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

***By***

***Dr. Shinjiro Takagi***  
*Nomura Securities Co., Ltd.*  
*Tokyo*

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## **Need to Establish an International Rule for Out of Court Workout Agreed By the Central Banks, the Bankers' Associations and other organizations Worldwide**

Shinjiro Takagi, *PhD*<sup>1</sup>

### **Creation of 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 prospect 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**”<sup>2</sup> published in 1999 and the INSOL International publicized so-called **INSOL 8 Principles**<sup>3</sup> 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**”<sup>4</sup> released in 2001, while the UNCITRAL encouraged voluntary restructuring negotiations and agreement in its “**Legislative Guide on Insolvency Law**”<sup>5</sup> 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 prepackaged 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

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<sup>1</sup> Dr. Shinjiro Takagi is the Executive Senior Advisor to Nomura Securities Co., Ltd. Ex. Chair of Industrial Revitalization Corporation of Japan, Retired Professor of Chuo University Law School, Retired Judge of Tokyo High Court (Court of Appeal), Admitted Japanese Bar in 1963.

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

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

<sup>4</sup> [http://www.worldbank.org/ifa/ipg\\_eng.pdf](http://www.worldbank.org/ifa/ipg_eng.pdf)

<sup>5</sup> [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)

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 a 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 plan possible. Negotiations for prospected pre-packed plans may take place at an earlier stage before the commencement of statutory insolvency proceeding.

These workouts are OOCW for reorganization of ailing business corporations.

### **OOCW in East Asian Countries**

After 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**”<sup>6</sup> of Thailand in 1998 and “**Hong Kong Approach to Corporate Difficulties**”<sup>7</sup> in 1998.

Asset management companies, such as Malaysian **DANAHARTA**<sup>8</sup>, **Jakarta Initiative**<sup>9</sup>, **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 Asian region. Asian Pulp & Paper, head-quartered in Singapore with major factories located in Indonesia and China, whose workout case has not yet been successful since its standstill notice of 2003 due to doubtful doings, including preference and siphoning money by owners to the APP group. Some international rules for OOCW applicable in these area could be helpful for the case.

In Korea, OOCW is conducted by financial sector assisted by the Financial Supervisory

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<sup>6</sup> [http://www.bot.or.th/English/AboutBOT/related/CDRAC/privilege\\_list/Pages/BangkokFrameWork.aspx](http://www.bot.or.th/English/AboutBOT/related/CDRAC/privilege_list/Pages/BangkokFrameWork.aspx)

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

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

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

Agency based on Corporate Restructuring Promotion Law<sup>10</sup> of 2005 which was amended several times thereafter.

In Japan, “**Guidelines for Out of Court Multi-Financial Creditors Workout**”<sup>11</sup> 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 Minister of Economy, Industry and Trade as well as Minister of Justice since 2007.

In addition to these developments, the Asia Bankers Association formally adopted on 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)<sup>12</sup>, 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**”<sup>13</sup> included in the “Final Report on Promoting Regional Cooperation in the Development of Insolvency Law Reforms” presented to 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 of 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 of INSOL 8 Principles which is expected to be adopted as a domestic rule in respective countries, and 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 ABA Guidelines should be replaced by “Financial Creditors” to make it clear that all kind of financial creditors are entitled to participate in OOCW. The challenge is how to obtain consents of

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<sup>10</sup> [http://koreanlii.or.kr/w/index.php/Corporate\\_Restructuring\\_Promotion\\_Act](http://koreanlii.or.kr/w/index.php/Corporate_Restructuring_Promotion_Act)

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

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

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

relevant organizations. To achieve an 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, the INSOL International, the International Bar Association, the International Insolvency Institute and others. The creation of Gentlemen's agreement might be much easier than enactment of uniform statutes all over the world.

## Appendix 1

### INSOL 8 Principles

- 1 Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a 'Standstill Period') to the debtor for 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 is inappropriate in a particular case.
- 2 During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) 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.
- 3 During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.
- 4 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 in the process as a whole.
- 5 During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.
- 6 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 relevant positions of relevant creditors at the Standstill Commencement Date.
- 7 Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.

- 8 If additional funding is provided during the Standstill Period or under any rescue or 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.

## Appendix 2

### Asian Bankers' Association Informal Workout Guidelines

#### Introduction

This document contains principles which should guide financial institutions as to how they should deal with customers in difficulties in circumstances where the customer, is dealing with multiple financial institutions as creditors (**Financial Institution 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 Institution Creditors to a customer'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 customer with borrowings from multiple Financial Institution 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 Institution Creditors (whether they are secured or unsecured creditors) should be prepared to cooperate with each other. The initial attitude of Financial Institution Creditors should be one of support.

Workouts need cooperation. Whilst Financial Institutions are likely to be reluctant to permit an increase in their exposure to a customer so that other facilities of financial institutions 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 Institutions 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 Institution Creditors.

### **Involvement of all Financial Institution Creditors in Workout Process**

All Financial Institution Creditors (other than those whose exposure is negligible) should be eligible to participate in an informal workout process. Other creditors-such as trade creditors, trade financiers, insurance institutions and bondholders may also participate in a work-out.

## **IMPLEMENTATION**

### **Meeting of Financial Institution Creditors Desirable**

Where it has become apparent that an informal workout process may be applicable to a debtor, Financial Institution Creditors should meet to consider whether or not to implement an informal workout process. All Financial Institution 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 Institution 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 Institution 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 Institution 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 formulated and assessed, unless such a course of action is inappropriate.

During the Standstill Period, all relevant Financial Institution 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 fulfil 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 Institution Creditors the best deal that can be achieved.

#### **Costs**

A careful watch must be kept on costs. Financial Institution 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.