schutzschirm in **Germany** (2011)
- 5 After Asian Currency crisis in 1997, out of court workouts were conducted in various **East Asian countries**.
- 6 Common Law Countries in Oceania region including Hong Kong, Singapore, Malaysia, Philippines, Australia & New Zealand, adopt English style **SA** and some of them adopt majority rule

6

Existing Asian Guidelines and Model Agreement

- 1 The Final Report entitled “Promoting Regional Cooperation in the Development of Insolvency Law Reforms” (Regional Technical Assistance Report /RETA 5975), drafted by a team consisted of Australian and Asian experts, was presented to Asian Development Bank (ADB) on Apr.2005.
- 2 Based on the ADB Report, “**Asian Bankers’ Association Informal Workout Guidelines**”(GL) and the “**Model Agreement to Promote Company Restructuring by Informal Workout**”(MA) were drafted and approved by the Asian Bankers’ Association (ABA) at the 22nd General Meeting held on Oct. 2005 in Melbourne.
- 3 GL & MA have never been used yet because of several reasons including conflict of interests. GL & MA are **buried treasure tools** which can be revived by minor **amendments**.

7

Proposal to APEC to adopt amended GL & MA

- 1 **ABA GL & MA maybe useful in wider Asia Pacific Region.**
- 2 **On Jan.22 & Apr.4, 2013, at APEC Business Advisory Council (ABAC) Advisory Group Meeting in Manila and Singapore, proposal to **formulate out of court workout rules applicable in Asia Pacific region adopting amended ABA GL & MA has made.****

8

Proposed Amendments to Existing Asian GL & MA

Only 2 points should be amended

- 1 A term “**Financial Institution Creditor**” should be replaced by “**Financial Creditor**” to include any type financial creditors to meet needs of changing world (for clarification to avoid possible misunderstanding) reflecting debts trading
- 2 Not only an “**Eligible Financial Creditor**” but also a “**Debtor Company**” must be qualified to commence the workout proceeding to avoid possible conflicts of interests between creditors and debtors

9

Recommendations to APEC

- 1 Ministries of finance, relevant **governmental agencies, central banks** and **bankers’ associations** of each country should recommend and encourage **financial creditors, business corporations** and relevant **professionals** to use the amended Asian GL & MA as **APEC Rules** in each respective home countries. Professionals may include lawyers, accountants, consultants, and investment bankers.
- 2 The APEC should recommend governments of member countries to enact **a special statute to encourage informal workout** (ex. moratorium, standstill or ring fence to prohibit collection efforts by individual creditors and court approval of accepted plan by most of creditors binding minority holdout creditors).

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I visited China, Hong Kong, Korea, Thailand, Malaysia, Singapore, Philippines & Australia from March to April to discuss our proposals with experts, including scholars, of these countries.

Most of them are supportive except one scholar who is skeptical of feasibility of the proposed rule in some countries where judiciary system is not very effective.

I also discussed at the annual conference of International Insolvency Institute (III), which is an association of experienced insolvency and restructuring professionals worldwide, held on June 19 in New York on my proposal. Members of the III are supportive to my proposal.

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Dr. Shinjiro TAKAGI – Curriculum Vitae

- Executive Senior Advisor, Nomura Security Co. Ltd. since 2007
- President, Corporation to Operate Guidelines to reduce debts owed by individual victims who suffered from huge earthquake, tsunami and nuclear plant explosion assaulted North Eastern Japan on 03/11/2013.
- Admitted in Japanese bar in 1963. After engaging private practice for 25 years, he sat bench from 1988 to 2000 as a Judge of Tokyo District Court in 1988, Presidents and Chief Judges of a couple of District Courts and Judge of Tokyo High Court (Court of Appeal). After resuming private practice in 2000, he reorganized a lot of ailing huge companies. He was Chair of the Committee organized by Japanese Bankers Association etc. to establish the "Guidelines for Out of Court Workout" to reorganize business corporations in 2001. He was Professor at Chuo University Law School from 2003 to 2006. He was Chair of Industrial Revitalization Corporation of Japan from 2003 to 2007. He earned Doctor of Law or PhD degree in 2002. He is the Honorary Chair of Japanese Federation of Insolvency Professionals. He is a member of American Bankruptcy Institute since 1982 and a fellow of American College of Bankruptcy since 1998. He is a Board Member of Governors of International Insolvency Institute. He received the Outstanding Contribution Award of 2005 from the III and was bestowed the Rising Sun, Golden & Silver Star Order by the Japan's Emperor in 2007. He wrote numerous books and articles regarding Japanese, American and international bankruptcy laws and civil procedures.

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