

Proposal to Establish an International Rule for Out of Court Workout Agreed By the Central Banks, the Bankers' Associations and Other Relevant Organizations Worldwide



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Creation of an international workout rule applicable worldwide

Out Of Court Workout (OOCW) is a useful tool to expedite reorganization of ailing business corporations which have viable future prospects by means of debt restructuring at an early stage. The International Monetary Fund recommended using prepackaged and pre-negotiated rehabilitation plans in its "Orderly & Effective Insolvency Procedures"² published in 1999 and the INSOL International publicized so-called INSOL 8 Principles³ which is the statement of principles for a global approach to multi-creditor workout in 2000. The World Bank also advised to use informal workout and restructuring in its "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems"⁴ released in 2001, while the UNCITRAL encouraged voluntary restructuring negotiations and agreement in its "Legislative Guide on Insolvency Law"⁵ of 2005. The INSOL 8 Principle is a model rule which is expected to be adopted as a domestic rule in each country worldwide, but my proposal is to create and establish an international rule for OOCW that is agreed by the central banks, the bankers' associations and/or other organizations of each country and respected and observed by financial creditors, bondholders and other relevant stakeholders all over the world. It may take more than a decade to achieve that task, but we have to start now.

OOCW and formal insolvency proceedings in the United States of America, the United Kingdom, France and Germany

Pre-negotiated and/or pre-arranged Chapter 11 instead of pre-packaged plans are normal for big cases in the United States of America exemplified by the General Motors case. Pre-packed administration has been authorized in the Statement of Insolvency Practice issued in 2008 by the Insolvency Service of the Department of Business, Enterprise and Regulatory Reform. Due diligence, drafting plans and negotiations are conducted and/or prepared

between a debtor company and major creditors assisted by professionals out of court prior to filing a petition for formal insolvency proceedings, i.e., Chapter 11 in the United States or Administration in the United Kingdom.

In France, safeguard and conciliation proceedings are commenced by a commercial court, but negotiations for reorganization plans between debtors and creditors are conducted out of court mostly and the plans agreed by majority of creditors are approved by the court.

The German new law titled "Act to Further Accelerate Company Restructuring" which has been effective since April 2012 is expected to make pre-packed plans possible. Negotiations for prospective pre-packed plans may take place at an earlier stage before the commencement of statutory insolvency proceedings.

These workouts are OOCW for reorganization of ailing business corporations.

OOCW in East Asian countries

After the Asian Currency Crisis in 1997, out of court workout rules were promoted in East Asian countries following advice made by the International Monetary Fund, the World Bank and the Asian Development Bank. They were the "Agreement among Financial Institutions for Corporate Restructuring" of Korea in 1998, "Framework for Corporate Restructuring"⁶ of Thailand in 1998 and "Hong Kong Approach to Corporate Difficulties"⁷ in 1998.

Asset management companies, such as Malaysian DANAHARTA⁸, Jakarta Initiative⁹, Bangkok Approach and Korean KAMCO conducted OOCW in these countries with governmental involvement to wipe out non- and/or poor-performing loans. Most of these quasi-governmental organizations except KAMCO have been closed already. However, the culture to restructure debts by means of OOCW has become popular in the Asian region.

Asian Pulp & Paper, head-quartered in Singapore with major factories located in Indonesia and China, is a workout case that began with its standstill notice of 2003 and has not yet been successfully concluded due to dubious acts, including preferences and the siphoning of money by owners to the APP group. Some international rules for OOCW applicable in this area could be helpful for the case.

In Korea, OOCW is conducted by financial sector assisted by the Financial Supervisory Agency based on Corporate

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² <http://www.imf.org/external/pubs/ft/orderly/index.htm>

³ <http://www.insol.org/page/57/statement-of-principles>

⁴ http://www.worldbank.org/ifa/1pg_eng.pdf

⁵ http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

⁶ http://www.bot.or.th/English/AboutBOT/related/CDRAC/privilege_list/Pages/BangkokFrameWork.aspx

⁷ <http://www.hkma.gov.hk/media/eng/publication-research/reference-materials/banking/fa03>

⁸ <http://www.bnm.gov.my/websites/danaharta.com.my/default.html>


⁹ <http://siteresources.worldbank.org/INTINDONESIA/Resources/CGI03/00-CGI-Oct17-18-00/JITE.pdf>

Restructuring Promotion Law¹⁰ of 2005 which was amended several times thereafter.

In Japan, "Guidelines for Out of Court Multi-Financial Creditors Workout"¹¹ was created in 2001 agreed by the Japanese Bankers' Association, the Japanese Federation of Managers' Associations and other relevant organizations. In addition, the Business Reorganization ADR (Alternative Dispute Resolution) has been operated by the private sector licensed by the Minister of Economy, Industry and Trade as well as the Minister of Justice since 2007.

In addition to these developments, the Asia Bankers' Association formally adopted, in October 2005, a set of guidelines for informal workouts and endorsed a template agreement for company restructuring to be used by financial institutions throughout the region, i.e., "Asian Bankers' Association Informal Workout Guidelines-Promoting Corporate Restructuring in Asia" (ABA Guidelines)¹², which may be drafted referring to the "Model Agreement to Promote Company Restructuring: A Model Adaptable for Use Regionally, by a Country, or for a Particular Debtor"¹³ included in the "Final Report on Promoting Regional Cooperation in the Development of Insolvency Law Reforms" presented to the Asian Development Bank in April 2005 written by Clare Wee, Ron Harmer, Richard Fisher and other distinguished professionals. Unfortunately, no actual OOCW case was conducted using the Guidelines so far, to my knowledge.

Proposal to establish the international rule for OOCW

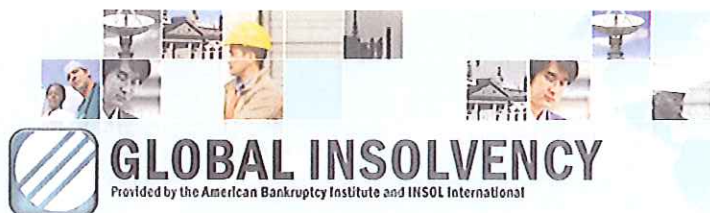
A regional rule alone may not be sufficient to deal with cases where financial creditors worldwide involve international workout processes and international rules must be observed and respected by most financial creditors all over the world. The prospective international rule for OOCW should be agreed by most central banks, bankers' associations and other relevant organizations worldwide. We have two excellent examples, being the INSOL 8 Principles which is expected to be adopted as a domestic rule in respective countries, and the ABA Guidelines as a regional rule. I would suggest that the proposed prospective rule may be drafted referring to these rules with some amendments. For example, the word "Financial Institution Creditors" included in the ABA Guidelines should be replaced by "Financial Creditors" to make it clear that all kinds of financial creditors are entitled to participate in OOCW. The challenge is how to obtain consents of relevant organizations. To achieve the ambitious goal of this project, close cooperation among many international organizations and associations is critical, involving the International Monetary Fund, the World Bank, UNCITRAL, the Organization for Economic Cooperation and Development, the European Central Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, INSOL International, the International Bar Association, the International Insolvency Institute and others. The creation of a gentlemen's agreement might be much easier than the enactment of uniform statutes all over the world. 

¹⁰ http://koreanlii.or.kr/w/index.php/Corporate_Restructuring_Promotion_Act

¹¹ <http://www.iiiglobal.org/component/jdownloads/finish/152/1056.html>

¹² <http://www.aba.org.tw/images/upload/files/06-AppendixB-InfWkOutGuidelines.pdf>

¹³ <http://www.aba.org.tw/images/upload/files/07-AppendixC-InfWkOutModAgreement.pdf>



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