

Asian Development Bank

Promoting Regional Cooperation in the Development of Insolvency Reform

RETA 5975

Draft Country Report for Singapore Conference Informal Work-outs – Indonesia, Korea, Philippines and Thailand

Indonesia

Engagement by Creditors and Debtors

1. **Question:** *Is there concern within the community regarding the restructuring process? If so, identify and provide examples of the issues causing concern, and suggestions as to the most effective way of addressing those concerns.*

Answer: In the case of the Indonesian Bank Restructuring Agency (“IBRA”), there are a number of concerns relating to the restructuring process performed by IBRA, including:

- Whether or not the restructuring would be implemented as an out of court settlement.
- What would be the best and most appropriate alternatives in dealing with the cooperative debtors and the non-cooperative debtors. The alternatives include making a separation between the majority shareholders from the Board of Directors and the Board of Commissioners, or including them in a package of settlement; whether a Master of Settlement and Acquisitions Agreement (“MSAA”) would be a better approach than a Master of Refinancing and Note Issuance Agreement (“MRNIA”) and Settlement of Shareholders Obligation (“SSO”) approaches; or whether SSO approach would be much better than MSAA or MRNIA approach.
- Asset values tend to become less and less.
- Not all of the assets being transferred to IBRA are free and clean.
- Where the transferred assets are free and clean, IBRA still faces difficulties in selling out such assets.



- Not all of those assets transferred to IBRA are able to be made available for transfer, due to the lack of concert from other creditors.
- Asset value is less than the total obligations of shareholders.

A number of concerns arise from the Jakarta Initiative Tasks Force ("JITF") mediation, including:

- The mediator only assists the parties in a dispute, and is not the one who determines the result of the mediation.
- Parties to the dispute possess different data and information.
- Parties have different approaches and perspectives.
- Parties can not agree on the terms and conditions, including the time schedule for the mediation process.
- One party prefers and tries to maintain status quo conditions.
- The parties are too emotional.

2. **Question:** *In the papers provided to delegates at the Manila conference were copies of the material relating to the informal work-out process within each of the Selected Countries. Local Consultants are asked to review the material relating to their country and confirm that it remains the current legislation. Also confirm any known amendments proposed for that legislation and provide examples.*

Answer: We confirm that the Law No.4 of 1998 regarding Bankruptcy Law (the "Law No.4/1998") applies to the bankruptcy proceedings in Indonesia, as well as to suspension of payment of debt ("Penundaan Kewajiban Pembayaran Utang" - PKPU). However, some amendments have been prepared, including the proposed new Bankruptcy Law, the amendment to the Law No.1/1995 regarding Limited Liability Company, the amendment to the Law No.8/1995 regarding the Capital Market, and the new draft of law on Financial Services Authority ("*Otoritas Jasa Keuangan*" – "OJK").

3. **Question:** *To what extent are financial creditors bound to the existing informal approach within the country? Provide details of any contractual agreements and details as to the parties involved with those agreements. Are there any significant creditor groups or institutions not party to the agreements?*

Answer: Financial creditors who become parties to an informal work-out process, and signed agreement and/or document related to that process, are bound by the terms of the said agreements and/or documents.

Depending on which approach is applied, in the case of MSAA/MRNIA, the common set of agreements concluded are:

- MSAA/MRNIA, as the main underlying agreement;
- Loan agreements to be concluded between the holding company and IBRA, and that the majority shareholders shall be obliged to transfer assets to IBRA/holding company; and
- The loan agreement will incorporate among others the following clauses:
 - if the holding company, shareholders and related persons failed to comply, or violated the terms of the master agreement, or the security documents, it would cause the loan agreement to be in default.
 - if the holding company shareholder are related person provide misrepresentation and/or warranties, this would also caused the loan agreement be in default.

4. **Question:** *Is there a formal document binding debtors to become involved in the restructuring process? If not, how is the co-operation of debtors obtained? Are there alternative ways of ensuring the co-operation of debtors?*

Answer:

The most important document which binds debtors to become involved in the restructuring process is the Term Sheet. It establishes the restructuring frame-work for a debt of a certain debtor.

Depending on the nature and complexity of the proposed restructuring, the Term Sheet will be followed by a number of agreements and/or documents.

5. **Question:** *Are international institutions a major source of finance for corporations within the country? If so, is it considered there are particular issues involved in work-outs involving foreign as well as domestic lenders? Please provide examples of the particular issues concerned.*

Answer: Yes, international institutions are currently a major source of finance for corporations within the country. Examples of the issues concerned include:

- Possible conflict in the governing law and/or jurisdiction;
- Possible conflict in the settlement of dispute clause;
- Acknowledgment of foreign court decisions and foreign arbitral award by the country of the losing party;
- Law enforcement;
- Public order;
- State sovereignty and immunity;
- The legal requirement for the local language as the governing language, and the possible contradiction between the local language version and the English version.

6. **Question:** *Identify the major associations which are involved in the banking, finance and corporate sectors and who would have influence over the work-out process, and which organisations are likely to provide support to the development of informal work-out guidelines. If possible, identify specific individuals in those organisations who may be willing to lend their support to this initiative.*

Answer: The major associations involved include the Association of Indonesian Private Banking, Association of Indonesian Lawyers, Association of Indonesian Capital Market Lawyers, Association of Indonesian Counsellors at Law, Association of Indonesian Accountants, Association of Bankruptcy Lawyers, Association of Receivers and Administrators, Association of Issuer, and Association of Indonesian Brokers/Dealers.

7. **Question:** *What capacity does the Central Bank, or other appropriate authority, have to ensure that creditors have individuals of sufficient seniority actively involved in the work-out process at an early stage? Provide recommendations for ensuring this involvement is achieved.*

Answer: IBRA and JITF are special agencies established by the government, and supported by the World Bank and the International Monetary Fund, which have played important roles in the implementation of corporate debt restructuring and informal work-out proceedings in Indonesia. Unfortunately, it is most likely that both agencies will disappear by the end of 2003.

JITF aims to share its experience in handling the out of court settlement process via mediation with BANI's and BAPMI's arbitrators. The main purposes of this is to facilitate BANI's and BAPMI's arbitrators in their gaining better knowledge and expertise in acting as a mediator. By doing so, JITF will pass on its role and function as a mediation facilitator to BANI and BAPMI.

8. **Question:** *Are there penalties for either creditor or debtor (other than general commercial concerns) which delay the informal work-out process? This may take the form, for example, of assumed higher provisioning for creditors.*

Answer: JITF's mediation process normally comprises three stages of proceedings, namely:

- the preparation stage;
- the mediation stage; and
- the final stage.

At the preparation stage, the case shall be registered with the JITF. This will be followed by a meeting between the requesting party and the adverse party. Following such meeting, JITF will prepare a preliminary mediation report and a tentative mediation schedule. There are no penalties for either the creditor or the debtor if one of the parties delays the informal work-out process. Completion of the preparation stage provides an indication of good faith on the part of creditors and debtors. This will be incorporated and reflected in the preliminary mediation report and tentative mediation schedule.

Settlement of the dispute will then proceed to the mediation stage and the final stage. If at the final stage no agreement can be achieved, JITF shall prepare the mediation report to be

discussed and reported to Financial Sector Policy Coordinator (“FSPC”). The case may be referred to the office of the Attorney General at the discretion of FSPC.

9. **Question:** *How is the issue of moral hazard (debtors not meeting their obligations even though they may have the capacity to do so) addressed, if at all?*

Answer: There are a number of relevant provisions within Indonesia which relate to the issue of moral hazard. The Decree of the Minister of Finance of The Republic of Indonesia No.336/KMK.01/2000, dated 18 August 2000 regarding the Physical Confinement in the Framework of Settlement of State’s Claims, among others, defined that:

- Debt bearer will include:
 - an individual debtor pursuant to certain loan agreement, or a person who, on the basis of the law or whatsoever reason, incurs a debt to the state.
 - a legal entity, including a foundation, represented in this respect by (i) the board of directors/members of the corporate management; and (ii) the member of the supervisory board/corporate management board in accordance with the deed on the establishment or the articles of association of the said legal entity.
 - partner(s) and/or management partner(s) where the debtor is a partnership.
- Debt guarantor, will consist of:
 - guarantors of personal loans;
 - guarantors for payment by money orders/drafts;
 - corporate guarantors; and
 - shareholders.

A letter of instruction to force physical confinement or imprisonment for debt shall involve an outstanding debt of at least Rp.500,000,000 (five hundred million Rupiah).

This physical confinement or imprisonment for debt is also regulated by the Regulation of Supreme Court of Republic of Indonesia No.1/2000 dated 30 June 2000 regarding the Physical Confinement Institution. It states that physical confinement shall be used as an effort to force the bad faith debtor(s)/guarantor(s) who have capability to pay, but for some reason do not want to pay, to fulfil their respective payment obligations.

Differences in Approach

1. **Question:** *Provide an analysis of the instructions provided by the Central Bank as to how banks and other financial institutions should provide for bad and doubtful debts. In particular, provide details of the guidelines for classification of debts and the level of provision which needs to be set aside for each class.*

Answer: Based on certain Decisions and Circular Letters of the Board of Management of Bank Indonesia, commercial bank loans may be classified into liquid, substandard, doubtful and non-performing loans.

2. **Question:** *Provide an analysis of the guidelines provided by the Central Bank for reclassification of debts when a restructuring agreement has been negotiated. In particular, at which point can a debt be reclassified and does consideration need to be taken as to the terms of the restructuring? If so, provide details as to the issues to be considered.*

Answer: For bad debt resulting from non-performing BLBI, the Central Bank has assigned the cases to a special agency established by the Government, i.e. IBRA. Based on the information from IBRA, that there are two insolvency cases in Singapore involving Indonesian shareholders, which involve assets in both Singapore and Indonesia. There is one such case in Honolulu, United State of America, involving IBRA as debtor, and another case filed in Chicago, involving IBRA as creditor.

3. **Question:** *Provide an analysis of the provisioning guidelines within locally adopted generally accepted accounting principles (“GAAP”) and whether local accounting principles comply with international standards.*

Answer: The Board member of the Association of Indonesian Accountants has confirmed that the generally accepted accounting principles (“GAAP”) apply in Indonesia, and are identical to local accounting principles. Local accounting principles therefore comply with the international standards of GAAP.

4. **Question:** Are there rules or guidelines to determine the role of advisers in the informal work-out process? If so, to what extent are the roles specifically defined and what processes are in place to ensure that the advisers are suitably qualified and experienced?

Answer: There are no rules or regulations in existence which can be used as guidelines to determine the role of advisers in the informal work-out process.

5. **Question:** Compare the guidelines currently being used within the country, if any, with the INSOL approach. Are the two similar, as interpreted within the country? Where there are differences, are they fundamental or able to be reconciled? Detail those differences and suggested amendments to the INSOL approach to take account of the differences.

Answer: Indonesia has a Statistical Central Bureau ("*Biro Pusat Statistik*" – "BPS") which regularly provides economic forecasts for the country. In addition to BPS, a number of private agencies with good reputations, including the Centre for Strategy and International Study ("*CSIS*") and *Lembaga Pengembangan Ekonomi dan Manajemen - Universitas Indonesia* ("*LPEM-UI*") also provide economic forecasts.

6. **Question:** Is there a central economic forecasting authority (or similar body) which is respected as providing reasonable assumptions as to economic forecasts?

Answer: We are not aware of any specific rules issued by the Central Bank which regulate the standard discount rates to be applied when considering future maintainable cash flows of businesses in restructuring.

7. **Question:** Does the Central Bank have standard discount rates to be applied in considering future maintainable cash flows of businesses in restructuring?

Answer: It is generally accepted that a privilege/priority will be granted to new working capital provided during/within the restructuring process over the company's cash flow, but not over the collateral security furnished under the pre-stand still debts.

8. **Question:** Is there provision within the legislation for working capital provided during a restructuring to be afforded any priority over "pre-stand still" debt? If not, what are the legal constraints upon such an approach?

Answer: No answer provided.

General Issues

1. **Question:** In considering the provisions of the existing insolvency laws of the country within the terms of reference for cross-border insolvency, please also advise, in the same terms, on the sections relevant to informal work-outs.

Answer: Suspension of payment is an arrangement that is intended to provide benefit to the debtors, and also to the creditors, in particular the unsecured creditors. It is designed to avoid the situation where a certain debtor, who owing to circumstances such as difficulty in obtaining credit, is declared bankrupt. It does this by giving the debtor sufficient time to repay his or her debts. In essence, it is a rescue. By giving the debtor the chance to re-organise his or her business and to restructure his or her debts, it is expected that the debtor will be able to continue his or her business, and settle the debts.

In comparison to bankruptcy proceedings, a suspension of payment is not based on the insolvency of the debtor: Article 212 of the Law No.4/1998 regarding the Bankruptcy Law – "Law No.4/1998"), and its purpose is not to liquidate the debtor. Unlike bankruptcy proceedings, where the debtor loses the right to dispose of and administer its property: Article 22 of the Law No.4/1998, in suspension of payment proceedings, the debtor retains the right to dispose and administer of the property, provided he or she does so in co-operation with the administrator(s): Article 214, Paragraph 2 of the Law No.4/1998.

It should be noted that only debtors are entitled to apply for a suspension of payment of debt. Such application can be made at the debtor's own initiative, or to counter a petition for bankruptcy submitted by creditor(s): Articles 212 – 217, Paragraph 6 of the Law No.4/1998. In respect of the later case, it should be noted that a decision suspending a payment of debt obligation can only be granted if a bankruptcy declaration has not been rendered by the Commercial Court.

Upon receipt of a petition for suspension of payment, the Commercial Court shall immediately grant a provisional suspension of payment, designate a supervisory judge and

nominate one or more arbitrators: Article 214, Paragraph 2 of the Law No.4/1998.

Although the Commercial Court shall not be allowed to reject a petition for suspension of payment, the Court may, however, dismiss the petition on the ground that it was not properly signed, or was not accompanied with documents intended by Article 213, Paragraph 1 of the Law No.4/1998, i.e. composition plan.

To decide whether a debtor may be granted a permanent suspension of payment, a session must be held at the latest on the 45th day, counted from the date the provisional suspension of payment is granted. The granting of the said permanent suspension of payment shall be decided by the Commercial Court, if approved by more than half of the unsecured creditors attending, and representing at least two-thirds of all claims of the unsecured creditors: Article 217, Paragraph 5 of the Law No.4/1998. It is clear therefore that the unsecured creditors who are absent or not represented at the session will have no influence on the quorum, and that their absence will not be construed as a vote against the granting of a permanent suspension of payment.

The duration of a permanent suspension of payment may not exceed 270 days, counted from the date on which the provisional suspension of payment was granted.

2. Question: *Provide an analysis of the risks and any concern with the existing process whereby a negotiated work-out is referred for formal approval and adoption. Specific risks to address include time delay and, in particular, the capacity of a party which does not support the negotiated work-out to utilise the formal process to delay adoption of the negotiated work-out.*

Answer: In the case of suspension of payment, the debtor will offer a composition plan to the creditors. This composition plan may be filed during the period of suspension of payment, but must not be filed more than 270 days from the date on which the provisional suspension of payment was granted. If for some reason, no agreement can be reached on the composition plan offered by the debtor prior to the expiration day of the 270 days, the administrator shall notify this to the Commercial Court, and the Commercial Court shall declare the debtor bankrupt on the following day at the latest: Article 217, Paragraph 1 of the Law No.4/1998

Regional Co-operation

1. Question: *To allow these issues to be considered on a regional basis, the Local Consultants are also asked to extend the coverage of the issues raised in the terms of reference relating to cross-border insolvency to include commentary on the applicability of informal work-out processes to cross-border insolvency. This would include:*

- *Commentary on any amendments to the informal work-out provisions contained within the insolvency laws of the country;*
- *Commentary on the administration of the insolvency laws within the country; and*
- *Commentary on the extent to which the various treaties discussed within the terms of reference are also applicable to informal work-outs.*

Answer: The commentary is as follows:

- A new draft law on insolvency has been submitted by the government to, and is to be discussed by Parliament. However, there are no specific regulations concerning cross-border insolvency or cross-border informal work-out processes. It is suggested that this issue ought to be submitted to and addressed by the members of Parliament, so that the issue is raised in terms of a Government proposal.
- The Commercial Courts in Indonesia have been in operation for approximately five years. The Judges of the Commercial Courts, and the Receivers and Administrators must be improved. It will take time for a reputable and respectable Commercial Court to emerge. The recent drop in bankruptcy cases filed at the Commercial Courts indicates that users are not happy with the existing practice.
- To our knowledge, Indonesia has not signed any treaties, bilateral or multilateral, regarding the enforcement of foreign court decisions or foreign mediation, except the New York Convention related to the enforcement of foreign arbitral awards. In practice, the enforcement of foreign court decisions and achieved mediation under foreign jurisdiction are some of the main obstacles.

2. **Question:** *During the conference in Manila, it was considered that an international organisation such as the ADB would be required to put its name to the guidelines, to give them credibility. Is this still thought of as an important aspect, and if so, which organisations would have the necessary credibility within the country?*

Answer: We believe that Economic Co-ordinating Ministry, the Ministry of State Owned Enterprises, the Central Bank, or the National Committee for Good Corporate Governance would be the right agencies to support and implement the mentioned guidelines.



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RETA 5975

Draft Country Report for Singapore Conference Informal Work-outs

Korea

Engagement by Creditors and Debtors

1. **Question:** *Is there concern within the community regarding the restructuring process? If so, identify and provide examples of the issues causing concern, and suggestions as to the most effective way of addressing those concerns.*

Answer: The most heavily debated concern is the so-called free riding problem, whereby the financial institution may benefit from the outcome of the work-outs, without sharing any of the losses incurred. In most cases, foreign creditor banks are typical free riders. In the work-outs of the Daewoo group, the loss sharing rates of foreign creditors were much less than those of Korean creditor banks.

In Korea, there were also cases where some debtor companies which were less likely to be rehabilitated, and should therefore be liquidated, were under work-outs. In the end, this increased the losses to creditors.

For the purpose of resolving such problems, the Corporate Restructuring Promotion Act was enacted, effective from 14 September, 2001. Nevertheless, we are of the view that such problems, including the problems associated with foreign creditors and free riding, have not been sufficiently resolved.



2. **Question:** *In the papers provided to delegates at the Manila Conference were copies of the material relating to the informal work-out process within each of the selected countries. Local Consultants are asked to review the material relating to their country and confirm that it remains the current legislation. Also confirm any known amendments proposed for that legislation and provide examples.*

Answer: The Corporate Restructuring Promotion Act became effective from 14 September 2001. It replaced the Financial Institution Agreement for Promotion of Company Restructuring in its entirety.

3. **Question:** *To what extent are financial creditors bound to the existing informal approach within the country? Provide details of any contractual agreements and details as to the parties involved with those agreements. Are there any significant creditor groups or institutions not party to the agreements?*

Answer: Financial institutions are strictly bound by the Corporate Restructuring Promotion Act. Besides foreign financial institutions, the Corporate Restructuring Promotion Act applies to almost all of the Korean financial institutions.

4. **Question:** *Is there a formal document binding debtors to become involved in the restructuring process? If not, how is the co-operation of debtors obtained? Are there alternative ways of ensuring the co-operation of debtors?*

Answer: Under the Corporate Restructuring Promotion Act, the Creditors Financial Institutions Committee ("CFIC"), and the debtor company shall enter into an Agreement on the Implementation of Management Normalisation Plan (in practice, called "MOU") within one year of the date of the resolution of the commencement of the Joint Management of Creditors Financial Institutions, i.e. work-outs. The MOU is the formal agreement which binds the debtor company within the framework of work-outs.

5. **Question:** *Are international institutions a major source of finance for corporations within the country? If so, is it considered there are particular issues involved in work-outs involving foreign as well as domestic lenders? Please provide examples of the particular issues concerned.*

Answer: Generally, international institutions are not a major source of finance for Korean corporations.

6. **Question:** *Identify the major associations which are involved in the banking, finance and corporate sectors and who would have influence over the work-out process, and which organisations are likely to provide support to the development of informal work-out guidelines. If possible, identify specific individuals in those organisations who may be willing to lend their support to this initiative.*

Answer: Such organisations include the Korea Federation of Banks; Korea Chamber of Commerce; Korea Employers Federation; Korea Investment Trust Company Association; Korea Securities Dealers Association, etc.

7. **Question:** *What capacity does the Central Bank, or other appropriate authority, have to ensure that creditors have individuals of sufficient seniority actively involved in the work-out process at an early stage? Provide recommendations for ensuring this involvement is achieved.*

Answer: The Central Bank has no such capacity in this respect. The Financial Supervisory Authority has no direct or legal capacity for such a purpose, but we cannot underestimate its indirect capacity in work-outs.

8. **Question:** *Are there penalties for either creditor or debtor (other than general commercial concerns) which delay the informal work-out process? This may take the form, for example, of assumed higher provisioning for creditors.*

Answer: If a debtor company fails to fulfil its obligations under work-outs, the CFIC may stop lending, withdraw the debt restructuring plan, or invoke formal insolvency proceedings. If a creditor financial institution is in violation of the work-out plan, then such a creditor may be subject to damages and penalties.

9. **Question:** *How is the issue of moral hazard (debtors not meeting their obligations even though they may have the capacity to do so) addressed, if at all?*

Answer: See answer to Question 8 above. In addition, CFIC should periodically evaluate the debtor company's implementation of MOU. If the CFIC is not satisfied with the result, then the CFIC may replace the management of the debtor company, as well as take other necessary measures.

Differences in Approach

1. **Question:** *Provide an analysis of the instructions provided by the Central Bank as to how banks and other financial institutions should provide for bad and doubtful debts. In particular, provide details of the guidelines for classification of debts and the level of provision which needs to be set aside for each class.*

Answer: The instructions of the Financial Supervisory Commission ("FSC") are:

- Normal: loan loss provision is more than 0.5% of the applicable debt amount.
- Precautionary: debts to the company with non-accrual loans for the period between 1 month and 3 months - loan loss provision is more than 2% of the applicable debt amount.
- Sub-standard: expected recovery amount of the debts to the company with non-accrual loans for more than 3 months or in the insolvency procedures - loan loss provision is more than 20% of the applicable debt amount.
- Doubtful: debt amount exceeding the expected recovery amount of the debts to the company with non-accrual loans for the period between 3 months and 12 months - loan loss provision is more than 50% of the applicable debt amount.
- Estimated loss: debt amount exceeding the expected recovery amount of the debts to the company with non-accrual loans for more than 12 months or in the insolvency procedures - loan loss provision is more than 100% of the applicable debt amount.

2. **Question:** *Provide an analysis of the guidelines provided by the Central Bank for reclassification of debts when a restructuring agreement has been negotiated. In particular, at which point can a debt be reclassified and does consideration need to be taken as to the terms of the restructuring? If so, provide details as to the issues to be considered.*

Answer: The FSC instructions do not provide that mere initiation of the restructuring negotiation itself will force the banks to classify the debts. After the finalisation of the work-out plan, banks recalculate the present value of the debts according to the debt restructuring, and then apply the guidelines described in the response to Question 1.

3. **Question:** *Provide an analysis of the provisioning guidelines within locally adopted generally accepted accounting principles ("GAAP") and whether local accounting principles comply with international standards.*

Answer: Articles 57 and 67 of Korea's Financial Accounting Standards provide that, in principle, allowance for bad debts shall be provided for estimated un-collectable accounts on a reasonable and objective basis. However, when the interest rate and the repayment period are changed unfavourably for the creditor by a corporate reorganisation, composition or mutual agreements between the transacting parties, etc., and the difference between nominal value and present value is material, then the difference shall be presented as bad debts expenses, or gain on exemption of debts.

Since Korea's financial crisis in 1997, the Korean government has consistently made efforts to harmonise Korea's GAAP in accordance with international standards. We are of the view that the loan loss provision standards comply with international standards.

4. **Question:** *Are there rules or guidelines to determine the role of advisers in the informal work-out process? If so, to what extent are the roles specifically defined and what processes are in place to ensure that the advisers are suitably qualified and experienced?*

Answer: No.

5. **Question:** Compare the guidelines currently being used within the country, if any, with the INSOL approach. Are the two similar, as interpreted within the country? Where there are differences, are they fundamental or able to be reconciled? Detail those differences and suggested amendments to the INSOL approach to take account of the differences.

Answer: The principles applied in the work-outs under the Financial Institution Agreement for the Promotion of Company Restructuring and Joint Management of Creditors Financial Institutions under Corporate Restructuring Promotion Act are similar to INSOL's approach.

6. **Question:** Is there a central economic forecasting body authority (or similar body) which is respected as providing reasonable assumptions as to economic forecasts?

Answer: There is no official economic forecasting institution that is deemed a governmental authority. However, the Bank of Korea (the central bank of Korea), and the Korea Development Institute have been the most outstanding economic forecasting institutions.

7. **Question:** Does the Central Bank have standard discount rates to be applied in considering future maintainable cash flows of businesses in restructuring?

Answer: No.

8. **Question:** Is there a provision within the legislation for working capital provided during a restructuring to be afforded any priority over "pre-stand still" debt? If not, what are the legal constraints upon such an approach?

Answer: The Corporate Restructuring Promotion Act expressly contains such provisions. However, it may not have priority over security interests under other relevant laws.

General Issues

1. **Question:** In considering the provisions of the existing insolvency laws of the country within the terms of reference for cross-border insolvency, please also advise, in the same terms, on the sections relevant to informal work-outs.

Answer: The Corporate Restructuring Promotion Act contains no provisions for cross-border informal work-outs. Foreign creditors may be involved in the work-outs of a Korean company if they agree to participate in the work-out procedures. However, this seldom

happens in practice. The Corporate Restructuring Promotion Act does not apply to the work-outs of foreign companies.

2. **Question:** Provide an analysis of the risks and any concern with the existing process whereby a negotiated work-out is referred for formal approval and adoption. Specific risks to address include time delay and, in particular, the capacity of a party which does not support the negotiated work-out to utilise the formal process to delay adoption of the negotiated work-out.

Answer: The result of the work-out shall be determined by the approval of the CFIC, with the affirmative votes of at least $\frac{3}{4}$ of the claims amount held by the secured creditors, as well as at least $\frac{3}{4}$ of the claims amount held by secured creditors and unsecured creditors.

The dissenting creditor financial institutions should also be bound by the resolution of the CFIC. Any dissenting creditors which voted against the work-out may exercise the appraisal rights on the claims under the Corporate Restructuring Promotion Act. There is, therefore, a slight chance that the dissenting creditors may utilise the formal approval process to delay adoption of the negotiated work-out.

Regional Co-operation

1. **Question:** To allow these issues to be considered on a regional basis, the Local Consultants are also asked to extend the coverage of the issues raised in the terms of reference relating to cross-border insolvency to include commentary on the applicability of informal work-out processes to cross-border insolvency. This would include:

- Commentary on any amendments to the informal work-out provisions contained within the insolvency laws of the country;
- Commentary on the administration of the insolvency laws within the country; and
- Commentary on the extent to which the various treaties discussed within the terms of reference are also applicable to informal work-outs.

Answer: There are no provisions relating to work-outs in insolvency. The administration of insolvency laws should not be necessarily connected to informal work-outs, as the court will not be engaged in the informal work-outs in any respect. We believe it is desirable to discuss cross-border work-outs and insolvency separately.

In this regard, however, work-outs are less concerned with the sovereignty issue because of the lack of government involvement in work-outs, including non-engagement by the courts. Thus, we are of the view that if international standards and procedures are set, then cross-border work-outs may be feasible. Nonetheless, it is more desirable that the creditor banks are allowed to have the option to participate in the international cross-border work-out arrangements, rather than force them to do so by virtue of an international treaty entered into by government.

2. **Question:** *During the conference in Manila, it was considered that an international organisation such as the ADB would be required to put its name to the guidelines, to give them credibility. Is this still thought of as an important aspect, and if so, which organisations would have the necessary credibility within the country?*

Answer: We do not believe so. Although the importance of the names of credible international organisations should not be ignored, the most important factor would be whether, in substance, the guidelines incorporate principles that are fair and acceptable to the financial institutions in international society.

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Philippines

Engagement by Creditors and Debtors

1. **Question:** *Is there concern within the community regarding the restructuring process? If so, identify and provide examples of the issues causing concern, and suggestions as to the most effective way of addressing those concerns.*

Answer: As an effect of the 1997 Asian financial crisis, there has been a noted increase in public concern regarding the efficiency and effectiveness of the country's restructuring process. The primary concern is the length of time of the restructuring process. It is generally perceived that the restructuring process is protracted, and that the result of such processes are irrelevant and inapplicable due to the change in the financial and economic conditions since the initial filing. The Philippine Supreme Court has attempted to address this concern by promulgating the Interim Rules of Procedure on Corporate Rehabilitation ("Interim Rules"), which include time limits for a corporate rehabilitation case.

The ability of the party litigants to delay the rehabilitation proceedings by appealing the approval of a rehabilitation plan is another issue which is of concern. The Interim Rules now provide that any order issued in a rehabilitation case is immediately executory, and that any appeal shall not stay the execution of the order unless restrained or enjoined by the appellate court (Section 5, Rule 3, Interim Rules of Procedure on Corporate Rehabilitation).

The Philippine legislature is also attempting to address the issues relating to corporate rehabilitation. A proposed bill on corporate recovery, amending the almost century-old Insolvency Act, is currently in the pipeline of pending bills.

Lastly, the Legislature has recently passed the Special Purpose Vehicle Act ("SPV Act"), providing for incentives and privileges for the disposal of non-performing assets of financial institutions.



2. **Question:** *In the papers provided to delegates at the Manila conference were copies of the material relating to the informal work-out process within each of the Selected Countries. Local Consultants are asked to review the material relating to their country and confirm that it remains the current legislation. Also confirm any known amendments proposed for that legislation and provide examples.*

Answer: The Philippines does not have any current legislation on informal work-out processes. There is, however, a provision in the newly passed SPV Act mandating a 90-day period for the financial institution and the debtor to restructure a non-performing loan before the said loan is transferred to a special purpose vehicle.

3. **Question:** *To what extent are financial creditors bound to the existing informal approach within the country? Provide details of any contractual agreements and details as to the parties involved with those agreements. Are there any significant creditor groups or institutions not party to the agreements?*

Answer: Informal work-outs are purely voluntary on the part of financial creditors. The only exception is the SPV Act which mandates a 90 day period for the financial institution and the debtor to restructure a non-performing loan before the said loan is transferred to a special purpose vehicle. As the bill has not yet been signed, we are unable to comment on practical experiences.

4. **Question:** *Is there a formal document binding debtors to become involved in the restructuring process? If not, how is the co-operation of debtors obtained? Are there alternative ways of ensuring the co-operation of debtors?*

Answer: There is no formal document which binds debtors to become involved in the restructuring process. In the Philippines, it is usually the debtors that make the request for a restructuring with the banks.

5. **Question:** *Are international institutions a major source of finance for corporations within the country? If so, is it considered there are particular issues involved in work-outs involving foreign as well as domestic lenders? Please provide examples of the particular issues concerned.*

Answer: International institutions are a major source of finance for corporations within the country. The World Bank, through the International Finance Corporation (primarily in agricultural and developmental projects), is one of many international institutions engaged in lending within the country. The Asian Development Bank is also a major source of funding. Branches of foreign banks are considered a major source of financing. Enforcement of creditor rights is an issue for institutional lenders, including foreign lenders.

6. **Question:** *Identify the major associations which are involved in the banking, finance and corporate sectors and who would have influence over the work-out process, and which organisations are likely to provide support to the development of informal work-out guidelines. If possible, identify specific individuals in those organisations who may be willing to lend their support to this initiative.*

Answer: The Bankers Association of the Philippines ("BAP") is an organisation of commercial banks which is active in the formulation and review of new legislation and rules applicable to creditor banks.

The Philippine Chamber of Commerce and Industry ("PCCI") is an organisation of major businesses in the Philippines.

The BAP and the PCCI may be interested in the formulation and development of informal work-out guidelines relating to corporate rehabilitation.

7. **Question:** *What capacity does the Central Bank, or other appropriate authority, have to ensure that creditors have individuals of sufficient seniority actively involved in the work-out process at an early stage? Provide recommendations for ensuring this involvement is achieved.*

Answer: The Bangko Sentral ng Pilipinas ("BSP"), as the central monetary authority tasked with the provision of policy directions in the areas of money, banking and credit, and the supervision of bank operations, has the capacity to ensure that creditors have individuals of

sufficient seniority actively involved in the work-out process at an early stage. The BSP has the duty and the power, under Section 16 of the General Banking Law, to ensure the quality of bank management by considering and reviewing the qualifications and disqualifications of individuals elected or appointed as bank directors or officers. The Monetary Board of the BSP has established rules and regulations relating to the qualifications and disqualifications of bank directors and officers.

It is recommended that representations be made with the BSP to encourage banks to be represented by senior officials in any negotiations relating to restructuring.

8. Question: *Are there penalties for either creditor or debtor (other than general commercial concerns) which delay the informal work-out process? This may take the form, for example, of assumed higher provisioning for creditors.*

Answer: There is no existing informal work-out process mandated by law or regulation.

9. Question: *How is the issue of moral hazard (debtors not meeting their obligations even though they may have the capacity to do so) addressed, if at all?*

Answer: Non-payment of a debt for more than 30 days is an act of insolvency, which is a ground for involuntary insolvency under the Insolvency Law. In addition, a collection suit may be filed against the debtor. Other than these, we are not aware of any mechanism in our legal system for addressing the so-called moral hazard.

Differences in Approach

1. Question: *Provide an analysis of the instructions provided by the Central Bank as to how banks and other financial institutions should provide for bad and doubtful debts. In particular, provide details of the guidelines for classification of debts and the level of provision which needs to be set aside for each class.*

Answer: See Questions 1 and 2.

2. Question: *Provide an analysis of the guidelines provided by the Central Bank for reclassification of debts when a restructuring agreement has been negotiated. In particular, at which point can a debt be reclassified and does consideration need to be taken as to the terms of the restructuring? If so, provide details as to the issues to be considered.*

Answer: See Questions 1 and 2.

The regulation of loan-loss provisions and loan write-offs is governed by Section 49 of the General Banking Law. Section 49 of the General Banking Law reads:

“SECTION 49. Provisions for Losses and Write-Offs. — All debts due to any bank on which interest is past due and unpaid for such period as may be determined by the Monetary Board, unless the same are well-secured and in the process of collection shall be considered bad debts within the meaning of this Section.

The Monetary Board may fix, by regulation or by order in a specific case, the amount of reserves for bad debts or doubtful accounts or other contingencies.

Writing off of loans, other credit accommodations, advances and other assets shall be subject to regulations issued by the Monetary Board.”

Under Section 49, a bank loan becomes a “bad debt” if the interest thereon is past due and unpaid for such period as may be determined by the Monetary Board, unless it is well-secured and in the process of being collected.

Pursuant to Subsection X302.1 of the Manual of Regulations for Banks (as well as Subsection 4302Q.1 of the Manual of Regulations for Non-Bank Financial Institutions), as amended by BSP Circular No. 313 (27 December 2001), banks (as well as quasi-banks), are required to set up a general provision for loan losses, namely:

- Five percent (5%) of the outstanding balance of unclassified restructured loans less the outstanding balance of restructured loans which are considered non-risk existing laws/rules/regulations; and
- One percent (1%) of the outstanding balance of unclassified loans other than restructured loans less loans which are considered non-risk under existing laws/rules/regulations.

Moreover, in line with Item III of Appendix 18 of the Manual of Regulations for Banks and Item 3 of Appendix Q-10 of the Manual of Regulations for Non-Bank Financial Institutions (as amended by BSP Circular No. 313), an allowance for probable losses

on the loan accounts and other risk assets is to be set up in accordance with the following schedule.

	Classification	Allowances
1.	Unclassified	0%
2.	Loans Especially Mentioned	5%
3.	Sub-standard	
	– Secured	10%
	– Unsecured	25%
4.	Doubtful	50%
5.	Loss	100%

Under BSP Circular No. 247 (2 June 2000), “unclassified loans” are defined as “loans that do not have a greater than normal risk and do not possess the characteristics of classified loans.” “Classified loans” are sub-divided into (1) loans especially mentioned, (2) sub-standard, (3) doubtful, and (4) loss.

“Loans especially mentioned” have potential weakness that, if left uncorrected, may affect the repayment of the loans and thereby increase the credit risk to the bank. This category includes, for example, loans without credit investigation reports, loans secured by collaterals that have declined in value, and loans past due for more than 30 days up to 90 days.

If a loan becomes past due for more than 90 days it will be classified as “sub-standard.” This category also includes, inter-alia, loans under litigation.

“Doubtful” accounts would include, for instance, loans previously classified by the BSP examiners as “sub-standard” but without at least twenty percent (20%) repayment of principal during the 12 month period following such classification. A loan is also categorised as “doubtful” when it is past due and there is an adverse claim over the real estate securing the loan, rendering the foreclosure of the mortgage uncertain.

Finally, the “loss” category would refer to “loans or portions thereof which are considered uncollectable or worthless and of such little value that their continuance as bankable assets is not warranted, although the loans may have some recovery or salvage value.” An example of this type is a past due clean loan the interest of which is unpaid for a period of six months. The aim of all this is to flush out the bad loans, and to have them properly classified and provisioned.

3. Question: *Provide an analysis of the provisioning guidelines within locally adopted generally accepted accounting principles (“GAAP”) and whether local accounting principles comply with*

international standards.

Answer: Under the locally adopted GAAP dealing on receivables, receivable balances should be valued at their face amounts, minus, if appropriate, allowances set up for doubtful accounts and for any anticipated adjustments which, in the normal course of events, will reduce the amount receivable from the debtor to estimated realised values. The amount for doubtful accounts should be provided in the amount determined after a study of the estimated collectability of receivable balances, and the evaluation of such factors such as aging of the accounts, collection experience of the company in relation to the particular receivables, past and expected loan experiences and identified doubtful accounts (Note 4 of the Statement of Financial Accounting Standards No. 3).

It is our understanding that, to the extent possible, the locally adopted GAAP complies with international accounting standards. The Accounting Standards Council, the body tasked with the establishment and improvement of the locally adopted GAAP, considers and utilises, among others, the accounting principles issued by other standard setting bodies such as the International Accounting Standards Committee and the Financial Accounting Standards Board.

4. Question: *Are there rules or guidelines to determine the role of advisers in the informal work-out process? If so, to what extent are the roles specifically defined and what processes are in place to ensure that the advisers are suitably qualified and experienced?*

Answer: As discussed, we are not aware of any rules or guidelines on informal work-out processes relating to corporate restructuring or rehabilitation.

5. Question: *Compare the guidelines currently being used within the country, if any, with the INSOL approach. Are the two similar, as interpreted within the country? Where there are differences, are they fundamental or able to be reconciled? Detail those differences and suggested amendments to the INSOL approach to take account of the differences.*

Answer: We are not aware of any rules or guidelines on informal work-out processes relating to corporate restructuring or rehabilitation.

6. **Question:** *Is there a central economic forecasting authority (or similar body) which is respected as providing reasonable assumptions as to economic forecasts?*

Answer: Under the 1987 Philippine Constitution, the National Economic and Development Agency (“NEDA”) functions as the independent planning agency of the government. Among other things, the NEDA is tasked with the provision of economic data and forecasts to the government. The NEDA Board is composed of the President as Chairman, the Secretary of Socio-Economic Planning and NEDA Director-General as Vice-Chairman, and the following as members: the Executive Secretary and the Secretaries of Finance, Trade and Industry, Agriculture, Environment and Natural Resources, Public Works and Highways, Budget and Management, Labor and Employment, and Interior and Local Government.

7. **Question:** *Does the Central Bank have standard discount rates to be applied in considering future maintainable cash flows of businesses in restructuring?*

Answer: The BSP maintains several key economic rates which vary daily or weekly and which may be applied in considering future maintainable cash flows of businesses undergoing restructuring:

Daily

- Domestic Interest Rates – BSP overnight and term RP/RRP, Interbank Call Loan Rates.
- Selected Foreign Interest Rates – 90-day and 180-day LIBOR/SIBOR.

Weekly

- Domestic Interest Rates – T-bill, Fixed-rate Treasury Bonds, Money Market, Manila Reference, Interbank call loan, Bangko Sentral RRP, Special Deposit Account, Bank Lending, peso and dollar deposit.
- Foreign Exchange and Interest Rates – Peso/dollar, PDS Forex transactions, LIBOR/SIBOR, BSP Gross International Reserves.

8. **Question:** *Is there provision within the legislation for working capital provided during a restructuring to be afforded any priority over “pre-stand still” debt? If not, what are the legal constraints upon such an approach?*

Answer: We are not aware of such a provision.

General Issues

1. **Question:** *In considering the provisions of the existing insolvency laws of the country within the terms of reference for cross-border insolvency, please also advise, in the same terms, on the sections relevant to informal work-outs.*

Answer: No comment, as the Philippines has no law which specifically governs informal work-out processes.

2. **Question:** *Provide an analysis of the risks and any concern with the existing process whereby a negotiated work-out is referred for formal approval and adoption. Specific risks to address include time delay and, in particular, the capacity of a party which does not support the negotiated work-out to utilise the formal process to delay adoption of the negotiated work-out.*

Answer: While the Philippines has no informal work-out legislation, the Interim Rules authorise creditor-initiated petitions for rehabilitation which are envisioned to get the stamp of approval of the courts for informal work-outs between the debtor and its creditors, especially if the work-out has the support of a majority of the creditors. The Interim Rules do not limit this remedy to local creditors. Foreign-based creditors may also avail themselves of this remedy. It is required, however, that the initiating creditors hold at least twenty-five percent (%) of the debtors’ total liabilities.

There are, however, risks involved in the process, such as the ability of the objecting creditors to raise legal issues, e.g. whether liabilities include non-monetary claims or whether they should include actual vis-à-vis contingent liabilities. Due to the novelty of the remedy under the Philippine setting, the judge may also need significant time to study the matter before finally approving the negotiated work-out plan. The Interim Rules attempt to minimise these risks by prescribing a maximum period of 18 months from the date of filing the petition for the court to approve or disapprove the plan. It is also submitted that the attendant risks are offset by the fact that once the plan is approved by the court, it is binding on all parties, even those who object to the terms of the plan.

Regional Co-operation

1. **Question:** *To allow these issues to be considered on a regional basis, the Local Consultants are also asked to extend the coverage of the issues raised in the terms of reference relating to cross-border insolvency to include commentary on the applicability of informal work-out processes to cross-border insolvency. This would include:*

- Commentary on any amendments to the informal work-out provisions contained within the insolvency laws of the country

Answer: The proposed CRA has provisions that are similar to the provisions of the Interim Rules on creditor initiated petitions for corporate rehabilitation. Like the Interim Rules, the proposed CRA does not discriminate against foreign based creditors availing of this mode to convert a pre-negotiated repayment plan into a court approved rehabilitation plan.

- Commentary on the administration of the insolvency laws within the country

Answer: We are unable to comment as we are not aware of any actual case showing the interplay of an informal work-out process with cross-border insolvency.

- Commentary on the extent to which the various treaties discussed within the terms of reference are also applicable to informal work-outs.

Answer: Presently, the treaties discussed relating to cross-border insolvency do not apply to informal work-outs.

2. **Question:** *During the conference in Manila, it was considered that an international organisation such as the ADB would be required to put its name to the guidelines, to give them credibility. Is this still thought of as an important aspect, and if so, which organisations would have the necessary credibility within the country?*

Answer: As an important regional financial and developmental organisation, the ADB is regarded with high esteem, such that including its name in the guidelines would lend more credibility to the work product. Other international organisations with the necessary credibility within the country are the International Monetary Fund and the World Bank.

Asian Development Bank

Promoting Regional Cooperation in the Development of Insolvency Reform

RETA 5975

Draft Country Report for Singapore Conference Informal Work-outs

Thailand

Engagement by Creditors and Debtors

1. **Question:** *Is there concern within the community regarding the restructuring process? If so, identify and provide examples of the issues causing concern, and suggestions as to the most effective way of addressing those concerns.*

Answer: Yes, there is concern within the community regarding the lack of certain enforcement amongst creditors and debtor(s) in informal workouts in the restructuring process.

The informal workout can only be enforced as an agreement amongst the parties who are signatories. It is not binding on other creditors.

To address this concern would require a special law to enforce such agreement over all creditors if, for example, a certain threshold of debt or numbers of creditors is met. Given the implementation of the TAMC regime, such a new law is unlikely.

2. **Question:** *In the papers provided to delegates at the Manila conference were copies of the material relating to the informal workout process within each of the Selected Countries. Local Consultants are asked to review the material relating to their countries and confirm that it remains the current legislation. Also confirm any known amendments proposed for that legislation and provide examples.*

Answer: In Thailand, penalties are imposed on creditors or debtors who act in bad faith or breach the restructuring agreement. Thailand's current legislation already provides for other issues concerning the restructuring process. Such legislation is referred to as the *Thai Asset Management Corporation Act*, B.E.2545 (TAMC). Under TAMC Act, the TAMC's committee is entitled to file a petition with the Bankruptcy Court seeking a bankruptcy order against the debtor or the guarantor who does not give a co-operation on business restructuring according to the plan as already approved by TAMC's committee.



3. **Question:** *To what extent are financial creditors bound to the existing informal approach within the country? Provide details of any contractual agreements and details as to the parties involved with those agreements. Are there any significant creditor groups or institutions not party to the agreements?*

Answer: In an informal CDRAC workout process, the financial creditors are bound to the informal workout as a matter of agreement, which provides terms and conditions about payment, restructuring plan, and debtor's business plan. It is optional in each case whether creditors agree to be bound.

4. **Question:** *Is there a formal document binding debtors to become involved in the restructuring process? If not, how is the co-operation of debtors obtained? Are there alternative ways of ensuring the co-operation of debtors?*

Answer: The formal document binding debtors to become involved in the restructuring process is the plan contained within the CDRAC informal work out agreement. It is only enforceable as an agreement although a debtor could use the CDRAC agreement as a defence to a bankruptcy proceeding by any creditor who is a signatory to a CDRAC plan. The threat of reversion to formal and less sympathetic formal procedures is the method of ensuring debtor compliance.

5. **Question:** *Are international institutions a major source of finance for corporations within the country? If so, is it considered there are particular issues involved in workouts involving foreign as well as domestic lenders? Please provide examples of the particular issues concerned.*

Answer: International institutions are a major source of finance for corporations within the country, both directly or as the ultimate source of funds loaned via local institutions. There is often something of a clash of business culture between foreign and local institutions regarding such issues as the criteria for accepting restructuring or seeking liquidation and the follow on effects on the local economy and employees.

6. **Question:** *Identify the major associates which are involved in the banking, finance and corporate sectors and who would have influence over the workout process, and which organizations are likely to provide support to the development of informal workout guidelines. If possible, identify specific individuals in those organizations who may be willing to lend their support to this initiative.*

Answer: The major associates, who are involved in the banking, finance and corporate sectors in Thailand, are the Bank of Thailand, the Thai Asset Management Corporation, and the leading government-owned and privately-owned banks. The Thai Government, via the Ministry of Commerce, will provide the law concerning to the restructuring process and as such has had a significant impact. With the implementation of the Thai Asset Management Corporation regime and the level of debt transferred to it (because of the high involvement of government-owned banks in lending) it would be unlikely that any other form of informal workout initiative would seek much practical support.

7. **Question:** *What capacity does the Central Bank, or other appropriate authority, have to ensure that creditors have individuals of sufficient seniority actively involved in the workout process at an early stage? Provide recommendations for ensuring this involvement is achieved.*

Answer: The Central Bank, or other appropriate authority will ensure that creditors have individuals of sufficient seniority actively involved in the workout process at an early stage by witness or evidence provided by each creditor joining the CDRAC process. The Bank of Thailand and other appropriate authorities require submission of evidence of the authority of each person involved in the process.

8. **Question:** *Are there penalties for either creditor or debtor (other than general commercial concerns) which delay the informal workout process? This may take the form, for example, of assumed higher provisioning for creditors.*

Answer: There are penalties for either creditor or debtor, which delay the informal workout process, and assume higher provisioning for debtors. The penalty provision for debtor is provided on the ground to avoid the lack of trust of the debtor. It does not press seriously to the creditor, because as we know that the success of the restructuring workout process can make the advantage to the creditors.

9. **Question:** *How is the issue of moral hazard (debtors not meeting their obligations even though they may have the capacity to do so) addressed, if at all?*

Answer: The issue of moral hazard (debtors not meeting their obligations even though they may have the capacity to do so) is left to be addressed by ordinary law if enforcement. To remedy this would require significant policy initiatives but there is no indication that such policy is being implemented or even considered.

Differences in Approach

1. **Question:** *Provide an analysis of the instructions provided by the Central Bank as to how banks and other financial institutions should provide for bad and doubtful debts. In particular, provide details of the guidelines for classification of debts and the level of provision which needs to be set aside for each class.*

Answer: The Bank of Thailand provides the instruction to the banks and the financial institutions to meet with the bad and doubtful debts. They are the process to deal with the case, default interest rate, negotiation process, etc.

2. **Question:** *Provide an analysis of the guidelines provided by the Central Bank for reclassification of debts when a restructuring agreement has been negotiated. In particular, at which point can a debt be reclassified and does consideration need to be taken as to the terms of the restructuring? If so, provide details as to the issues to be considered.*

Answer: The Bank of Thailand does not provide the guidelines for reclassification of debts when a restructuring agreement has been negotiated.

3. **Question:** *Provide an analysis of the provisioning guidelines within locally adopted generally accepted accounting principles ("GAAP") and whether local accounting principles comply with international standards.*

Answer: Even though Thailand does not adopt the US GAAP (General Accepted Accounting Principle) or the IAS (International Accounting Standard) in its entirety in the financial reports of listed companies, companies listed on the Stock Exchange of Thailand (SET) have to follow the Thai GAAP which implements 21 out of 34 standards set out by the IAS. Moreover, it is the policy and goal of the Institute of Certified Accountants and Auditors of Thailand (ICAAT) that within four years all the IAS that are

applicable to Thailand will be adopted by the Thai GAAP.

In addition to compliance with the Thai GAAP, companies that are listed on the SET are subjected to rigorous disclosure requirements. Their financial statements have to be reviewed by external and independent auditors and disclosed to the public on a quarterly basis. Their annual financial statements have to be audited by independent auditors and a majority of listed companies have the 5 international audit firms as their external auditors. These auditors, apart from having to be licensed by the ICAAT, they also have to be registered with the Thai SEC and their work and standards of auditing are reviewed by the Thai SEC and the ICAAT on a regular basis.

The Thai SEC also requires listed companies to file their annual disclosure statements. Contained in those statements must contain be extensive information on risk factors that the companies are facing, management discussion and analysis on past performance, and financial position as reflected in the financial statements. In case where there is any negative effect on performance of the companies, discussion in the annual statement should also provide detailed description of plans to avert the problems. The annual statement must also provide information of related parties transactions during the year; the significant ones of which are required by the SET to be approved by shareholder meetings. Discussions on the level of internal control and management control over the companies through audit committees, whose composition includes independent directors, must also be disclosed. The Thai SEC conducts random reviews of approximately a quarter of the total number of such disclosure documents. Any company that fails to disclose such information is subjected to sanction by the Thai SEC.

4. **Question:** *Are there rules or guidelines to determine the role of advisers in the informal workout process? If so, to what extent are the roles specifically defined and what processes are in place to ensure that the advisers are suitably qualified and experienced?*

Answer: No, there are no such rules.

5. **Question:** Compare the guidelines currently being used within the country, if any, with the INSOL approach. Are the two similar, as interpreted within the country? Where there are differences, are they fundamental or able to be reconciled? Detail those differences and suggested amendments to the INSOL approach to take account of the differences.

Answer: In Thailand, we already have the law and regulations, which are similar to the INSOL approach. They are the enforcement of the agreement that was made in the informal process, the priority of working capital, the penalties in an event of delay or breach of the agreement, and the providing of bad and doubtful debt.

6. **Question:** Is there a central economic forecasting authority (or similar body) which is respected as providing reasonable assumptions as to economic forecasts?

Answer: The Economic and Social Development Council is a government organization, which provides the Economic and Social Development Plan as the guideline of the Economic development in Thailand and as such provides reasonable assumptions and forecasts.

In addition various banks and non-governmental organizations produce their own forecasts which are often reviewed carefully by business and banks.

7. **Question:** Does the Central Bank have standard discount rates to be applied in considering future maintainable cash flows of business in restructuring?

Answer: No, the Central Bank of Thailand does not have standard discount rates to be applied in considering future maintainable cash flows of business in restructuring. It will be considered on a case by case basis.

8. **Question:** Is there provision within the legislation for working capital provided during a restructuring to be afforded any priority over "pre-stand still" debt? If not, what are the legal constraints upon such an approach?

Answer: The Bankruptcy Act does not allow for a priority of working capital over "pre-stand still" debt but does not prevent such a priority to be specified in a rehabilitation plan or CDRAC plan. BOT framework for debt restructuring recommends such a priority be adopted.

General issues

1. **Question:** In considering the provisions of the existing insolvency laws of the Country within the terms of reference for cross-border insolvency, please also advise, in the same terms, on the sections relevant to informal workouts.

Answer: In Thailand, there are no provisions for cross-border insolvency in either under the existing laws or for informal workouts.

2. **Question:** Provide an analysis of the risks and any concerns with the existing process whereby a negotiated workout is referred for formal approval and adoption. Specific risks to address include time delay and, in particular, the capacity of a party which does not support the negotiated workout to utilize the formal process to delay adoption of the negotiated workout.

The time taken to establish a CDRAC plan, combined with the fact it is only binding on the signatories, and the ease with which other creditors can implement formal procedures is the greatest risk and main reason why CDRAC is no longer a popular remedy.

Regional Co-operation

2. **Question:** During the conference in Manila, it was considered that an international organization such as the ADB would be required to put its name to the guidelines, to give them credibility. Is this still thought of as an important aspect, and if so, which organizations would have the necessary credibility within the country?

Answer: While an international organization would lend some credibility to any guidelines, on its own that would have only limited value in finance. Only the backing of a regulatory body within Thailand, such as the Bank of Thailand, would ensure the guidelines were highly respected.

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