行政院及所屬各機關出國報告

（出國類別：會議）

參加OECD在泰國舉辦之亞洲國家破產機制改革研討會報告

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參加OECD在泰國舉辦之「亞洲國家破產機制改革」研討會報告

壹、 前言

南華於九十一年十二月十六日至十七日奉派參加經濟合作發展組織(Organization for Economic Co-operation and Development, OECD) 在泰國曼谷舉辦的「亞洲國家破產機制改革」研討會，本次會議主要係檢視亞洲地區國家、企業發生破產情況及其後重建改革之發展，並深入探討亞太地區破產重整制度改革發展與不良金融資產處理現況暨改革成果，另就泰國在金融危機後新修訂之破產及重整相關法令與執行成效予以評估。

OECD 為瞭解亞洲國家破產重整法制對於不良資產處理效率之影響，共舉辦兩次研討會，第一次研討會在澳洲雪梨舉行，本次為第二次研討會，在泰國曼谷舉行，參加的國家包括日本、韓國、菲律賓、新加坡、澳洲、中國大陸、巴基斯坦、印度、印尼、馬來西亞、泰國及我國。出席的國際組織包括國際貨幣基金(IMF)、世界銀行(WORLD BANK)、亞洲開發銀行(ADB)、經濟合作發展組織(OECD)等。出席的專業人士包括國際性之律師事務所、會計師事務所及顧問公司。本次研討會共計九十餘人參加，討論情況非常熱烈。

貳、本次研討會之重點內容

本次為期兩天的研討會，首先由 OECD 首席顧問 Mr. Lampros Vassiliou 針對亞洲地區主要國家的破產重整機制改革現況作摘要報告以及提出政策性建議，另外有七場專題討論會(請詳附件一)，討論重點包括:(一)重整(informal workouts)技術、發展與國際性問題；(二)不良資產之處理、重建基金與資產證券化議題；(三) 金融監理、誘因與公司治理；(四)泰國新修正破產制度之評估與法制改革建議等。

本報告以下共分為五部分:第一部分為 OECD 首席顧問 Mr. Lampros Vassiliou 對亞洲國家破產重整機制改革現況之報告及政策性建議(附件二)；第二部分為世界銀行首席顧問 Mr.Gordon W. Johnson 報告世界銀行所制定之「破產與保護債權人機制之有效處理原則」，共有三十五條(附件三)；第三部分為我國代表在研討會之報告，本文摘述理律律師事務所劉律師紹樑對我國破產重整機制改革之報告(附件四)，至於金融局邱專門委員淑貞對金融改革與金融重建基金之報告，以及南華與眾信會計師事務所陳會計師威宇就我國處理問題金融機構與不良金融資產處理經驗之報告請詳附件五及附件六；第四部分介紹泰國新修正之破產制度，最後為結語。

參、OECD 首席顧問 Mr. Lampros Vassiliou 對亞洲國家破產重整機制改革之政策性建議

一、基本理念

(一)重整革命(Restructuring Revolution)

1980 年代末期因經濟不景氣，拉丁美洲、東歐及亞洲等地區部分國家開始發展破產及企業重整制度，故 90 年代及本世紀初許多企業發生問題時，得有相關機制處理及因應。部分亞洲國家除已修訂破產法外，亦發展法庭外債務重整機制。部分國際性機構亦投注可觀心力發展跨國破產法，以增進運作效率，並盡可能整合國際間破產制度及作業處理。亞洲各國對債務重整制度之發展與成效，已對不良資產之投資人提供頗佳願景。過去 5 年來，亞洲地區最明顯之進展，應屬企業重建及法庭外債務重整之機制，整個演進過程應為「重整革命」，而非「破產革命」。

1997 年亞洲發生金融危機，該地區許多國家開始改革其破產、重整及協議清償等相關法律及作業流程，冀望補救法律面及制度面之弱點，並藉此強化金融體系及企業體系。迄今，司法制度之改革最為顯著，債務重整得於法庭外進行，雖執行面仍有缺陷，惟其法律架構已有改進。有關清理制度則仍然欠缺，或幾乎尚未建立。

(二)金融危機也是轉機(The Crisis was a good thing)

金融危機迫使亞洲地區許多國家改革其破產、重整及協議清償等法律及制度，進而增進法院、政府機關及金融監理機關之機能，並培育專業顧問、銀行及企業經理人等進一步認識企業破產之理論及技術。長期而言，金融危機應有正面之意義，若再加強公司治理，則亞洲地區之投資穩定性可望提昇。

某些個案，債務重整有被濫用情形，如：掏空公司資產者可藉由債務重整方式，安然脫身；反之，若循破產法途徑處理，公司經理人將被嚴格檢視是否有詐騙或背信行為，並對犯罪行為人追究法律責任。若法律及制度原已有欠完善，則對違法犯罪者追究法律責任更形困難。債務重整已為時尚，但有些重整計畫欠具體可行；金融機構熱中於此，係因其 NPL 可藉由重整之名，轉變為正常資產，進而減少提存備抵呆帳。具體可行之重整計畫應有獨立客觀之專業人士參與評估。

一般而言，有關企業破產及其處理方法之認知已有提昇，惟對管理財務困難之企業及債權催理方面仍然欠缺，建立完善之破產制度仍待努力。若能配予特殊法律，AMC 可增進金融機構不良債權之銷售管道及投資市場。

二、茲提出政策性建議(policy recommendations)如下：

(一)加速破產處理，避免無繼續經營價值之企業留存而有繼續

經營價值之企業倒閉(Unviable business Trade on and good business collapse)

清理 (liquidation) 或許是處理破產事件中最古老及效率最佳之手段，惟亞洲地區國家似乎不熱中以清理方式解決破產事件。新加坡、香港及馬來西亞係亞洲地區擁有最佳清理機制者，其他國家則傾向以處理 NPL 來拯救企業。透過清理方式處理失敗企業，讓債權人收回債權，失敗企業之資源可重新進行分配，惟鮮有國家備有完善之清理機制。無法獲利之企業若持續營運，其負債會持續擴大，無生存之意義；另拯救企業之機制若欠缺效率，終會迫使仍有經營價值企業倒閉。例如，菲律賓之企業常因核准程序及執行重整計畫時一再延宕，營運資金未能充分供應，終致企業以倒閉收場。

(二)加強檢視企業財務報表之真實性，以免增加國家納稅人之負擔(The hole in Asian economies – corporate loss converted to sovereign debt)

多年來亞洲地區之企業長期虧損情形未被充分揭露，終致發生金融風暴。惟亞洲地區國家亦可趁機確實檢視企業資產負債表之真實性。當經濟繁榮時期，各項物資均被炒作膨脹，因景氣尚佳，掩飾一切假象，惟當景氣反轉時，金融危機即隨之而來。金融機構首當其衝，國際投資客及當地存款人對金融體系產生信心危機，金融機構之營運隨即發生困難。政府可選

擇介入干預經營不善之金融機構，或任其優勝劣敗自然淘汰。當然，所有政府均選擇介入干預，對尚未倒閉之金融機構存款部分或全部保障，部分國家由政府出資成立 AMC 購買 NPL，多數國家之納稅人成為最後損失之承擔者。

(三)儘速建立特別法庭解決破產事件(Specialized courts have been plagued)

部分國家成立特別法庭解決破產事件，雖可大量並加速處理破產案，惟其處理方式引發是否符合憲法及司法制度之問題。另有其他衍生問題，諸如承辦法官之貪瀆，對法律解釋前後不一致，法院承辦案件積壓如山，狡詐之債務人之拖延戰術等。

印尼之商業法庭因不當引用破產法及法官貪瀆事件，致其清理制度之國際聲譽大損。1999 年泰國成立特殊破產法庭時，處理某些受爭議破產案之績效尚佳，係因該法庭能迫使不願和解之債務人與債權人協議清償。惟成功案例仍然有限，因法院未能完全依照債權人之意願進行評估債務人之資產及負債狀況。該機制成立之初，法官尚可得財務及會計等技術之訓練及支援，以利更深入審理案件，嗣因法官輪調制度，致使破產法庭未能有效發揮其應有功能，破產案件因而開始積壓。近來更有法官貪瀆情事，進而影響案件審理結果。

一般而言，破產法與契約（contractual）及財產

（property）等二權利時有牴觸，因而引發是否違憲之疑義，正因如此，案件審理常遭延宕。

(四)加速強制執行(Little development of civil remedies and secured transaction regimes)

泰國及印尼之債權人聲請強制執行擔保品常須費時數年以上，甚至超逾十年；其強制執行法早已落伍，致有實質擔保意義之資產相當有限。1998~1999 年間傳聞泰國即將採用新強制執行法，惟新法亦不符時代所需，例如：新法規定借戶之利息延滯未逾五年，不得執行拍賣不動產擔保品。另不動產移轉須負擔高額規費及稅捐時，便無法活絡不動產交易市場，如：菲律賓及印尼。

所謂「策略債務人（strategic debtor)」係指借戶縱有能力清償債務，仍然選擇不清償。法律制度欠完善，對債務人無督促能力，進而產生借款毋須還款之文化，即為產生「策略債務人」之溫床。亞洲地區許多國家因欠缺完善破產法及保障債權人之法律，致重整機制未能有效運作。

(五)加強預防犯罪及增進公司治理(prevention of fraud and corporate governance)

破產法須具備二項重要功能：預防犯罪及增進公司治理；惟須有適當訓練及充足資金等相關配套措施，破產法方能發揮其應有功能。經由破產程序可檢視失敗企業之營運軌跡、交易

狀況、董事會之功能及責任、犯罪行為、內控缺失及其他不當之作業等。許多國家之破產清理人,僅應債權人之請求及協助,才願意重新對破產企業進行調查。目前未有國家提供資金讓破產清理人進行企業破產原因調查;另當企業破產時,資產已被掏空,實已無資金可供清理人辦理調查工作,因而破產責任未被追究,企業錯誤經營之行為模式亦難以矯正。公司法及破產法未能有效規範企業負責人或經理人,又因債權人及債務人私下達成協議,違法事件常被忽略。

(六)建立救援企業制度(Rescue models out-step practice and culture development)

歐美先進國家之救援企業法律早已行之有年,其目的係為防止企業暫時失去流動性,而無法繼續營運,惟其爰用有嚴格規範。亞洲地區國家之救援企業法律已有顯著發展,甚有失衡或被濫用情形。泰國、印尼及中國等地區之救援制度有偏好債務人,壓迫債權人情形;另清理機制亦欠完善,清理過程常須費時數年,債權人多不願以清理方式解決債權問題。

救援企業制度改革及法院審案程序加速後,債權人擁有更多籌碼與債務人協商,惟真正能迫使債務人誠意參與協商者,非「掌控企業之經營權」莫屬。

(七)加快執行進度(Implementation has been the major problem)

亞洲地區許多國家之法律架構已有顯著改善，惟執行面仍有問題。例如，部分法條陳義過高，執行困難，因許多人從未經歷此類法律制度。因此，改革法律必先改革百姓之心態、文化及行為等，方能事半功倍。

(八)破產制度設計要有足夠誘因(An efficient insolvency system is in itself not enough)

不論制度如何完善或效率佳，債權人及債務人均不願以破產方式解決問題，除非破產制度設計有足夠誘因。除充分保障企業負責人及債權人之權益，尚須賦稅優惠、金融監理法規等鼓勵配套措施。

(九)金融危機須長期性改革(Emergency measures rather than long lasting reform)

過去 5 年亞洲地區許多國家之改革，係因應金融危機之迫切性改革，主要目的係短期內對金融機構採取之立即性措施。為協助重建金融體系，許多新機構應運而生。改革措施包括：㈠設立國營或民營 AMC、㈡設立快速處理 NPL 機構、㈢設立重建基金購買倒閉金融機構之 NPL、㈣設立公正專業顧問公司、㈤設立管理法庭外債務重整機制之委員會、㈥提供特殊司法制度，放寬外資投資限制，及賦稅及不動產移轉規費減免等措施鼓勵投資 NPL。

上述各項措施均屬臨時性之階段任務，部分措施促使金

融重建之步調（pace）尚屬成功，惟重建之品質（quality）仍未達預期。另短期性之重建措施，易產生執行不當，或道德危險之疑慮。如今事實證明完善之破產制度仍須長期性改革；惟以前短期性改革措施之貢獻仍有其功能。

(十)避免新的輕率放款與道德危險(New reckless and directed lending – the moral hazard of AMC transfer)

AMC 直接向銀行購買 NPL，銀行可重新取得資金，並改善其財務結構。惟債信良好之借戶仍然有限，銀行多將其資金配置於風險性較低獲利性較差之資產，如：政府債券。銀行為改善獲利能力，不得不再將資金投入放款業務，另一波放款風潮再度掀起，惟實質放款戶債信未必已有改善。

道德危險係另一項 AMC 可能衍生之問題：當銀行 NPL 金額過大時，銀行即將無法去化之 NPL 轉售予國營 AMC，則銀行毋須對其 NPL 產生之原因深入檢討分析，並設法建立完善授信制度改善營運體質，嗣後承作授信業務亦不再評估其承受之信用風險。

(十一)避免歷史錯誤重演(Short institution memories)

除大型國際性銀行外，一般銀行似乎患有記憶健忘症，係因對過去曾遭受之危機，未能牢記在心。平均 5 至 7 年，銀行之歷史錯誤事件容易重新上演。目前有證據顯示，授信浮濫情形已隱約再現，亦即對債信欠佳之借戶有過度融資情形。

(十二)強而有力之金融監理機關係金融重建成功之最佳後盾

(Strong and capable regulators often key factor to success)

由泰國、馬來西亞金融重建成功之經驗顯示，強而有力之金融監理機關係金融重建成功之最佳後盾。

(十三) 重整計畫要具體可行，避免重復重整(Fictional rescheduling not real restructuring)

亞洲地區許多企業重整案，其重整計畫有欠具體可行。因重整案之重心不在企業能否繼續經營，債務人有無能力履約亦未切實評估，故重整案最終未能給予企業再生機會。債權人之所以同意此類重整案，常因債權人可額外加徵擔保品或增收手續費，或可暫時規避提列呆帳準備等誘因，事實上，債權人亦不期望債務人會遵守協議條款履約。若企業之股票尚存價值，銀行以債作股方式處理 NPL 應屬合理；惟有部分個案，係以「以債作股」之名，行掩飾營運損失之實。

也有許多重整案常於第一年時，債務人即未能繼續履約，因而再重新協議重整，主要係許多重整條件訂定不切實際。另因重整期間多為長期性，重整時許多假設條件，如：經濟成長率、出口成長率、資本投資成長率等指標，難以準確預估。當債務人未能履約時，債權人可能會同意重新協商議定重整條件，以利重整持續進行；惟不論重整之品質為何，若因重整案重新協議後，原授信案即被分類為「正常資產」，實有欠妥，

其投機性之行為對未來經濟成長有負面影響。

(十四)重整過程要有公正專家參與

重整過程中，若有公正專家參與，且債權人及債務人能誠意合作，該重整案成功機率大增，各方亦能受惠。反之，若債權人態度過於強勢,常導債務人不配合行為,採用拖延戰術，或其他抗拒行動，致債權人權益受損。泰國甚有發生參與重整之會計師遭殺害情事。

專業顧問之角色有被曲解，其價值性被低估。一般人僅注意顧問業者之服務費用，或許自亞洲金融危機以來，顧問業者賺取有史以來最豐厚之酬勞，惟亦反應從未有企業如此殷切地需求顧問服務之事實。顧問費用再昂貴，與積欠銀行之利息相較，仍屬微不足道。顧問業之功能係能提供知識及技術，確保重整品質，為保護其執業聲譽，顧問業者會慎重處理事務。

國外顧問業者能提供許多有關重整之諮詢服務，惟部分國家因國家主義及獨占等因素，以法令及政策之手段排擠國外顧問業者。若無外來之相關知識及技術，重建金融體系及企業會面臨重重困難。

(十五)建立國際間更具效率之破產制度

目前國際間對破產法及其制度之重視正達高峰期，許多國際性組織紛紛發表研究報告,討論有關破產制度、擔保融資、法庭外處理 NPL 之機制等議題，甚至訂定相關處理準則，以建

立國際間更具效率之破產制度，或鼓勵處置或重整 NPL。

肆、OECD 首席顧問 Mr. Lampros Vassiliou 對亞洲主要國家破產重整機制改革現況之報告(Regional overview)

一、韓國於金融危機前早有清理及救援企業之機制，惟運作效率欠佳。近年來韓國建立一系列處理 NPL、協助企業重整及再生機制，如：企業重整特別公司、不動產投資信託、企業重整機制（CRV）等。1998 年金融機構達成法庭外處理企業債權之協議。KAMCO 向金融機構購買之 NPL 已逾 98 兆，其處理 NPL 方式有以公開標售，或以正常資產為擔保發行證券，以利取回流動資金。

大宇及現代兩大集團之重整案係此階段之代表作。2001 年 9 月訂定之促進企業重整法，債務人有一段債務清償寬限期，以利準備重整，並簽署備忘錄，使債權人爭執之解決方式單純化。韓國擬修訂破產法，俾使其制度符合國際標準。

二、台灣係少數 NPL 仍在持續增加地區，其放款評估分類標準過於寬鬆，實際 NPL 金額遠高於官方統計數。亞洲地區發生金融危機時，台灣相對其他國家有較佳抵抗力，惟近來全球景氣下滑，台灣銀行業即難以閃避，資產品質持續惡化，過去一年

銀行 NPL 大增。2000 年 11 月通過金融機構合併法，旨在協助處理問題金融機構，政府並宣布一系列金融重建措施。33 家銀行共同投資 160 億元成立 TAMCO。最近一年有數宗金融機構合併案，如：富邦銀行與台北銀行、國泰銀行與世華銀行等。另有許多外資與本地銀行合作設立 AMC。政府提供損失分五年認列及稅賦優惠措施，鼓勵銀行出售 NPL，希望 2003 年前將銀行之逾放比率降至 5%以下。

台灣整批 NPL 銷售市場正逐漸加溫中。政府設立重建基金處理倒閉金融機構，為徹底解決金融問題，擬將重建基金規模擴大，並將重建期間加長。資產證券化之法案已完成立法，並將實施運作。

對上市及公開發行公司訂有清理及重整機制，其他企業仍然欠缺。過去四年約有 40 家上市公司聲請重整，惟僅有少數裁定獲准。重整機制之效率仍然欠佳，破產法亦須加以修訂方能因應潮流。

三、中國於 1986 年制定破產法，雖已逐漸走向市場經濟，私營企業亦蓬勃發展，惟破產法僅適用於國營企業。其破產制度中清理人係由官方組成，雖有重整機制，惟迄未有案例。中國破產制度首要目標即保障原企業員工權益。1994 年制定公司法，首度引入「股東權益」之概念。對處理一般民營企業破產

之相關法律仍然欠缺，惟有關外資企業部分則另有法律規範。許多破產案係屬「國家計畫」之政策產物，全由政府主導。重整方案有數種選擇，較特殊者係將經營失敗企業之生利資產移轉予主要債權人所屬機構，再以該生利資產所生收益償債，若事業能持續營利，員工及其他債權人亦能受惠。中國加入 WTO 後,私營企業大量增加,破產及重整之機制亦須加緊跟隨潮流。目前正起草破產新法，預估有關救援企業機制將會一併納入。法庭外處理 NPL 之機制仍然欠缺，四大國營 AMC 所購入之 NPL 重整成功之個案仍然有限，NPL 再轉售亦因作業程序冗長，投資人大失所望。國營 AMC 持有之 NPL，其債務人合計高達百萬人，遍及各省，因地方稅捐偏高，地方政府欠缺合作誠意及溝通不良等問題，致重整績效嚴重挫敗。

四、香港已有相當完備破產制度，其制度係因襲英國法制，法庭外處理 NPL 機制亦相當普遍，惟有關救援企業機制尚未建立。金融主管機關對營運發生困難企業訂有處理準則，以供銀行公會成員參考。香港破產及重整案多數與中國債權人有關，又香港企業多有在中國投資及置產，致處理營運困難企業更形複雜。2000 年 1 月香港破產法修正草案提送立法機關審議，主要修訂重點如下：1、發生營運困難企業得有 30 天至 180 天之償債寬限期；2、經由公正人監督、企業得自行提償債計畫；

3、企業發生危機時，依法提存員工薪津及福利金，保障員工權益；4、防止董事會及高階經理人干擾破產處理；5、為企業尋求挹注資金之保障等。新法案可望適用香港本地及外資企業，惟立法程序遭受延宕，能否順利完成立法尚難確定。

五、印尼於 1998 年修訂破產法後，重整及清理機制才正式納入。依據印尼破產法規定，商業法庭有權裁定債務人可暫停對無擔保債權人清償債務，亦可指定管理人或監理法官協助管理債務人之資產。執行破產法情形與原始法律精神尚有落差，致債權人傾向以體制外方式與債務人協議清償。該國破產法係以債務人角度解釋破產是否成立。印尼在 IMF 及亞洲開發銀行資助下，設立「七人小組（Team 7)」，成員包括律師及法官，其任務係評估商業法庭之裁定是否允當。雅加達倡議工作小組（JITF）及金融政策委員會（FSPC）係協助法庭外債務重整之組織。JITF 可督促債務人進行債務重整，債務人若未同意，政府可能會裁定債務人破產成立。印尼銀行重建機構（IBRA）主要任務係購買 NPL，政府正加速清理 IBRA 所持有之 NPL，俾提振其疲軟經濟，惟峇里島爆炸事件後，投資人信心亦大受影響。IBRA 將於 2003 年底結束其任務，其 4,000 名員工及契約夥伴亦將逐漸解散，因 IBRA 係印尼最大土地所有權人，一旦結束任務，將有重大衝擊。

六、馬來西亞對銀行家數過多及金融危機後銀行資本適足性偏低等問題，處理成果頗為成功。1998 年成立「國家經濟行動會議」協助企業及金融體系重建，包括對銀行挹注資本，購買財務困難企業之資產及負債，指定特定人管理經營困難企業，處置 NPL 等。企業債務重整委員會（CDRC）主要任務係協助債權人及債務人進行重整，或法庭外和解，其經營績效頗佳。馬來西亞自 1965 年即有清理、重整、破產管理等制度，財務發生困難之企業可向法院聲請重整，同時法院亦可裁定暫停所有對該企業之訴訟程序。某些重整案，破產管理人可接手企業之管理權。為保障債權人及企業資產，必要時，可由法院指定破產管理人。馬來西亞之金融重建績效頗有成就，由該國央行主導，已有許多銀行進行合併，預估金融機構合併仍會持續進行。此外，政府對銀行挹注之資金亦已收回。

七、菲律賓相對未受金融危機之影響，惟 2000 年及 2001 年因經濟及政治不穩定，股價及菲律賓貨幣倍受打擊。目前菲律賓之破產制度已落伍，法令欠完備，效率不彰，顯已無法為該國漸增之 NPL 提供有效解決機制。破產制度之相關改革進度緩慢。現行企業重整之主管機關係證管會（SEC），惟執行重整之相關法律是否符合憲法精神仍有疑慮。近二年來由「資本市場

發展委員會」主導改革破產法，惟新草案似有過於複雜，且偏向保護股東權益等情形。最新修法共識為以符合國際潮流為原則。新草案名稱為「企業破產及重建條例」，四項主要精神如下：1、為促進法庭外債務重整，債務人享有三個月之清償寬限期；2、重整計畫須經債權人同意及法院裁定；3、為加速重整程序，債權人須先行協商，企業股東於法院裁定前得聲明異議；4、建立企業清理機制。菲律賓銀行已自法院承受大量不動產擔保品，因不動產景氣低迷，致銀行處分承受擔保品困難，且有跌價損失情形。銀行冀望景氣回轉，暫不轉銷呆帳，以待不動產價格回昇。結果銀行成為 NPL 最大持有人，本國銀行雖有尋求外資協助解決 NPL，惟效果仍然不彰。

八、泰國於金融危機後，有一系列改革破產制度措施。主要有：1999 年設立特殊破產法庭，促進企業重整及處理破產；建立法庭外企業債務重整機制；設立金融業重建局（FRA），接管 58 家金融機構，拍賣其資產；提供賦稅及其他誘因，鼓勵重整及投資 NPL。

2001 年國營 AMC（TAMC）成立，其任務除購買 NPL，另有主導管理及重整 NPL 之權，惟 TAMC 是否能充分發揮其預期功能，尚待觀察。

管理重整計畫之相關法規業已制定，重整提案人

（planner）須為本國企業，並設有證照制度。提案人申請重整須預繳保證金，若提案人為債務人或其經理人，則可免除擔保提供。因制度設計偏袒債務人之權益，故會計師或其他專業人士多不願擔任重整提案人。

九、印度可能成為未來整批 NPL 銷售之主要市場，因該國繁重的法規，致 NPL 有大量增加之勢。目前管理企業重建及清理程序均有法規可供遵循；惟重整實際運作尚屬困難，因制度設計及執行欠缺效率；法庭外和解之機制亦尚未建立。為保障債權人及建立 AMC，2002 年 1 月制定相關管理法規，目前已有數家 AMC 成立(印度 AMC 之名稱為 Asset Reconstruction Company)。為加速企業重建效率，正研擬改革破產制度，賦予法官更大權限，以利處理企業重整案。

十、巴基斯坦已有一系列與破產制度相關法規，惟其制度似有偏袒債權人情形，致企業重整效率欠佳。2001 年重整法案修訂後，若債權人行使抵押權時，因債務人抗告，未能順利執行，債權人可自行轉售其抵押權。2000 年該國資產管理公司 CIRC 成立，惟其收購之 NPL 仍然有限。為促進重整及清理機制，該國已研擬改革法案，惟專業人才欠缺，制度改革成效尚待觀察。改革草案規範一般企業重整，除有法院裁定，債務人

仍保有控制其資產權利。若企業發生弊案，或有嚴重內控缺失時，政府可指派企業重整管理人。另該草案加入外部稽核制度，許多國家之破產制度中尚無外部稽核，係因考慮重整之財務負擔，進而影響債權人權益。惟若以公司治理角度而言，外部稽核或許有其必要性。

伍、世界銀行首席顧問 Mr.Gordon W. Johnson 報告：

世界銀行「破產與保護債權人機制之有效處理原則」

一九九七年新興市場的金融危機讓全世界驚覺維護金融安定的重要性，國際清算銀行金融穩定論壇(Financial Stability Forum)認為有效的破產與保護債權人處理機制是維護金融安定十二項重要因素之一，世界銀行與國際貨幣基金、國際清算銀行等國際組織乃分工合作制定這十二項重要因素之有效處理原則(包括有效銀行監理之重要原則 Core Principles for Effective Banking Supervision)，以供世界各國遵行，共同維護金融安定。這十二項維持金融安定的重要因素及負責制定有效處理準則的單位如下：

1、市場基礎設施(Market Infrastructure) —會計與審計準則：國際會計準則委員會(IAS)

2、公司治理(Corporate Governance)：經濟合作發展組織(OECD)

3、破產與債權人權利：世界銀行

4、金融制度—貨幣政策與金融政策：國際清算銀行(BIS)

5、銀行監理：國際清算銀行(BIS)巴賽爾銀行監理委員會

6、保險業監理：國際保險監理機關協會(International Association of Insurance Supervisors, IAIS)

7、證券業監理：國際證券管理委員會(International Organization of Securities Commissions, IOSCO)

8、支付與清算系統：(CPSS)

9、財政透明化(Fiscal Transparency)：國際清算銀行

10、 公共債務管理(Public Debt Management)：國際貨幣基金(IMF)、國際復興開發銀行(IBRD)

11、 資訊傳播(Data Dissemination)：國際貨幣基金

12、 市場正義(Market Integrity)—洗錢防制：國際貨幣基金、國際復興開發銀行

世界銀行在二00一年四月制定「破產與保護債權人機制之有效處理原則」(Principles and Guidelines for Effective Insolvency and Creditor Rights Systems)，共有三十五項原則，摘錄如下：

債權人權利的法律架構
原則 1：適合的強制執行機制 現代以信用為基礎的經濟體須要有可預測性、透明化、可行的強制執行機制，使有擔保與無擔保債權都能以有效率的方式依破產與非破產程序進行債權收回，而且在設計這些機制上，必須考量到能夠和諧運作。
原則 2：無擔保債權的強制執行 制度化的信用體系應具備有效率、透明化、可靠且可預測的債權回收機制，包括取得與出售動產與不動產，出售或取得無形資產，例如債務人對第三人的債權。
原則 3：保全利益的立法 法律架構必須能藉由契約或法律的執行，來提供創造、確認與執行對動產與不動產的保全利益，這樣的法律應明定下列事項： 1) 保全利益的形式應涵蓋動產與不動產，有形資產與無形資產，包括存貨、應收帳款、收入、將來可取得的財產及占有與非占有之利益。 2) 保全利益必須將債務人對債權人所有義務都包含在內，不論是現在或未來發生，或在任何人之間的。 3) 以最低成本方式對債權人、承購者及大眾公告保全利益之存在情況。 4) 明確規定對相同資產的債權請求順位，並且儘可能地減少或降低對保全利益之優先債權。
原則 4：有擔保債權的登記與記錄 應以有效且成本最低的方式來公布針對動產與不動產的保全利益，登記是較好的方式，登記費應低廉且可供所有人登記與查詢。

原則 5：有擔保債權的強制執行 強制執行機制應提供有效率、低廉、透明化且可預測的方式來加強對對財產的保全，強制執行的流程應該提供快速對擔保資產的清理權力，確保能以市價回收資產的最大價值，在執行的過程中，非訟程序與訴訟程序都應審慎考量。
企業破產的法律架構
原則 6：主要目的與政策 儘管各國的處理模式不同，不過有效的企業破產機制應達到下列目的： 1） 與該國的法律體系與商業體系相結合。 2） 提供重整的機會使企業的資產價值達到最大化。 3） 在清算與重整性中取得適當的平衡。 4） 對相同條件的債權人，包括國內與國外債權人，提供同等的待遇。 5） 破產處理方式應及時、有效率且公平。 6） 避免個別的債權人尋求簡速判決以過早分割債務人的資產。 7） 提供透明的程序蒐集與發布資訊。 8） 確認現有債權人之權益並尊重優先債權。 9） 建立跨國界的破產機制並承認國外已進行的破產程序。
原則 7：董事與經理人的責任 當企業面臨破產時，董事或經理人的決策對債權人有害時，應負損害賠償責任，且應採行負責任的作為以降低企業所承受的風險，並應設立作業準則以規範其作為對債權人可能有的負面影響。
原則 8：清算與重整 破產法一方面對於已經無法挽救的企業，應提供有效率的清算，讓債權人在清算取得較多的報償，另一方面，若企業尚有挽救餘地，則應予重整之機會，只要

條件允許，應容許清算與重整間有較為便捷之轉換。
原則 9：著手進行—適用方法與取得性 1) 除了金融機構與保險公司應適用特別法或破產法中之特別規定外，破產程序應適用於所有的企業，公營事業也應與私有企業採用相同破產法。 2) 應使債務人在符合基本條件後（無法清償債務或財務困難），讓其很便利地進入破產機制，企業在董事會或經理階層宣布後就可以進入破產程序，債權人則需要在提出明確的債權未獲清償的證明後才可參與破產程序（縱然是數額不大的債權）。 3) 較佳的破產基準是以債務人無法履行清償責任時為準，即是所謂的流動性測試，至於資產負債表亦可作為另一個測試依據，但不能用來取代流動性測試。當開始破產程序後，除了必要之經營外，非經法院同意，債務人不得移轉或出售或處分其資產或所營事業。
原則 10：著手進行—延期或中止進行 1) 破產的進行中，應禁止債務人在未經許可下處分資產，並中止債權人強制執行債務人的財產或對債務人財產進行抵銷，執行的範圍應該盡量寬鬆以利於處分債務人的所有財產。 2) 為提高資產的回收價值，在清算過程中，對有擔保債權人的強制執行應限定一定之中止期間，以藉由出售整個企業或其產品來增加資產的回收率，若要重整則須提出擔保品。
原則 11：管理—經理人 1) 在清算期間，經理人應被法院所指派的清理人所取代，並應賦予清理人相當之權限為債權人的利益來處分資產，財產的管理應立即轉交清理人，除非經理人被授權管理公司，在這情況下，法律應規定經理人與清理人有同當之責任。在債權人所申請之

破產程序中，如情況允許，應指派暫時且限定責任之清理人監督該企業以確保債權人之權益。 2) 在重整進行時有兩種較為妥適的方法，一是完全用清理人來取代經理人，二是以公正且獨立的清理人或監察人來監督經理人，在第二種情形下，若證明經理人經營不當，有重大過失或有舞弊等情事時，所有的權力就應轉給清理人，同樣地，債權人或法院對於獨立的清理人或監察人，也應採去相同的標準，只要有不適任、有重大過失、舞弊或其他不當行為，亦應即撤換。
原則 12：管理 –債權人與債權人會議 為保障債權人權益應成立一債權人會議，使債權人能主動參與破產處理過程，並使債權人會議能監督破產流程，債權人會議應有權獲知破產進度的一切內容，並將資訊轉告債權人，並召集債權人做重要決策，法令應對會議的組成與運作做出規範，在重整情形下，債權人應任命一獨立監督人以監督重整作業。
原則 13：管理—財產的取得、保管及處分 法令應明定取得、保管與處分債務人所有財產的權利，包括債務人在破產程序後所取得之財產，且採取即時的動作去取得並保管債務人的資產或企業，法令應提供彈性與透明的機制來處分資產並獲取最大之價值。
原則 14：管理—契約義務的對待 對於履行契約之若干義務，如有可能影響到破產目的達成者，則法律必須進行適當之調處，不管是以強制、取消或另定新約的方式，除非基於其他維護更重要的商業或公共利益之理由，方得讓契約相對人之權利繼續存續。
原則 15：管理—詐欺或不公平交易 當企業已經無法清償債務、或有詐欺與不公平交易之

行為，將導致企業無法清償債務，法令應限制或取消破產前的詐欺或不公平交易，但對於破產前認為有可能為利益輸送或不公平交易行為之期間，在認定上不宜過長，以避免干預正常之商業和信用關係。

原則 16：請求方式—股東與債權人的對待

1）債權人在破產前依法取得的優先權應被保留，以確保債權人對法律的期待及對商業關係的可預測性。這種原則，除非是為了達成特別之政策，如進行重整或是能使資產價值達到最大化時,才有例外。債權優先性的規定能讓債權人有更大的動機去進行債權的管理。

2）破產法應承認有擔保債權人對擔保品的權利，當這些權利可能因為達成破產法的政策而受到減損時，法律應避免債權人對擔保品的權利在破產程序進行時遭受到損失，在抵押品拍賣後，這些有擔保的債權人應儘可能優先分配。當法院中止有擔保債權人行使權利時，應有一定的時間限制，以達到債權人利益與破產目的之調和。

3）在分配予有擔保債權人、支付破產程序之費用與管理人之酬金後，除非有其他理由證明應先支付予某特別之債權，否則剩餘財產所得應按比例分配予剩餘之債權人。一般而言，公共利益並不特別優於私人權利。

企業重整之相關要點

原則 17：重整狀態的設計

重建應該允許快速且簡易的進行，保障所有的參與者，允許商業計劃的協商，使多數債權人同意一個計劃後便能使所有的債權人都接受此決議（這可能與適當的保護有相抵觸），提供監督的機制使作業不致被濫權。

原則 18：管理—企業運作的穩定與持續 法令應建立一套健全之優先補助金機制，以提供給那些在挽救企業過程中有緊急商業需求之債務人。
原則 19：資訊—取得與揭露 法令應要求揭露債務人的相關資訊，並且對於該資訊提供獨立的評論與分析，債務人的董事應參與債權人會議，且應提供有關債務人的相關資訊。董事與對破產公司事務有了解之人，應要求對法院與管理人提供相關之資訊。
原則 20：計劃—準則、考量與投票 法令除了就基本的要求作規定外，不應就企業之計劃給予規範以避免濫權，但可就不同的債權人的投票權限予以規範，投票權應以債權之數額來決定，多數決可決定重整計劃。而對於知悉內情者之投票權則應給予一定之限制。多數決之效果應有拘束所有債權人之效力。
原則 21：重整計劃—決議程序 法令應於公平保障債權人且多數債權人皆能同意之基礎上，建立一明確準則以規範重整計劃之決議程序。在有少數債權人反對之情形下，倘重整計劃能兼顧少數債權人之公平性，並且提供少數債權人同等或優於經清算程序所可得之利益，重整計劃仍應依多數債權人之決議通過。重整計劃表決會議進行中，得於有限時間內休會。若重整計劃被否決，債務人清算程序即應自動開始。
原則 22：重整計劃—施行與修正 法令應提供重整計劃有效施行的監督機制，包括要求債務人定期向法院報告施行進度等。重整計劃應可經由債權人決議修正以切實符合債權人利益。再者，法令亦應規範於具備何種要件時，重整計劃應即終止以利債務人進行清算。

原則 23：免除及拘束力
為確保重整企業能有最大機會完成重整，法令應對債務的免除或修正有優於重整計劃之規範。另外若重整計劃係因債權人有被詐欺之情事而獲得通過，則計劃將有可能面臨重新考量或遭到廢棄。
原則 24：國際考量
破產程序也許會牽涉國際層面，破產法應考量在不同國家法院間，就管轄權、外國法院裁判之承認、合作或協助等事項提供規範，並允許選擇不同之準據法。
非正式的企業和解與重組
原則 25：建制法令架構
法令應提供適合環境以鼓勵所有利害關係人能夠在雙方同意下達成和解，促使企業重生。適合的環境包括即時且正確地取得發生危機企業的財務資訊，鼓勵對該企業進行融資、再投資或資金注入，允許更廣範的重整活動，如：債務免除、債權到期日調整、以債作股、優惠稅制等措施。
原則 26：非正式和解程序
國家的金融部門（央行或財政部）應該促使非正式法院外程序之建制，以處理企業的財務困難—尤其是企業破產將引發系統性危機時。在具備適當的債權補償與完善破產法令情形下，非正式程序較能夠被認可維持。在非正式程序中，由於可較有彈性就重整計劃作整體配套措施，該程序可迅速產生與正式程序相同之企業再生結果，若正式程序允許債權人與債務人運用非正式程序之彈性，正式程序或許在運作上會更為有效。
破產制度的運作
原則 27：法院的角色
破產案件應由獨立而具有破產專業知識的法院或主管

機關來處理及監督，設立專業破產法庭將產生莫大助益。法律應賦予法院或其他裁判機構對企業重整有一般性的監督權，法院對債權人是否通過重整計劃的決議應予接受。
原則 28：法院能力與法官訓練之資格評鑑 破產法院的專業能力與處理表現應設立標準予以評定，標準的設立目的係用以評量及促進法院之能力，並藉著充足適當的資格評鑑促使法官受訓與持續進修。
原則 29：法院組織 法院之組織應以能夠兼顧管理者、債務人及所有債權人各方利益之公平、客觀、透明之處理方式為目標。在破產程序中，法院及各方參與者應受到法院操作規則、個案處理與管理規則之拘束。法院內部亦應重新配置資源以達到資源效益極大化，法院的作業並應盡量標準化。
原則 30：透明與可信度 破產制度應係透明而具備可信度，制度規則應確保能立即取得法院記錄、公聽會以及債務人的財務資訊或其它公共資訊。
原則 31：法院裁判與執行 司法裁決應經由運作過程之一致性而使法院見解具有可預測性之基礎上，協調各方利益而得以達成共識解決。法院必須有充分完整之授權及有效執行裁決之權力。
原則 32：法院的廉潔 法院的作業與決定應有明確的法令依據，以避免舞弊與不當的影響，而法院應避免有利益衝突、偏頗之情事發生。

原則 33：參與者的廉潔 法令或法院之命令，在設計上應避免讓參與破產程序之相關人有產生舞弊、不法行為或濫用破產制度之機會，此外破產法庭應有適當的權力來處理不法的舉動或濫權行為。
原則 34：監理機關的角色 監理破產清理人之機構應與清理人分別獨立，並且這些機構應設立相關之準則來因應法令的要求與公眾對於公平正義之期待。
原則 35：破產清理人的專業能力與廉潔 破產管理人應有專業之能力來行使法令所賦予他的權力，並應以公正無私的態度來執行清理工作。

陸、劉紹樑律師對我國破產重整機制改革之報告

一、前言

1、在我國破產事件是非訟事件，其意謂非關訴訟與紛爭。但事實上，幾乎所有的律師與經濟學者都認為破產程序之進行有相當之利害關係，所以破產法不應被定位為非訟程序。

2、破產法制被割裂成不同的法律，沒有一套統一的破產法典，舉例而言，經濟部主管的公司法有一專章規範公司重整，但只有公開發行公司（包括上市、上櫃公司）適用該相關規定，至於他們的子公司並無法適用公司重整的規定（縱然在一些非正式的案件中，律師可藉由私下的協商來處理這種無法一體適用所造成之情況)。另一方面，破產法在中華民國是一套獨立的法規，而且是由司法院所主

管，並由其下屬法院執行辦理。換言之，清算與和解程序與公司重整程序是分屬不同的機構所執掌。

3、在 1990 年以前，政府對銀行業給予相當程度之控管，導致銀行業對於放款業務僅以企業之資產為考量，而不太考慮企業本身之價值與承擔之風險（包括破產的風險與費用）。

4、未特別成立專責的破產法院，而法官也未曾受過相關專業訓練。

5、對於徵信業務所必要之組織架構並無規範。在所有針對喪失贖回權利的抵押品之執行程序中，抵押人對於財產惡意轉讓的情形屢見不鮮，令人感到相當憂慮。總的來說，信用資料的蒐集與處理規定非常零散且未予明確規範，其中銀行法第四十八條規定禁止銀行與非銀行組織共享相關的信用資料，亦是原因之一。

二、目前改革情形

90 年代末期，產業界感受到全球景氣低迷所產生之壓力，銀行逐漸累積不良債權，政府隨即對這些金融機構加強監管並制定相關法案來處理不良債權(如 2000 年銀行法的修正與 2001 年公布施行之行政院金融重建基金設置及管理條例)，與接管部分的基層金融機構（如農漁會信用部）。

由於早先銀行對於大型貸款戶同意展延還款期限，以致造成金融環境惡化，所以從 2001 年，我國政府實施"2-5-8"計畫，要求銀行處理不良債權，所有的銀行必須將不良債權的比率降到百分之五以下，且資本適足率必須達到百分之八以上標準。至於處理的時程則須在金融重建基金之規模修法通過達到新台幣一兆元後的兩年內完成。

此外，金融機構合併法授權資產管理公司向銀行購買不良債權，在 2002 年 7 月施行的金融資產證券化條例允許並鼓勵銀行將資產證券化。在 2001 年 11 月公司法進行大幅的修正，其中並對於公司重整條文作更完善的修訂。從 2000 年起我國司法院也著手對破產法進行大規模的修訂，目前已經完成草案並提付討論。但是破產法的修正草案仍維持過去的型式，並未包括公司的重整程序。

三、我國現行的破產法及相關規定

依據破產法，破產程序的定義是指破產公司的清算和解散。此外，依據破產法第四條，破產在外國宣告者，對於破產人在台灣之財產不生效力。因此當一家美國公司依據美國破產法第十一章聲請保護時，美國破產法院對該公司所下之延緩執行命令，其效力並不及於設在我國之分公司的資產。我國的法院不會去考慮依據美國破產法第十一章所進行之程序是否屬於

我國破產法第四條所謂外國宣告的破產。因為根據我國破產法這種立法的型式與狹義解釋的方式，法院幾乎不可能會得出這樣的結論。

此外，外國法院對於破產的延緩執行命令，依照我國民事訴訟法第四百零二條的解釋，並不認為是外國法院之判決。據此規定，有下列情形者，我國法院對於外國法院的確定判決即逕予認可，而不會再為重新認定其效力：

1. 依我國法律，外國法院有完全的管轄權。
2. 在程序中，對於我國的被告之通知或判決已合法送達（送達本人或依我國法律上的協助送達者）。
3. 外國法院的判決並無違背我國公共秩序或善良風俗。
4. 外國法院承認我國法院的判決。

重要的是，此類判決必須是終局判決且不得再行上訴救濟。相對而言，暫緩執行命令在本質上只是暫時的且並非為終局之判決。換言之，依據我國法律，外國公司的債權人仍然可以對於該外國公司在台灣的資產，尋求救濟。

惟這些外國公司必須考慮以透過其在我國的分支機構，請求依我國破產法規來取得保護。不過有幾點問題仍待考量，第一、分支機構並非是一個獨立的法律個體，第二、公司法公司重整的規定只適用於公開發行公司，所以重整的規定無法適用到這些分支機構，第三，我國破產法只有規定即時的清算與解

散,如此一來,當該外國公司在其本國依破產程序進行重整時,可能就會有問題產生。

此外,我國或外國的債權人得請求對該外國公司在我國的財產執行,這類強制執行程序包括終局執行及訴訟前保全程序(這類的扣押必須在七天內繳交請求金額三分之一的擔保金及提出明確的聲明)。

總而言之,目前對於跨國破產法規明顯付之闕如,我國現行破產法規並沒有對跨國破產的情形予以規範,且其效力並不及於我國境外的財產。此外,我國破產法規對於外國公司在我國境內財產執行的效力,也僅限於依我國法律執行之程序。

四、我國破產法修正草案

我國司法院已經在 2002 年公告破產法初版修正草案,以供各界討論及研究,對於目前現行法及 1999-2000 年草案中對於跨國破產案件之處理規定不足之處,本次草案已有相當程度之修正。

在這次新版的草案中,為因應經濟活動國際化之需求,而有必要承認外國法院許可之和解與破產,即以重建或清算為目的,由外國法院管理或監督債務人財產或事務之程序,包含重整、再生、特別清算等清理債務程序,特別新增第五章「外國法院之和解與破產」,明定聲請承認之管轄法院、聲請程序、

法院裁定承認後應行之程序、法院於裁定前得為之保全處分、裁定承認後之效力、債務人或破產人於中華民國境內財產之處理及外國和解管理人或破產管理人之程序參加等相關規定。茲就修正之主要內容，摘錄並析論如下：

(一)允許承認外國法院所為之執行程序

2002 年初版草案同意可由和解或破產程序的代表人向我國法院聲請承認外國法院許可之和解或宣告之破產（草案第 208 條)。一經承認外國法院許可之和解或宣告之破產，對該外國債務人在台灣財產，其處理之程序及效力依開始國之法律（草案第 213 條)。經承認之外國法院許可和解或宣告破產，對於債務人、破產人或利害關係人在中華民國之財產，亦有效力。外國法院許可和解或宣告破產，經法院裁定承認後，債務人或破產人於中華民國境內之財產，由和解管理人或破產管理人適用本法及其他中華民國法律有關之規定處理之（草案第 214 條)。

(二)允許國內國外破產程序並行

2002 年的初版草案包括廣泛處理並行程序的條款，該條款包含經我國法院所承認之外國法院所為之程序，及依我國破產法在我國境內所為之程序。

例如，2002 年初版草案的條文規定經承認之外國法院許可和解或宣告破產，不影響和解、清算或破產程序之進行。前項

外國和解管理人或破產管理人，得為已於外國法院許可和解或宣告破產程序申報之和解或破產債權人參加我國法院許可和解、清算或宣告破產之程序（草案第 217 條）。

法院有許可和解或宣告破產之聲請者，於其裁定確定前，應停止外國法院許可和解或宣告破產聲請承認之程序。但承認較有利於國內債權人者，不在此限（草案第 218 條）。

因 2002 年初版草案基本上同意並行程序同時存在，所以條文規定債權人之債權於外國法院許可和解或宣告破產程序中受部分清償者，就債務人依本法進行之和解、清算或破產程序，應俟其他債權人同順位債權所受分配，與其受清償程度達同一比例後，始得再受分配。債權人之債權於外國法院許可和解或宣告破產程序中將來可受清償者，就債務人依本法進行之和解、清算或破產程序受分配之金額，應俟其他債權人同順位債權受分配之程度達同一比例或提供相當擔保時，始得領取。其未供擔保者，應予提存（草案第 219、220 條）。

2002 年初版草案亦規定和解管理人、清算人或破產管理人，得為已申報之和解、清算或破產債權人，參加外國法院許可和解或宣告破產之程序。和解管理人、清算人或破產管理人得請求外國之和解管理人或破產管理人，為必要之協助及資訊之提供，並得對外國之和解管理人或破產管理人為必要之協助及資訊之提供（草案第 221、222 條）。

總之，2002 年初版草案對於並行程序做有部分的規範，但外國法院的程序並無優先或排除的效力。

(三)外國法院重建程序並未予包含在內

草案中關於承認程序部分，有一重要的問題係對於外國法院之重整程序命令並無適用之餘地。如此而言，本國破產法只能夠以清算的程序來處理。因此，當破產法沒有納入重整程序時，則其承認之範圍即不宜包括外國法院的重整程序。

(四)時間落差

外國法院許可和解或宣告破產與台灣法院裁定承認間，必然會存有一定的時間落差。2002 年初版草案允許善意相對人得就其與債務人或破產人在中華民國境內財產所為之有償行為，對抗和解或破產債權人；相對人若知其事實者，以和解債權人或破產財團所受之利益為限，始得對抗之(第 215 條參照)。

(五)聲請承認裁定須具備之要件

2002 年初版草案亦要求聲請承認裁定須具備特定文件(草案第 209 條)，較重要者有下列數項：

1). 外國法院許可和解或宣告破產之裁判書正本或經認證之繕本，並附具中譯本。

2). 具有和解管理人或破產管理人資格之證明文件，並附具中譯本。

3). 和解債務人或破產人在外國之財產狀況說明書及債權

人、債務人清冊，並附具中譯本。

4). 外國法院許可和解或宣告破產所適用外國法規之全文或其所適用之條文，並附具中譯本。

儘管這些條文規定明確，卻較聯合國破產基本法第 15 條至第 18 條規定為嚴格。一旦我國法院承認外國法院許可和解或宣告破產者，該外國法院許可和解或宣告破產之裁判、我國法院承認之要旨及一切相關文件皆應公開(第 211 條參照)。

(六)聲請承認裁定之准否

2002 年初版草案包含一重要條文，規範我國法院是否應予承認外國法院之許可和解或宣告破產之標準。若有下列情形之一，本國法院不得裁定承認：

1). 依中華民國之法律，外國法院無管轄權者。

2). 不當損及國內債權人利益者。

3). 有背公共秩序或善良風俗者。

此外，許可和解或宣告破產之外國法院，其所屬國對於我國法院許可之和解或宣告之破產不予承認者，法院得以裁定駁回聲請人之聲請。

原則上此條文係依循民事訴訟法第 402 條承認外國法院判決效力之規定。較為進步之處在於放寬相互承認之要求(此亦為仲裁法承認外國仲裁判斷之標準)。

(七)保全處分

法院於裁定是否承認前，得依職權或和解管理人、破產管理人之聲請，為下列保全處分：

1). 禁止對於債務人財產強制執行程序之開始或續行。

2). 禁止債務人為財產之移轉、設定負擔或其他處分。

3). 其他必要之保全處分。

前項保全處分，除法院裁定中有明確限制外，於法院承認或駁回之裁定確定時失其效力(草案第 212 條)。

(八)承認裁定之撤銷

下列事由經證明後，法院應以裁定撤銷承認：

1). 外國法院許可和解或宣告破產有第二百十條情形之一者。

2). 外國法院許可和解或宣告破產，於該程序之開始國業經終止或撤銷者。

3). 和解管理人或破產管理人提出之文件係偽造、變造或有其他虛偽情事者。

4). 和解管理人或破產管理人違反破產法法定義務情節重大者(草案第 216 條)。

五、結語

我國政府體認到若要維持全球競爭力，必須從事金融改革，而破產制度是金融體制中逐漸重要的一環，金融改革勢必

包含破產制度的革新。是以，我國將不間斷的改革破產制度。

破產制度革新的關鍵在於司法院的法官，他們有責任一方面審理破產及重整案件，另方面提出修正草案使破產法得以現代化。在此等考量下，2002 年破產法初版草案跨國破產章節所可能衍生的問題，應置於聯合國跨國破產基本法下尋求脈絡一致的解決方法。甚且，我們應該更積極的去研究探索聯合國國際貿易法委員會於破產法立法指導方針中揭示的目標方向。

柒、泰國破產制度改革

一、泰國的企業債務重整(Informal workouts for Corporate Debt Restructuring)

1997 年金融危機導致大量企業倒閉。金融體系之 NPL 亦創歷史新高，1999 年之 NPL 占總授信餘額高達 47%。因法規及制度欠完備，致處理 NPL 異常困難，亦相當耗時。所幸，法院處理 NPL 之程序已有修訂，法庭外債務重整機制亦相繼建立。為促進法庭外債務重整機制，泰國政府制訂一系列與債務重整相關之法規及準則，如：企業重建基本辦法、債權人間之協議辦法 (Inter-Creditor Agreement, ICD)、債權人及債務人協議辦法 (Debtor-Creditor Agreement, DCA)、法庭調解基本準則等。另破產法亦有所修訂，以利債務人透過法院程序重整債務。

為促進法庭外債務重整機制，泰國增設許多機構，如：中央破產法庭、金融業重建局（FRA）、國營或民營資產管理公司（AMC）、泰國資產管理公司（TAMC）、企業債務重整諮詢委員會（Corporate Debt Restructuring Advisory Committee, CDRAC）、法院調解中心及地方性債務重建委員會等。

為協助企業債務重整，新增之相關法規有：泰國銀行處理債務重整準則(BOT's Guidelines)、泰國企業重建基本辦法(Bangkok Framework)、債權人間之協議辦法、債權人及債務人協議辦法等。

二、主要破產法規介紹

（一）泰國銀行處理債務重整準則(BOT's Guidelines for Debt Restructuring)

泰國銀行處理債務重整準則係 1998 年 6 月泰國中央銀行（Bank of Thailand, BOT）為協助金融業解決大量 NPL，制訂之處理辦法；為使該辦法更切合實務面，1999 年 6 月再予修訂。該辦法提供賦稅及土地移轉規費減免等優惠鼓勵金融業處理 NPL。惟該辦法僅係為金融監理目的而訂之一般性辦法，各金融機構仍須因應自身情況且不違返法令之原則，制訂內部作業辦法且須報經 BOT 核準。泰國銀行處理債務重整準則主要重點有：

1、債務重整除可讓企業繼續營運，債權人亦須持續收回債權。債權人不得僅為減少提存備抵呆帳及 NPL 重新歸類為正常授信等考量，與債務人達成不切實之債務重整協議。

2、金融機構之董事會，須對債務重整訂定正式政策及作業辦法，其內容須涵蓋重整程序之各個環節，如：協議清償期間、評估及核准辦法、監督及績效報告等

3、若債權人與債務人為有利害關係者，且為協助解決債務人之財務困境，該債權人得不須徵提第三人對債務人之財務分析、償債能力評估及現金流量分析等報告。

4、對債務重整之各個階段均須擬訂作業計畫，並備妥相關文件。

5、重整案須遵循主管機關所訂之相關法令，並切實辦理追蹤及督導。

(二) 泰國企業重建基本要點(Bangkok Framework)

為增進法庭外債務重整機制，1998 年初泰國外貿協會、工業局、本國及外商銀行公會等單位，共同制訂「企業重建基本要點」。該要點無法律之強制性，僅係為多數債權人提供法庭外債務重整機制。該要點宗旨係讓有繼續經營價值之企業，能持續營運，且無意圖迫使債權人放棄任何權益。其精神希望債權人、債務人、企業員工、股東及泰國經濟均成為債務和解

成功之贏家，且將各方之可能損失最小化，保障工作機會及生產力，預防企業仍有生存價值而遭受被清理之厄運。

該要點主要內容有：債務和解不僅為財務紓困，首要目的係讓資產活化再生，且企業能長期生存。債務和解須有合理時間表；企業高階經理人須參與重整；為使債務重整順利，債務契約期限合理展延應屬必要。金融機構不得僅為規避授信資產評估分類及提存備抵呆帳等目的，逕與債務人達成和解協議。

三、企業債務重整諮詢委員會之運作(CDRAC's Debt Restructuring Process)

1998年6月企業債務重整諮詢委員會（Corporate Debt Restructuring Advisory Committee, CDRAC）成立，其主要任務係為協助並促進債務和解及談判。CDRAC之主席即為BOT之總裁。CDRAC之程序主要係依據「債權人間之協議」（Inter-Creditor Agreement, ICD）及「債權人及債務人協議」(Debtor-Creditor Agreement, DCA）二項辦法辦理。1999年3月DCA及ICA經金融機構共同簽署及CDRAC核准後，該二項辦法即成為法庭外債務重整之作業規範。

ICA主要係規範：重整計畫之表決、重整期限、債權人間之調解、指派執行決議小組成員、審核重整計畫等。所有簽署

ICA 之債權人均須接受協議之條款規範。

DCA 之主要功能：選任協議之主辦單位及指導委員會，召開協調會，調解糾紛，表決重整計畫，執行決議等。DCA 對重整談判訂有嚴謹時間表，只須 4-5 個月，第一輪投票表決即可完成，該次表決有效決議須有 50%以上債權人及持有 75%以上之債權額同意。若重整計畫於第一輪表決時，未獲同意，債務人可再提案修正，並送第二輪表決。第二輪之有效決議須 50%以上之債權人及債權額同意。若重整計畫於第一輪表決未被同意，惟第二輪時取得有效同意決議，指導委員會或主辦單位或任一債權人，均可於第二輪票決後十個營業日內，將表決結果提送 CDRAC，並請求選任執行決議小組。

債權人以不違反 DCA 之原則，可組成「執行決議小組(Executive Decision Panel)」，小組成員不得有與債務重整有任何利益衝突關係，如：股東、董事、經理人、員工或債權人等。必要時，執行決議小組可由債務人付費，聘任專家顧問協助處理重整事務。

協議之結果對所有債權人均有約束性，惟若有債權本金逾 10 億泰幣者，可以書面方式告知解除遵守協議條款之義務。若重整計畫歷二輪投票仍未獲同意，債權人可立即向法院聲請強制執行，或成立新經營團隊介入管理，或逕行清理債務人。

債務重整計畫雖已議定，惟債務人若有下列情事之一，

則視同違約：

㈠債務人未能履行協議條款，或任何承諾事項有不實情形（有5個營業日之寬限期）。

㈡債務人對協議條款之正當性抗辯，或拒絕承認。

㈢債務人採取法律行動停止履約。

㈣債務人之財產被扣押，或管理階層被撤換，或其經營權被遞奪。

㈤協議條款被法院判決無效，或有違反現行法規。

若債務人違反協議，經債權人書面提醒告知後，協議立即失效。債權人即可向法院訴請清償債權，或清理債務人，或依破產相關法律重組債務人之經營團隊。

若債權人未能遵守協議條款，提報至 CDRAC 後，除可能被發函警告外，亦可能處以罰鍰；其中違反 DCA 條款者，處五十萬泰幣以上，或債權金額之 10%以下罰鍰；違反 ICA 條款者，處一百萬泰幣以上，或債權金額之 50%以下罰鍰。

四、績效

1998.7~2002.9 間 CDRAC 核准之企業債務重整案，計有 15,321 案，債權金額共計 2,836,816 百萬泰幣。透過 CDRAC 程序重整之債務，其成效紛述如下：

㈠已重整成功者計 10,260 案，債權金額計 1,363,252 百萬泰

幣；其中2,608案屬批發及零售業，2,438案為個人消費貸款，1,606案為生產事業。

㈡未重整成功者計3,110案，債權金額計774,176百萬泰幣。

㈢尚在重整階段者計202案，債權金額計101,610百萬泰幣。

㈣債權轉賣予TAMC者計26案，債權金額計22,985百萬泰幣；轉為正常戶者計60案，債權金額計159,662百萬泰幣。

CDRAC採用多種方法辦理債務重整，惟多數成功案例所採用之方法係屬二種以上之複合式。迄2002.7月統計結果，最常採用者為「展延借款期限」(占27.3%)，其次為「債務減免」(占21.7%)，再次為「以債作股」(占17.8%)。

五、成功之要件

法庭外重整機制運作成功之要件，除債權人與債務人間誠意合作，亦須股東積極參與；另再輔助ICA及DCA二項機制，可提高重整效率，以及獨立客觀之專業顧問參與，可確保重整之公正性。

為整合部分異議債權人，可聲請法院裁定協議條款；雖協議條款無法律之強制性，相較於循破產法途徑，法庭外重整機制處理債務問題更具彈性。此外，完善之債務重整機制尚須諸如主管機關、CDRAC、各金融機構、AMC、財務、會計、工程、分析師等專家配合。

為鼓勵以談判和解方式處理 NPL，政府提供賦稅及不動產移轉規費減免等優惠措施，亦從寬定義 NPL。同時亦設立 CDRAC，擔任調解債權及債務雙方之糾紛；CDRAC 係以市場導向為原則，制訂相關辦法，鼓勵債務和解談判。2001.6 月為加強處理 NPL，TAMC 於焉誕生；目前該機構管理之 NPL 約 7,000 億泰幣，約佔全部 NPL 之半數。因金融機構大量出清 NPL，其獲利逐漸改善，股票及債券市場開始活絡；金融機構之授信成長率雖未明顯提昇，惟整體經濟活動已有明顯改善。

仍留存於金融體系之 NPL 應如何處置?對目前總體經濟及金融體系是否存有威脅性?

迄 2002.6 仍留存於金融機構之 NPL，計 8,430 億泰幣（1999 年約有 27,290 億泰幣），約佔授信總餘額之 17%，均已提存足夠備抵呆帳。

TAMC 持有之 NPL 約 7,168 億泰幣，其中 1,184 億已重整成功，820 億強制執行中，5,160 億談判和解中；TAMC 係以債權面額之 33%購買 NPL，約與目前擔保品之市價相當，預估對納稅人不會造成損失。

國營銀行轉投資設立之 AMC 持有之 NPL 約 4,000 億泰幣，其購買價格有偏高情形，惟其可能遭受之損失已被合理估算。民營 AMC 持有之 NPL 約有 1,400 億泰幣，預估其可能遭受損失相當有限。

綜以觀之，目前留存於金融體系之NPL應不會對未來經濟發展及金融業造成太大危險。

六、挑戰

因金融危機引發之實際問題比預期嚴重，處理NPL之經驗及知識欠缺，另協議和解過程中，債務或債權雙方常有僅為維護自身權益著想情形，又政府提供鼓勵之誘因效果未如預期等，均係法庭外債務重整機制所面臨之挑戰。前述各項困境若未解決，長期而言，對經濟復甦會有不利影響。

七、優點

法庭外債務重整係泰國新設機制，相較循法院訴訟程序，顯有省時及效率較佳之優勢；若重整成功，債權及債務雙方均可獲得較大之利益。另若有公正客觀之專業顧問參與，股東及債權人均能獲得較佳保障，債務人亦能保有企業之經營權；企業若能持續順利營運，債權人當可收回較多債權。

八、泰國擬修訂破產法之重點(Summary of Proposed Amendments to Thai Bankruptcy Law)

泰國政府計劃再修訂破產法，修訂重點：企業重建條款及有關破產訴訟程序之條款，預估2003年可望開始實施。修

正草案之主要內容：

1. 登記合夥關係之事業體依法可聲請重整。

2. 有流動性困難之企業尚未破產時，依法可聲請重整。

3. 未被核准或裁定同意之重整案，重新聲請時，享有 180 天債務清償寬限期。

4. 對債務人撤銷訴訟，須在重整裁定前提出聲請。

5. 重整案若由債務人主動聲請，所有對保證人（自然人）之訴訟程序均得以暫停。

6. 重整提案人被指派前，提案人須先列示相關費用收取標準，及其所須聘任之相關人員。法院有權審查提案人之相關費用收取標準。

7. 債權人或企業股東有權聲請撤換重整提案人，或對提案人進行訴訟。

8. 在特定情況下，法院有權裁定撤換提案人。

9. 單一持有 15%以上債權之無擔保債權人，可依法聲請重整，惟其個人身份將被歸類為團體組織。

10. 債權人表決重整案時，投票人之合計債權數須逾 75%之債權總額

11. 若重整提案人與債權人不同意修改重整條款，法院可斟情核准保障弱勢債權人權益之重整條款。

12. 若債權人未同意重整計畫時，法院可斟情指派破產管理

人。

13. 高等法院可決定是否受理重整之上訴案。

14. 官方指派之破產管理人，有權對破產案之有利害關係人聲明之異議核准或駁回。

15. 為防止部分破產自然人規避破產規定，官方指派之破產管理人可於法院判決破產確定三年內，向法院聲請中止破產程序。

16. 調降清理及處置破產人之資產所須支付費用。

捌、結語

一九九七年金融危機爆發，亞洲各國為快速處理問題金融機構及不良資產，紛紛進行各項改革，泰國在發生金融危機時，應 IMF 的要求在破產法上作了很大的修正，韓國發生金融危機以後，也在 IMF 的要求下，大刀闊斧進行全面性改革，包括金融改革、企業改革、勞動改革及政府組織再造，積極建立處理不良資產以及協助企業重整及再生機制，並進行法制改革，合併破產三法(破產法、公司整理法、和議法)，制定企業重整專業公司法(CRC 法)、企業重整投資公司法(CRV 法)，引進企業重整專業化機制，造就經濟金融改革成功的典範。

我國自民國八十年底十六家新銀行陸續開業營運以後，

金融業務大餅遭到瓜分，金融機構的經營情況逆轉，資產報酬率與淨值報酬率呈下降趨勢，逾放比率不斷攀升，民國八十四年八月間爆發彰化四信案件後，金融弊案與擠兌事件層出不窮，問題金融機構乃逐漸浮現。民國八十六年亞洲金融風暴之後，國內一些大型企業財團在八十七年下半年陸續發生財務危機，其後八十八年的九二一震災，以及近年來景氣持續低迷，企業經營更加困難，借款人還款能力大受影響，致使金融機構不良資產不斷增加，體質日趨惡化，政府為解決不良資產問題及經營不善問題金融機構，在民國 89 年修正銀行法，制定金融機構合併法，賦予資產管理公司(AMC)設立之依據與處理問題金融機構不良債權之特殊權限，並在民國 90 年制定行政院金融重建基金設置及管理條例，籌措一千四百億財源讓四十四家經營不善之基層金融機構平和退出市場，至於銀行業逾期放款過高問題，雖然在中央銀行調降存款準備率，財政部調低營業稅率後，銀行業以增加的盈餘積極打銷呆帳並大量出售不良資產，然部分銀行仍無能力自行處理，且部分銀行之淨值已呈負數，需要政府協助解決，因此目前正擬擴大重建基金之規模，以加速銀行不良資產之處理，強化金融體系之健全，然而此項金融重建工作亦需要有良好健全的企業重整機制來配合，才能發揮功效。

目前我國有關破產之規定偏重債務人權益，並未建立一

套有效的法院外債權債務協商機制，因此，如何於相關之法律中強化債權人之權利，使其權益受到衡平之保護，以及在法院設立專業之破產重整法庭審理案件，以加速處理流程，此均為我國於進行企業重整時，在法制面上仍有待努力突破之處。

我國企業重整機制規定在公司法，其主管機關為行政院經濟部，而破產法之主管機關則為司法院，且破產法已經多年未予修正，已未能符合當前快速處理不良資產與問題企業之需求，宜儘速修正並整合破產與重整相關法規，俾使有繼續經營價值之企業獲得資金挹注重生，無繼續經營價值之企業則讓其迅速退出市場，以節約國家資源。此外，對於掏空資產之金融犯罪行為，則應加重處罰並修改相關法制，以求速審速決，並收嚇阻之效。

附件一

The Second Forum for Asian Insolvency Reform (FAIR)

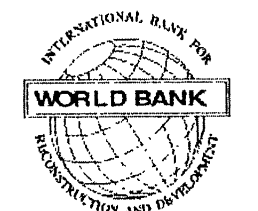
AGENDA

Shangri-La Hotel, Bangkok, Thailand
16 - 17 December 2002

In partnership with

The Government of Japan

and



The World Bank

Hosted by:

The Ministry of Justice of the Kingdom of Thailand

Day 1 – Monday 16th December 2002

Session 1 - Registration and Welcome

08:00 – 08:30 **Registration**

08:45 – 09:15 **Welcoming remarks**

- **Mr. Somchai Wongsawat, Permanent Secretary, Ministry of Justice of the Kingdom of Thailand**
- **Mr. Mike Rawstron, General Manager - Corporate Governance Division, Department of Treasury, Australia**
- **Mr. Henry Pitney, Principal Counsel & Head, Private Sector Legal Group, Asian Development Bank**
- **Mr. Gordon Johnson, Lead Counsel, World Bank**
- **Mr. Mats Isaksson, Head, Corporate Affairs Division, Directorate for Financial, Fiscal & Enterprise Affairs, OECD**

Session 2 – The FAIR Procedure & Overview of Developments and Policy Recommendations

09:15 – 10:30 **Chairperson: Mr. Robert Zafft, Senior Corporate Governance Specialist, Corporate Affairs Division, OECD**

- **Mr. Lampros Vassiliou, OECD Lead Consultant, Head of Corporate Insolvency & Restructuring-Asia, Allens Arthur Robinson / Siam Premier**

Mr. Zafft will summarize the procedure of the FAIR. Mr. Vassiliou will provide an overview of regional developments and a series of policy recommendations.

10:30 – 11:00 Coffee break

Session 3 – Proposals for Reform

11:00 – 12:30 **Chairpersons: Mr. Gordon Johnson, Lead Counsel, World Bank**
Mr. Lampros Vassiliou, OECD Lead Consultant

- **Mr. Salman Ali Shaikh, Banking Law Reform Committee, Pakistan**
- **Mr. Feisal Naqvi, Banking Law Reform Committee, Pakistan**
- **Ms. Professor Shi Jingxia, Bankruptcy Law Drafting Committee, China**
- **Mr. Henry Pitney, Principal Counsel & Head, Private Sector Legal Group, Asian Development Bank**

- **Mr. Oscar More, Chairman, Committee on Economic Affairs, Philippines**
- **Mr. Cesar Villanueva, Villanueva Bernando & Gabionza, Philippines**
- **Professor Christina Liu, Member of the Legislative Yuan, Chinese Taipei**

Discussions of various proposals for law reform and issues arising in design of insolvency law systems. Short speeches by country representatives followed by question and answer session.

12:30 – 14:00 **Lunch**

Session 3 – Proposals for Reform (continued)

14:00 - 15:00

Chairpersons: Mr. Gordon Johnson, World Bank
Mr. Lampros Vassiliou

- **Mr. Sumant Batra, INSOL India, India**
- **Professor Soogeun Oh, Ewha Womans University, Korea**
- **Mr. Stephen Adamson, Ernst & Young, UK**
- **Mr. Nick Hill, Partner, RSM Nelson Wheeler, Hong Kong China**

Session 4 – Regulators, Incentives and Corporate Governance

15:00 – 15:45

Chairpersons: The Hon. Wisit Wisitsora-At, Ministry of Justice of the Kingdom of Thailand
Mr. Lampros Vassiliou

- **Mr. Robert Zafft, OECD**
- **Mr. Juan de Zuniga, General Counsel, Bangko Sentral NG, Philippines**
- **Mr. Deryck Palmer, Partner, Weil Gotshal Manges LLP, USA**

This session will consider the role of regulators in informal workouts. It will also consider incentives that can be created by stock exchange listing rules, central bank provisioning and loan classifications rules and other techniques to promote restructuring. The interactions of insolvency and corporate governance will also be considered particularly in relation to corporate governance issues arising in restructured companies together with the role of insolvency laws in preventing, identifying and punishing corporate fraud.

Panel discussion

15:45 – 16:15 **Coffee break**

Session 5 – International Issues Arising in Informal Workouts

16:15 – 17:30

Chairpersons: Mr. Lampros Vassiliou

- **Mr. Richard Fisher, Chairman of Partners, Blake Dawson Waldron, Australia**
- **Ms. Professor Shi Jingxia, Bankruptcy Law Drafting Committee, China**
- **Mr. Lawrence Liu, Attorney-at-Law, Lee and Li, Chinese Taipei**
- **Dr. Manfred Balz, Senior Executive Vice President, Deutsche Telekom AG, Germany**
- **Mr. Alan Tang, Partner, Grant Thornton, Hong Kong China**
- **Mr. Sijmen de Ranitz, INSOL, Netherlands**
- **Mr. George Kelakos, American Bankruptcy Institute, USA**

International issues arising in informal workouts: cross border informal workouts, the experiences of foreign creditors in informal workouts in the region and other international issues arising in workouts.

Panel discussion

19:30

Dinner - Hosted by the Ministry of Justice of the Kingdom of Thailand

Day 2 – Tuesday 17th December 2002

Introduction of the Forum for Insolvency and Risk Management (FIRM)

08:45 – 09:00

- **Mr. Gordon Johnson, World Bank**

PART B **Session 6 – The Techniques, Development, Benefits and Dangers of Informal Workouts. Are Workouts Working?**

09:00 – 10:30

Chairpersons: Mr. Timothy Di Seino, Bingham Dana McCutchen, Singapore
Mr. Lampros Vassiliou

- **Mr. Professor Wang Weiguo, Professor , Chung Chun Approach, China**
- **Mr. John Lees, President, INSOL, Hong Kong China**
- **Mr. Bacelius Ruru,Chief Executive Officer, Jakarta Initiative Task Force,Indonesia**
- **Mr. Samuel Tobing, Chief Operating Officer, Jakarta Initiative Task Force, Indonesia**
- **Mr. Dongsoo Kang, Research Fellow, Korea Development Institute, Korea**
- **Mr. Manuel Yngson, President, INSOL PHIL, Philippines**
- **Mr. Tumnong Dasri, Director, Bank of Thailand, Thailand**
- **Mr. Peter Warbanoff, Senior Vice President, Standard Chartered Bank, Thailand**
- **Mr. Terry Bond, INSOL, UK**

Discussions of various approaches and frameworks for informal workouts and the experiences of debtors and creditors in informal workouts. What are the risks arising from the restructuring practices which have developed in Asia? The session will identify factors and dynamics that facilitate informal workouts. The session will explore the techniques for financial and operational restructuring which can be utilised in informal workouts. The session will also consider abuses of the informal workout procedure. The session will also consider whether financial institutions and others have learnt lessons from the Asian financial crisis.

Panel Discussion

10:30 – 11:00 **Coffee break**

Session 7 – Bulk Sale of Non-Performing Loans and Assets, the Role of Asset Management Companies, RTC Type Bodies and Restructuring Funds, Special Purpose Vehicles and Securitisation

11:00 – 12:45

Chairpersons: **Mr. Paul Kirk, Global Leader, Business Recovery Services, PricewaterhouseCoopers, Australia**
Mr. Lampros Vassiliou

- **Mr. Morgan Kelly, Account Director, Deloitte Touche Tohmatsu, Australia**
- **Mr. Michael Harris, Partner, PricewaterhouseCoopers, China**
- **Mr. Philip Chen, Partner, Deloitte Touche Tohmatsu, Chinese Taipei**
- **Ms. Jean Chui, Assistant Director General, Ministry of Finance Bureau of Monetary Affairs, Chinese Taipei**
- **Mr. Yong Ho Oh, Executive Director, Korea Asset Management Corporation, Korea**
- **Mr. Chris Beshouri, Associate Principal, McKinsey & Co., Philippines**
- **Mr. Francis Lim, ACCRA Law, Philippines**

12:45 – 14:15 **Lunch**

PART C — Session 8 – Thailand Review: An Assessment of the Thai Insolvency System

14:15 – 15:00

Chairperson: **Mr. Robert Zafft, OECD**

- **Mr. Richard Broude, Lawyer, OECD Consultant, USA**

Presentation of report

Session 9 – Proposals for Law Reform in Thailand

15:00 – 15:45

Chairpersons: **Mr. Richard Broude**
Mr. Lampros Vassiliou

- **Mr. Charles Ostick, Partner, PricewaterhouseCoopers, Thailand**
- **Mr. Surasak Vajasit, Partner, Freshfields, Thailand**
- **Mr. Kraisorn Singharajwarapan, Official Receiver, Legal Execution Department, Thailand**

Presentation and Panel Discussion

15:45 – 16:15 **Coffee break**

Session 9 Part B - The Plight of the Planner and the Happy Restructurings

- **Experiences in Thailand of Advisors, Debtors & Creditors**
- **The Role and Regulation of Insolvency Practitioners/Independent Planners**
- **Perspectives from the Region**

16:15 – 17:00

Chairpersons: Mr. Richard Broude
Mr. Lampros Vassiliou

- **Representatives of creditors**
- **Representatives of debtors**
- **Financial and legal advisors**

Floor Discussion

Session 10 – Recommendations of FAIR Participants to Thailand
Summary and Closing Remarks

17.00 – 18:00

Chairperson: Mr. Lampros Vassiliou

This session will be an open session where participants in FAIR will be asked to give recommendations from the floor of areas where the law and practice in Thailand could be improved and suggest approaches in this respect. There will also be a floor discussion regarding the FAIR.

Floor Discussion

Wrap up, next steps and closing remarks

附件二

FORUM FOR ASIAN INSOLVENCY REFORM (FAIR II)

BANGKOK, THAILAND

DECEMBER 16 & 17, 2002

REGIONAL REPORT

Lampros Vassiliou[1]

OECD Lead Consultant

[THIS IS A SUBSTANTIAL ABSTRACT FROM THE REGIONAL REPORT. THIS ABSTRACT IS INTENDED TO FACILITATE DISCUSSION AT FAIR AND PROVIDE AN EASY REFERENCE POINT OF REGIONAL DEVELOPMENTS. THE FULL REPORT WILL BE AVAILABLE ON THE OECD WEBSITE]

Background

The objective of this report is to facilitate discussions at FAIR II[2]. The author conducted missions in Thailand, Malaysia, Indonesia, the Philippines, Chinese Taipei and China in connection with FAIR II and to assist in preparation of this report. The comments below will generally focus on these countries although references to other countries in the region will also be made.

[1] The author, Lampros Vassiliou, is the OECD Lead Consultant for FAIR. He is a Partner and Head of Corporate Restructuring & Insolvency - Asia for Allens Arthur Robinson (in association with Siam Premier International Law Office). He can be contacted at Lampros.Vassiliou@aar.com.au. Mr. Vassiliou is also a consultant for the World Bank and the Asian Development Bank on technical assistance and assessment projects in the insolvency arena.

[2] FAIR II is the Second Forum for Asian Insolvency Reform. The Organisation for Economic Co-operation and Development (*OECD*), in partnership with AusAID, the Government of Japan, the World Bank and the Asian Development Bank, will hold FAIR II in Bangkok, Thailand on December 16 and 17, 2002. FAIR II is hosted by the Ministry of Justice of the Kingdom of Thailand.

This report will seek to provide the following.

(1) A review of the progress of and dynamics affecting restructuring and insolvency law reform in the Asian region.

(2) A review, on a country by country basis, of recent developments in restructuring and insolvency law reform in the Asian region.

A Restructuring Revolution

The author has in a number of presentations described developments in insolvency law reform and practice over the last few years as an insolvency revolution. Certainly, insolvency laws have had a prominence that has not previously been witnessed in many countries. Insolvency law developments and corporate rescue models adopted by some countries following the recessions in the late 1980s have been proved to be useful precedents in assisting economies in Latin América, Eastern Europe and Asia to deal with insolvency in the 1990s and at the beginning of this century. At the micro level, countries throughout the world, particularly in Asia, have revised their insolvency laws and developed out of court workout approaches. At the macro level, a number of multi-lateral agencies have led significant endeavours aimed at developing cross-border insolvency laws, increasing the efficiency of systems, and most recently, achieving uniformity in insolvency laws and practices where possible. Progress in debt restructuring has varied from country to country as has the landscape for investors in distressed assets in the Asian region.

However, the period of significant change in the last five years in Asia is perhaps better described as a "restructuring revolution" rather than an "insolvency revolution" for most of the progress and focus has centered on development of corporate rescue regimes and informal workout practices. Following the Asian financial crisis which began in 1997, many countries in Asia began to reform their corporate insolvency, restructuring and debt recovery laws and procedures as part of a strategy to remedy legislative and institutional weaknesses and strengthen their financial and corporate sectors. Significant progress has so far been made in a number of Asian jurisdictions in relation to the development of out of court work out processes and in improving the legal framework for rehabilitation procedures, although significant implementation problems persist. There has been little effective development, however, of liquidation procedures.

The Crisis was a Good Thing

In the long run, the Asian economic crisis will be viewed as a good thing for Asia, at least from the perspective that it has caused many countries in Asia to reform their corporate insolvency, restructuring and debt recovery laws and procedures. In addition, the capacity of courts, government agencies and regulators to apply insolvency and restructuring laws is improving in many countries and a new breed of consultants, bankers and executives have developed with a fuller understanding of the techniques and approaches to corporate insolvency and distress – which are inevitable consequences of corporate business activity in a market system. It is hoped that the increased focus on corporate governance will improve the stability of the investment outlook in Asia.

The restructuring process has been abused for improper purposes in some cases. For example, fraudsters have been allowed to walk away from companies, after gutting them of assets. Insolvency procedures present a one-off golden opportunity in the life of a corporation to examine whether there has been any fraud or breach of duty by its officers and to hold the perpetrators accountable. Rarely has there been the resolve to seize this opportunity and where the aggrieved parties have been bold enough to pursue the wrongdoers, deficiencies in laws and practices have frustrated their attempts.

There has also been a wave of fictional rescheduling of debts without any realistic expectation that the debtor will be able to comply with the rescheduled timetable for payment. Much of this unworkable rescheduling has been done to allow reclassification of loans from non-performing to performing to assist creditors to satisfy provisioning requirements.

There have been some instances of realistic financial restructuring and true operational restructuring. This has usually occurred where the debtor has been cooperative in the process and expert independent advisers have been engaged.

In general, the level of understanding of insolvency and the way it should be handled has increased. However, the stigma associated with insolvency is still high – there is not yet a culture of early admission of financial difficulties and an open, collective approach to deal with them.

A number of Asset Management Companies (*AMCs*) have been established, together with the creation of special legislative environments to facilitate investment in distressed assets and bulk sales of non-performing loans (*NPLs*) by financial institutions.

These concepts are discussed in greater detail below.

Unviable Businesses Trade On and Good Businesses Collapse

Liquidation procedures are perhaps the oldest and most successful form of insolvency procedure. In Asia there has been, in general, an inadequate focus on the development of liquidation procedures as the backbone of insolvency procedures. Liquidation procedures offer the best known mechanism to deal with unviable businesses. Singapore, Hong Kong and Malaysia have probably developed the most efficient liquidations systems in a regional comparative sense. In other countries the focus, following the crisis, has been on development of rescue procedures, formal and informal, together with measures to facilitate disposal of NPLs. Liquidation laws provide a mechanism to liquidate the assets of an insolvent company with an unviable business and distribute the proceeds to creditors. They permit, if they operate efficiently, a prompt reallocation of resources from the insolvent company to other, hopefully more successful, economic activities. There are, however, few countries in Asia that have developed efficient and effective liquidation procedures. The consequence of this is that unviable loss making businesses with no hope of recovery have been allowed to continue operating and incurring further liabilities which they will not be able meet.

In contrast, ineffective and slow rehabilitation procedures have also caused good businesses to collapse whilst waiting to pass through rehabilitation procedures. In the Philippines, for example, companies with viable business have collapsed whilst going through restructuring processes due to delays in the approval and implementation of plans. The debtor has been unable to obtain new money needed to fund working capital for its viable businesses (viability here often been considered on the basis of a core business, excluding non-core investments).

The Hole in Asian Economies - Corporate Losses Converted to Sovereign Debt

It is arguable that the collapse seen in the crisis economies of Thailand, Indonesia, Korea, Malaysia and, although the real effects of the crisis were felt later, in the Philippines and Chinese Taipei, would have occurred at some point soon, notwithstanding the currency collapses which began in Thailand, inciting the consequent contagion. This view relies on the position that there were economic losses in the corporate sectors that had accumulated over previous years, and even decades, but remained hidden. The Asian crisis forced the economies to put the true picture into their balance sheets. During the boom, which preceded the crisis in most of these economies, inflated project prices, inflated investments and inflated material purchase prices were common, as it seems was fraud, although these were not revealed as the economies chugged along. The momentum stopped with the crisis and all was revealed. The effect of the crisis hit directly on the financial sector and the banking system rather than the corporate sector. Distrust of the systems by the international market (investors) and the local market (depositors) soon became clear. Bank runs were feared and most governments were faced with a decision to either do nothing and let the market prevail or intervene. All intervened. Blanket or qualified guarantees of bank deposits were provided for banks which were not closed down. Government funded AMCs were established in some countries and numerous other techniques adopted which ultimately see the government, and therefore the taxpayer, bear the burden of ultimate losses. The funding provided by the IMF and the bonds issued by governments to fund the acquisition of NPLs by national AMCs together with the recapitalisation of the banking systems could be viewed as a surrogate for the accumulated losses in the corporate sector.

Specialized Courts Have Been Plagued

A number of countries have established specialized courts or divisions of courts to handle insolvency cases (Thailand and Indonesia for example) or have designated particular courts and judges to handle these cases (the Philippines for example). These measures, whilst often successful at the outset at speeding up the consideration of cases, have been plagued by constitutional and jurisdictional problems, the ease at which temporary restraining orders are issued, corruption of judges, inconsistent interpretations of the law, the build up of caseload, rotation of judges and delay tactics by crafty counsel and recalcitrant debtors.

The Commercial Court in Indonesia has been plagued by concerns of corruption and inconsistent application of the Bankruptcy Act. The remarkable abuses of the court system, notably in the Manulife case (to sanction the arrest of a bona fide Canadian purchaser who had purchased assets from an authorized curator and, separately, in allowing a solvent insurance company to be placed into a bankruptcy administration procedure by holding that a an agreement by shareholders that the company would pay a dividend could be the basis for finding that the company owed a debt, upon which a bankruptcy petition could be based, even though the company was not party to the agreement), have brought the credibility of the Indonesian insolvency system into disrepute around the world. The Indonesian Corruption Watch reports of corruption in the legal system is staggering.

In Thailand the specialized Bankruptcy Court initially made a significant difference after its establishment in 1999 with a number of credible decisions in high profile and controversial cases. For example, in the controversial and hotly contested Thai Petrochemicals Industry (*TPI*) case it held that the company was insolvent, on a balance sheet test of insolvency as required by Thai law, by allowing the assets to be valued using a discount cash flow valuation methodology - this was widely misreported as the court adopting a cash flow test of insolvency. This decision was generally regarded at the time as a litmus test for the Thai system and heralded as a success as creditors were able to force a rehabilitation procedure on a debtor who did not wish to enter the procedure. However, after the TPI case, there has not been a flood of aggressive creditor-led petitions for rehabilitation in Thailand. TPI remains a rare case. Few creditors have been prepared to attempt to force a recalcitrant debtor into rehabilitation. The court has also been not entirely consistent in its assessment of attempts by debtors to utilize accounting techniques or questionable valuations to show that that the value of their assets exceed its liabilities. The court initially benefited from a number of technical assistance training and exposure programs provided to the judges of the Central Bankruptcy Court. However, much of the benefit from that training has been lost as judges have been rotated out of the court in accordance with general practice in Thailand. The court was also extremely successful at expediting the hearing of cases, and remains so, although the backlog of cases has mounted up and things are not as fast as they used to be. There are, in more recent times, increased concerns as to whether corruption and improper influence are affecting results.

Constitutional challenges or uncertainties relating to the bankruptcy laws in Indonesia, the Philippines and Thailand have also been significant. Bankruptcy laws generally interfere with contractual rights and property rights. This can raise real constitutional issues in countries

where these rights are protected under the constitution. There have been a number of constitutional challenges to the Bankruptcy Act in Thailand - these result in lengthy delays as the matter is dealt with by the Constitutional Court and, in the meantime, the bankruptcy or rehabilitation case is suspended (in the rehabilitation case of Nakornthai Strip Mill (NSM), the delay has been over 1 year).

In the Philippines there are significant questions regarding the constitutional validity of any bankruptcy law that interferes with contractual rights. There are also issues regarding the validity of court rules issued to govern the hearing of cases. However, at a practical level there have not been any constitutional challenges to the insolvency laws or related rules. One reason for this is probably that much of the procedure is set out in rules issued by the Supreme Court of the Philippines, which is the same court that would consider any such challenge.

Little Development of Civil Remedies and Secured Transaction Regimes

There has also been little development of civil remedies and secured transaction regimes and related court processes. In many countries, particularly Thailand and Indonesia, enforcement of securities can take many years, even decades. Secured transactions laws are outdated and do not permit a broad enough spectrum of assets to be given as security.

In Thailand while there was widespread reporting of a new foreclosure law being implemented in 1998/9, the reality was that there were no amendments to the foreclosure laws, which still specify that a mortgage cannot be foreclosed unless interest has been outstanding for 5 years.

High registration, transfer and other fees and taxes also limit the utility of securities in countries like the Philippines and Indonesia.

The application of concepts of adequate protection for secured creditors in bankruptcy regimes have been limited. Rarely has a secured creditor been allowed to enforce its security in a rehabilitation case by showing that it's security is not being adequately protected.

The ineffectiveness of the legal system in this respect has created instances of a culture of non-payment. Borrowers believe they can borrow money and never have to repay it. There has also been the development of the so-called 'strategic debtor' - the debtor who is able to pay but chooses not to, for no one can compel him to.

Restructuring takes place in the shadow of liquidation procedures, secured creditor remedies and general creditor rights, with the relative efficiency of these laws and rights acting as a stimulant or depressant, as the case may be, to out of court restructuring efforts. In Australia, for example, the liquidation procedures and antecedent transactions laws, which enable preferences to be cancelled, operate to make informal workouts almost extinct. Another factor prevalent in other countries that operate to provide a key incentive to prompt recourse to formal rehabilitation procedures are laws imposing personal liability on directors for insolvent trading – these are rare in Asia.

The absence of strong, efficient and well understood insolvency and creditor rights laws in many Asian countries to underpin, incentivize and implement realistic restructuring efforts have limited much of the long-lasting utility of "restructuring" that has taken place.

Inadequate Focus on Prevention of Fraud and on Corporate Governance

The role of insolvency laws in preventing and punishing fraud and in promoting good corporate governance has not received adequate focus in the development and, more importantly, the implementation of new insolvency regimes across the region. The prevention of fraud and promotion of good corporate governance needs to be a primary focus in the formulation and enforcement of new insolvency laws. This often requires, at the practical level, training and other capacity development and funding of official receivers or other officials or private sector representatives who are appointed as liquidators of insolvent companies.

Insolvency is the one period in the life of a company, admittedly its death, when a comprehensive review of its activities can be undertaken. In the case of rehabilitation, this hospitalization offers a special one time opportunity to review a company's history, transactions and conduct of its directors. This review, which a liquidator or other administrator is required to undertake, offers perhaps the best opportunity to identify fraud, serious mismanagement and other improper practices. It provides an opportunity to hold

directors liable for insolvent trading and other breaches of the fiduciary, statutory or other duties.

However, in many countries in the region (for example, Thailand, Malaysia, Indonesia and the Philippines) the official receiver, official assignee or liquidator will generally only conduct such a comprehensive review if requested to do so and assisted, including financially, by creditors.

None of the countries in the region have established funds or other mechanisms to facilitate the performance of the liquidator's investigation functions in administrations where the insolvent companies have no assets at all. Assetless administrations are often the result of allowing fraudsters to gut their companies of all assets, thereby leaving no resources to be used to investigate and discover their fraud, let alone trace and recover assets.

In Asia generally, whilst insolvency systems have developed, there has not been a focus or intensive application on the liquidation aspect of insolvency procedures, as many countries have preferred the promotion of restructuring. The investigative and disciplinary aspects of the insolvency laws have been overlooked and that is why corporate behavior has not changed. Fraudsters can get away with their crimes and systems can be abused. Many laws are not enforced. There has not been a focus on the importance of the interaction between insolvency laws and corporate laws, particularly the fact that insolvency laws create a dynamic that facilitates the proper functioning of corporate laws. They offer the 'stick'.

In informal workouts, even in major workouts covered on the business pages of international newspapers, too often creditors have been offered deals as part of the workout which involve, as a condition of the deal to creditors, that creditors release shareholders or former management and others from liability for some suspected fraud or improper conduct. This is often clearly stated up-front in the offer to creditors. If we pay you X percent, you agree not to investigate this issue any further- that's the deal put to creditors.

Rescue Models Out-step Practice and Culture Development

There have been significant advances in the development of rescue laws but often these advances have been regarded as out-stepping practice and culture. This has limited the utility of the laws.

It is notable that rescue laws were added to the legislative frameworks of many countries such as the United Kingdom, the United States of America and Australia many years, even centuries, after the development of well understood and commonly utilized liquidation laws. These countries sought to develop a rescue culture to prevent companies with potentially viable businesses being liquidated unnecessarily by a strict application of the liquidation laws. In those countries the rescue laws sought to introduce flexibility to the strict regimes of existing liquidations.

In contrast, in a number of countries in Asia the rescue laws have been enacted in circumstances where there is no credible or efficient liquidation procedure.

In addition, in countries like Thailand, Indonesia, the Philippines and China, rescue laws have introduced a stick available to creditors to use in negotiations with creditors. This is a rather odd role for a rescue law and perhaps one reason why the laws have not worked so well in aggressive rehabilitations commenced by creditors where the debtor has not been co-operative in the process. In these countries the threat of liquidation has not traditionally been a credible threat that creditors could use to force a debtor into sensible conduct or to make a reasonable offer to pay its outstanding debts. The debtor, faced with a threat that if you don't pay, we (being the creditors) will put you into liquidation, was often unconcerned as the process would take years, there would be plenty of opportunity for delay and all involved realized that the creditor would probably end up receiving little or nothing if it went through with the threat. In addition, in many of these countries creditors do not have efficient civil remedies or secured transactions regimes which they can resort to, to recover their debts. With the enactment of new rescue laws and expedited associated court procedures in these countries, creditors have been able to use the threat of bringing a petition for rehabilitation as a threat or stick against debtors. This is a rather odd and inappropriate role for rescue laws. The threat being if you don't pay we will rehabilitate your business! However, that has not been the real threat. The real threat has been if you (the debtor) do not pay or act co-operatively in agreeing to our restructuring terms, we will take away control of your business from you by placing you into rehabilitation.

Hong Kong and Malaysia do not have any rescue laws. Hong Kong is considering the introduction of a rescue procedure. These countries have solid liquidation laws already in place. It will be interesting to see if the introduction of a flexible rescue law in these countries

operates in a materially different way to experiences in the other countries discussed above. There is certainly a culture or understanding in Hong Kong and Malaysia of the role of a liquidator and this will probably ease the introduction of any rescue law which envisages the appointment of an independent administrator to take control of the debtor's business.

It can take many years to develop an understanding in the community of the role of insolvency laws and the role of insolvency practitioners.

Implementation Has Been the Major Problem

Whilst there have been significant developments in the improvement of legislative frameworks in many countries, particularly where new rescue laws have been introduced, implementation problems are significant. Practice has not matched the letter of the law. Indeed, the objectives of some laws have been entirely circumvented by contrary practices. For example, the rehabilitation laws introduced after the crisis in Thailand and Indonesia are fundamentally good laws, judged by reference to most international best practice criteria. However, such an analysis of the written letter of the law is academic and of little or no utility unless the practice or implementation of the law is also considered. The reality is many people do not live and conduct business by the strict letter of the law. In this sense, legislative reform must be seen as a first step toward triggering a change in attitude, culture and behavior.

An Efficient Insolvency System Is In Itself Not Enough

Creditors and, in particular, debtors, will not utilise an insolvency regime, regardless of how efficient it is or the number of insolvencies existing at that time, unless there is some incentive to utilise the insolvency system.

What is needed to ensure that the insolvency regime is utilised are clear incentives or triggers to entice debtors and creditors to utilise the system. In Australia, for example, the voluntary administration procedure introduced on 23 June 1993, following the General Insolvency Inquiry (commonly known as the Harmer Report), instituted very clear incentives for directors of insolvent companies to have prompt recourse to the voluntary administration system. At the same time as the voluntary administration procedure was implemented, a new regime imposing civil and criminal personal liability for directors of insolvent companies who

continue to trade whilst insolvent was introduced. The new insolvent trading liability scheme allowed directors to avoid personal liability by providing them with a defence if they acted promptly to appoint a voluntary administrator. This defence represented an acknowledgment that in handing over an insolvent company to an independent administrator the director was taking the most honorable of steps, acknowledging the position of the company and seeking to protect the interests of the true stakeholders of the company at that time, the creditors.

In addition, the taxation laws in Australian were amended in 1993 to provide for personal liability for directors for unpaid group taxes if the directors failed to appoint a voluntary administrator within a specified of period following receipt of a penalty notice from the taxation authorities. This procedure has, in Australia, been the trigger, in a practical sense, for many voluntary administrations, which have now become, by far, the most commonly used insolvency procedure.

Central bank loan provisioning and loan classification rules can also provide incentives and triggers for restructuring. This is discussed below.

Emergency Measures Rather Than Long Lasting Reform

Much of the reform seen in Asia in the last five years has been crisis-related emergency reform. There has been a focus on short-term reforms aimed at providing immediate respite from the effects of the financial crisis. The Asian crisis has seen many new institutions set up to assist in restructuring and recovery efforts. Some of these institutions have been highly effective, others just infrastructures which have been unable to deliver results. Each new institution offer the government of the day political advantage in the sense of allowing them to identify clear initiatives that they have undertaken to address the prevailing economic problems.

These emergency reforms have included:

(1) the creation of AMCs including national AMCs (such as Danaharta in Malaysia, the Indonesian Banking Restructuring Agency (*IBRA*), the Korean Asset Management Company (*KAMCO*), the Thai Asset Management Company (*TAMC*)) or collective

AMCs (such as the Taiwan Asset Management Company formed by a collective of financial institutions);

(2) the creation of rapid disposition agencies such as the Financial Sector Restructuring Authority in Thailand (the *FRA*) which was responsible for disposing of the assets of 58 suspended finance companies in Thailand;

(3) the creation of restructuring funds such as the Financial Restructuring Fund in Chinese Taipei which is funded by tax receipts and is used to acquire NPLs from closed financial institutions (although there are proposals to extend the fund at present to enable acquisition of NPLs from other operating financial institutions);

(4) the establishment of independent facilitating bodies such as the Jakarta Initiative Taskforce (the *JTIF*) in Indonesia aimed at encouraging restructuring;

(5) the creation of restructuring committees such as the Corporate Debt Restructuring Committee (the *CDRC*) in Malaysia and the Corporate Debt Restructuring Advisory Committee (the *CDRAC*) in Thailand which have administered frameworks, binding and non-binding, for out of court informal debt restructurings;

(6) the creation of special legislative environments and vehicles to promote investment in distressed debts and assets such as the mutual funds created by the Securities Exchange Commission in Thailand, numerous vehicles in Korea (such as Corporate Restructuring Vehicles, Corporate Restructuring Companies and Real Estate Investment Trusts), and the proposed special purpose asset vehicles (*SPAVs*) in the Philippines. Restrictions on foreign ownership were put aside and tax waivers and incentives offered to encourage investment.

Each of these initiatives has a limited life. Many have now expired or ceased to exist. In all cases the focus has been to provide a temporary opportunity or vehicle to promote recovery. None were intended to be long lasting reforms.

These developments have had varying degrees of success. Some have been very successful at promoting the pace of restructuring, less successful at promoting quality in restructuring. There is some concern that these emergency returns have promoted some inappropriate practices, even moral hazards.

Five years after the financial crisis, it is clear that there is now a need to focus on the long-term development of efficient insolvency systems. That is not to say that these emergency

reforms have not had any utility. To the contrary, the remnants of these measures in cultural development and practice in dealing with distressed assets is unquestionable.

New Reckless and Directed Lending - The Moral Hazard of AMC Transfers

One example of the concerns regarding AMCs is as follows. AMCs enable banks to transfer their NPLs, accumulated over many years and probably including a number of connected, directed or simply imprudent loans to an AMC. These ugly loans are simply transferred off the bank's books in exchange, commonly, for bonds or some other debt instrument that the bank can book as an asset in its balance sheet. The bank, now with a healthy balance sheet free of any NPLs, will commonly build up reserves, as in the post-crisis environment there are few good borrowers to lend to. After a while the formerly balance-sheet-negative bank is now flush with cash reserves with little idea what to do with them. After investing in treasury bonds for a while and realizing that they are a poor substitute for lending, and with lending officers wondering where their bonus is to come from, the bank again looks to lend. However, the quality of the potential borrowers has not changed. Undeterred, the bank, having been able to easily rid itself of NPLs previously, embarks on a wave of reckless lending.

Perhaps a more extreme example of potential moral hazards is the situation where a state bank, with NPLs amounting to 70%, 80% or perhaps more of its outstanding credits, transfers these NPLs to an AMC. Little other restructuring occurs within the bank. Now, assuming that there must have been some level of imprudent or incompetent management within the bank to enable it to develop such high levels of NPLs, or perhaps there was a high level of directed or connected loans or improperly influenced lending decisions, it would seem that some internal restructuring was required. Whatever the problem, something was clearly wrong. The danger of transfer to the AMC is that the bank, otherwise unchanged, is then the utilized by government and directed to lend with little regard to credit risk analysis.

New lending at present is sometimes an indication of a reckless institution. It is odd that in many restructurings new money required for working capital is coming from the institutions that were previously, prior to their transfer to AMCs, the highest holders of NPLs.

Short Institutional Memories

Banks have short institutional memories. This is not true across the board, but is certainly a fairly safe generalisation. Except for some of the major international banks, it would seem that the lessons of the crisis have not become part of the entrenched institutional knowledge of much of the banking sector. Ask a banker whether the bank will make the same mistakes every 5-7 years and few will deny that this is true. Already evidence of reckless lending is beginning to show again. Overlending to bad debtors could again become the latest fashion.

Haircuts - The New Dynamic

As the years after the crisis passed, an interesting change has developed. At the beginning of the crisis, banks were commonly under-capitalised and scarce of funds. Following transfers of NPLs to AMCs and other restructuring and capitalisation measures, the banks' position has now changed. With few good borrowers to lend to, banks have built up cash reserves, preferring to invest in bonds, rather than lend. Consequently, banks are now commonly holding excess liquidity. This has changed the dynamic in restructuring negotiations. Previously under-capitalised banks were reluctant to accept write offs for the effect on their own balance sheet and capitalisation would be too drastic. However, in the new period of overliquidity, write downs have become easier to accept and more common.

That said, many banks still seem to be averse to accepting a write down of debt. Commonly, this aversion stems from a concern from the responsible account officer or bank committee or board, that their decision to accept the write off will crystallize a loss for which they may be held personally responsible for – this is a particular concern in state banks or in institutions where management is prone to change.

Strong and Capable Regulators often Key Factor to Success

Measures have been most successful in countries where those measures have been sponsored by a strong regulator, often the central bank. Often the influence of the regulator has not been directly applied, although it has been feared. It is without doubt that the influence of Bank Negara has been central to the success of restructuring in Malaysia. Even in countries like Thailand, where the Bank of Thailand did not directly impose itself as a regulator of

restructuring, its influence via the CDRAC process which was conducted under its auspices, was a material factor in the progress of restructuring.

Whilst CDRAC in Thailand did not involve itself openly and directly in the reasonableness of the positions of taken by the parties in the restructuring and limited itself to overseeing the timetable for restructuring set by the CDRAC process, there was always a fear in the minds of creditors that unreasonable conduct in a restructuring could affect their general banking business in Thailand. The power of the Bank of Thailand to impose fines for breach of the CDRAC process was however rarely invoked.

The CDRC in Malaysia, on the other hand, openly involved itself in the issues in dispute between the parties involved in a restructuring and facilitated a resolution of disputes. It told parties when it thought they were being unreasonable - much of the ability to do so stemmed from the leadership of two individuals heading up the CDRC (Dato Azman and Derrick Fernandez). A similar approach might not be accepted or be as successful in other jurisdictions due to cultural differences.

In Indonesia, the JTIF was set up entirely independently of the central bank, Bank Indonesia. It was not supported by a strong regulator. It had little by way of "sticks" to enforce reasonable conduct by parties and one "carrot" (namely, certain tax incentives which applied to restructurings carried out under its auspices). It's success in progressing the pace of restructuring efforts has been limited by these factors.

Focus on Disposal rather than Restructuring

There has been a focus on bulk disposal rather than restructuring of distressed debt, and numerous debt warehouses have been created which are yet to deal with the real issues.

Almost every bank in Chinese Taipei is looking at or has already begun a process of bulk sale of its NPLs to an AMC or to investors. China also transferred many of the NPLs in the system to its 4 AMCs. Little restructuring of the debtors' businesses owing these NPLs has occurred.

The philosophy has been to deal with the bank's balance sheet issues first and leave the restructuring of the corporate sector until after the financial sector restructuring is complete.

Bad Banks have Not Developed

The focus on disposal of NPLs has limited the development of specialised divisions within banks with expertise in handling NPLs - the bad bank. Some banks have been able to develop expertise and have applied the lessons learnt to credit risk analysis at the front end of their business - lending. However, this has been limited. For many banks that transferred their NPLs to an AMC or sold them to investors, they have not been able to develop a culture within the bank of managing distressed accounts. From a long-term perspective this is perhaps the most troubling remnant, or missed opportunity, of the emergency steps taken to deal with the crisis.

Rapid Disposition Agencies have developed culture of Bulk Sale

The disposal in bulk sales of NPLs and distressed assets by AMCs and rapid disposition agencies such as the FRA in Thailand have created for the first time in many countries, a culture of bulk sale. The FRA in Thailand is perhaps the best example. It conducted a series of bulk sales, with various packaging approaches, of the assets of the 58 suspended finance companies in Thailand. These sales, which were reported around the world as the largest one day sales in history, were in many cases the first time a bulk sale or coordinated program of sale was undertaken, particularly across a range of selling institutions. It sold the housing loans, the business loans, the artwork, the motor vehicles etc. of these finance companies. There was criticism of the sale prices and some accused it of conducting a fire sale. It adopted techniques to increase prices such as offering profit sharing arrangements which enabled purchasers to increase prices offered as part of the purchase price was profit sharing from future profits from the asset sold.

One important remnant of the FRA experience is the culture of bulk sale in Thailand. This culture has recently materialized in crucial new procedures adopted by the Legal Execution Department. This department is part of the Ministry of Justice and is responsible for selling property on civil execution cases and in bankruptcy cases as the official receiver. It has recently organized huge bulk sales of foreclosed properties, in which it has coordinated many financial institutions in sales of their foreclosed assets. These sales, coupled by adjustments in

rules regarding minimum sale prices, have created activity in the property sector and for the first time created an effective mechanism to dispose of foreclosed assets in many areas. Never before have foreclosed assets been sold off in this type of bulk sale approach in such a coordinated and successful fashion by the official receiver.

Fictional Reschedulings Not Real Restructuring

It is now passé, although still clearly true, to say that much of the restructuring that has occurred in Asia has been fictional rescheduling of debt without there being a realistic expectation that the debtor will be able to comply in full with the reschedule timetable for repayment and without any serious attempts at operational restructuring or other real restructuring techniques.

Many restructuring plans do not truly focus on the viability of the business; rather, they are simply a rescheduling of debts with no real expectation that the debtor will be able to comply with the rescheduled debt reduction program, in particular the significant balloon payment which is a common feature of many restructurings.

Many formal rehabilitations do not result in the debtor's business being rehabilitated and the business continuing in existence with a fresh start, free and clear of unsustainable debt.

Creditors use restructuring negotiations as a means of extracting additional security, equity or fees when they are not truly committed to the long term restructuring contained in the restructuring plan in which they extracted that additional leverage or profit and do not expect that the debtor will be able to comply with the plan.

Debt to equity swaps are being used as a mechanism for creditors to avoid having to write off their lost investment. There is justification for a debt to equity swap if there is perceived to be some possibility that the shares in the insolvent company will, one day, have value. However, in some restructurings, this is not the case - the debt for equity swap can be simply a mechanism to hide the lost investment for a few years as there is no real expectation that the company will be able to comply with its restructuring plan.

Repeat Workouts

It was feared that many of the restructurings entered into in the first few years after the crisis would fail and would need to be reworked. This is already occurring. Many plans contained forecasts which were based on unrealistic hopes of economic recovery, boom in certain markets, expansion of exports markets, ability to secure new capital investment and other dreams that have not materialized.

It is interesting that default under a plan has rarely led to more drastic consequences for the debtor. Default has often resulted in a reworked plan being agreed which is often less onerous on the debtor.

However, these repeat restructurings are not really remarkable. They are to be expected and are a natural consequence of an attempt to enter into a restructuring plan for a long period, of say 10 years or more. It is impossible to make accurate economic or financial forecasts over such a long period. In any 10 year plan it must be acknowledged by the parties that they will need to rework the plan at some point, possibly many times, as circumstances change.

However, parties have preferred to enter into these long term plans, rather than a short-term plan for say the next two years which sets out clear requirements for those two years and acknowledges that another round of negations will take place at the end of the two years to set the plan terms for the following short term period.

Failure to Accept Reality Now - the Disguised Standstill

Often in restructuring, there is an initial period called a moratorium where things are frozen or stayed. The reschedulings might be viewed as an extension or adaptation of the moratorium. As one banker said, "we will do the rescheduling now and then do the restructuring next time they default". If the macro objective since 1997 has been to achieve stability, at least in the short term, as well as satisfying stated requirements of the international agencies that assisted Asian countries following the crisis, then restructuring has been a success.

Grudgingly, it must be accepted that the reschedulings may serve a useful purpose. The sad aspect is that many of them are drafted and agreed by stakeholders, knowingly or ignorantly, as fictions (i.e. drafted and agreed as if the parties expect the debtor to comply, for example, by paying the interest deferred in the first few years in later years and being able to make the 85% bullet payment in the last year of the term).

If what is really intended is an extended moratorium, with additional security and fees being paid by the debtor during the moratorium period, then this is how the deals should be framed.

The nonsense is when any restructuring regardless of its quality (i.e. even if it is an unachievable rescheduling), is allowed to permit the loans to be reclassified as performing. This, rather than the rescheduling itself, is what will haunt economic development in the years to come.

Loose Loan Provisioning and Loan Classification Criteria

Countries will be haunted by loose loan classification and provisioning criteria that have enabled fictional debt reschedulings to be reclassified as performing loans. When the Asian financial crisis hit, many economies in the region did not have did not appear to have the ability to accept the effect of the losses caused by the crisis. Certainly the desire by financial institutions to restructure has largely stemmed from the desire to reclassify NPLs as performing loans in order to alleviate related provisioning requirements. Unrealistic reschedulings with no write down of debt have often been good enough to allow the NPL to be reclassified. There have been variances in the degree of analysis applied to the restructuring deals by central banks before allowing the loan to be reclassified as performing.

The inability of some banks to take haircuts on debts due to the consequent effect on a bank's balance sheet have skewed the structuring of many reorganisation plans.

Some central banks allowed financial institutions to amortise losses from restructures over time in order to spread the effect of the write down. This represents an acknowledged fiction, although it does provide a useful carrot to entice banks to move forward with restructurings that involve some write down or other loss.

Official NPL Figures Don't Tell The True Story

It is also passé, although again completely true, to say that official NPL statistics issued by central banks do not tell the full story of the level of NPLs in an economy. Often these figures, by their nature, only relate to loans in the financial sector or loans issued by certain financial institutions. They do not often contain loans transferred to AMCs or other vehicles. This is not a failing of the statistics as they report exactly what they are intended to – the level of NPLs in the financial sector assessed under applicable loan classification criteria. However, declines in the official NPL figures are often interpreted and reported as representing the status or progress of restructuring in an economy. This is entirely misleading.

Different approaches prevail from country to country as to the relevant loan classification criteria. The definition of NPLs applied in different countries, ranges from payment default for 90 days to 180 days elsewhere. Chinese Taipei probably has the widest variation from international best practice (Basel Committee on Banking Supervision). Official NPL figures in the Philippines and Chinese Taipei are rising, with most other jurisdictions report declining figures. Unofficial estimates by accounting firms and economists significantly exceed the official figures.

In countries such as the Philippines, in addition to looking to official NPL statistics it is important to also analyze the level of acquired or foreclosed assets held by the banks. Banks in the Philippines have been extremely successful at acquiring assets from their borrowers through voluntary debt to asset swaps known as dacion en pago so that banks have now become significant holders of distressed assets, particularly real estate assets rather than NPLs.

Reports commonly feature a comparison of the total level of NPLs against gross domestic product (*GDP*). The significance of such a statistic is confusing as the NPL figure is an accumulated figure while GDP represents an annual result. The value seen by some in the comparison may be only that it would take a significant or in some cases majority slice of GDP to deal with the NPL problem.

Co-operative Debtors Have Benefited Most

It is without doubt that co-operative restructurings have been the most successful. Where the debtor and creditors have been co-operative in the negotiation process and have formulated plans that benefit the debtors and the creditors in a balanced way, the results have been clear. This success has been reflected in share prices for listed companies following a so called 'happy restructuring'. The most successful restructurings have been those conducted co-operatively with the involvement of independent experts. Clever debtors can use the restructuring process to make progress in areas that might otherwise be impossible due to sensitivities or internal political issues - they can blame the creditors or the advisors whilst pushing through changes they want.

Aggressive Creditors Have Suffered Most - Vexatious Debtors Can Manipulate Systems

There have been few instances of creditors resorting to aggressive actions against debtors seeking their liquidation or rehabilitation in cases where the debtor objects strongly to such action. Where aggressive action has been taken, systems have rarely facilitated the action by the creditors. Debtors have been able to use delay tactics or otherwise frustrate actions by the creditors or their representatives. It has proved to be difficult to take control of businesses held by recalcitrant debtors. Debtors have resisted, often successfully.. Even if the resistance has proved ultimately unsuccessful, the debtor may have been able to achieve significant delay or at least sufficient time to arrange its affairs so as to hide frauds, distance assets and otherwise defeat creditors.

In some cases debtors have been able to bring action after action opposing the conduct of creditors or insolvency practitioners. These attacks have also extended to matters beyond the matters in dispute between the parties. In sports terms, attacking the player rather than the ball. Few, if any, Asian legal systems permit the court to declare a person a vexatious litigant and restrain them from bringing any legal action that suits them.

There have also been concerns for personal safety and alleged threats of violence. These concerns are not illusions. In Thailand on 10 March 1999 Mr. Michael Wansley of Deloitte Touche Tohmatsu was assassinated whilst working on a restructuring of a group of sugar companies. Restructuring experts accept serious risks in performing their role particularly

where it involves taking control of a tycoon or family run company in countries where business violence is not unusual.

Creditor-friendly v Debtor-friendly Systems - The War is Not Over

The debate as to what type of insolvency system works best is raging in many countries in the Asian region. The historical development of insolvency systems varies from country to country with English, Dutch, Spanish, German and, more recently, American and Australian influences featuring prominently. The debate often contains references to cultural issues and it is not unusual to hear views that creditor friendly systems do not suit the multitude of Asian cultures and value systems. In countries that implemented new rescue laws following the crisis, such as Thailand and Indonesia, critics of those laws say that the laws were simply transplanted from Western systems and do not suit Asia. There is a movement now in some countries, for example Thailand, to move to a debtor in possession system.

It is notable that no new or innovative approaches to restructuring or insolvency laws have really developed in Asia following the financial crisis. Most of the approaches have followed insolvency laws in other countries or restructuring techniques adopted elsewhere (for example, following the savings and loan crisis and the creation of the Resolution Trust Corporation in America). Cultural resistance to the new rescue laws has been significant and it will be interesting to see if an innovative approach can be developed that addresses these issues and produces an efficient system.

Role of Advisors Misunderstood and Under-valued

Advisors have been misunderstood and undervalued. They have proved to be easy targets for criticism and there has generally been a failure to appreciate the value that truly expert restructuring advice can add. There has been a focus on fees charged by financial and legal advisors. This is not remarkable in light of the fact that the consultancy fees borne by companies following the Asian crisis in restructuring have probably been the largest ever fees paid by these companies for consultancy services, but this is only a reflection of the fact that never before have companies required such significant levels of consultancy advice. It is often difficult to accept that thousands or millions of dollars in consultancy fees are justified by the contribution made by these experts. This fails to acknowledge that, in many cases, intelligent restructuring advice and approaches can create savings or gains which far exceed the level of

consultancy fees. In the larger restructuring cases, debtors can complain endlessly about the advisor's fees whilst failing to compare those fees to interest accruing on their loans. Rarely, even in the largest of restructurings, would consultancy fees exceed a minor fraction of the accruing interest charges.

There has also been a failure to acknowledge the degree of knowledge transfer resulting from the advisers. This extends to restructuring techniques and general business practices.

Advisors also often provide the only source of quality control in a restructuring. Certainly it is essential to ensure that only qualified and reputable people are permitted to be engaged in providing such advice. The reality in many restructurings is that the integrity of the advisors involved and their concerns to protect their own corporate branding provides the dominant source of restraint against tendencies to illegal or questionable approaches in these restructurings.

The Foreign Advisor

The reality has also been that Asia did not have the required level of expertise in restructuring to deal with the financial crisis. Consequently, foreign advisors have provided much of the restructuring advice in the first five years following the crisis. This has triggered nationalistic and monopolistic sensitivities in the services sectors in some countries.

There has been a degree of mistrust of foreign advisors and some countries, for example Thailand, have adopted regulations or policies that prefer domestic advisors.

Without foreign advisors it is difficult to envisage how restructuring efforts in the financial and corporate sectors would have proceeded. There has clearly been a high degree of knowledge transfer from foreign advisors. This is evidenced by the new breed of Asian bankers, accountants and lawyers who now understand international best practice approaches to restructuring.

Fear of personal liability for commercial decisions affects state banks and AMCs

One of the major dynamics affecting restructuring in Asia has been the fear of personal liability for commercial decisions. This has been a feature of the operation of state banks and agencies operations.

The concern stems from a fear that the application of any level of discretion or commercial judgement could be questioned retrospectively where the result has caused damage or losses. This is particularly so where there are concerns that there will be a change of government or subsequent review of the conduct of the relevant agency. These concerns often result in stagnation of activity. There have been prosecutions of individuals involved in the FRA sales in Thailand. Fear of personal liability has affected the speed at which IBRA has been able to make decisions. There are also concerns that these factors could stagnate the activities of the TAMC.

AMCs Work Best When Re-capitalization Function Separate

AMCs can be used to facilitate the recapitalisation of the banking sector. This generally occurs by the AMC paying for the transferred loans at a price which exceeds the true market value of the loan. The inflated transfer price is really a quasi-recapitalisation of the bank. This approach can have a restrictive effect on the ability of the AMC to restructure individual loans. This is particularly the case in national or state AMCs where there is a concern that in agreeing to a restructure, disposal or other dealing with the loan which results in a loss when compared to the transfer price, the individuals involved could be causing damage or loss to the state.

In contrast, in Malaysia, the recapitalisation function was performed by Danamodal, leaving the national AMC, Danaharta, which acquired the NPLs, free to restructure them without regard to an inflated transfer price.

AMCs Need Resources and Clear Procedures - Corporate Governance

It is interesting to compare the level of resources engaged by the national AMCs in the region. IBRA, which is now one of the largest asset owners in Indonesia, employs thousands of

people, although it's life is coming to an end. Danaharta also has a large workforce. The offices of these agencies are impressive commercial properties (commonly acquired from a defaulting debtor or closed bank). The TAMC, the youngest of the region's national AMCs, faces a significant challenge in developing a qualified workforce to handle the significant portfolio transferred to it - outsourcing may offer part of the solution to this challenge.

Defined and transparent procedures, such as those contained in Danaharta's operations manuals, are crucial in establishing an effective national AMC. These procedures can avoid any issue of personal discretion being applied, thereby avoiding the stagnation effects discussed above. It is also notable that the Danaharta board contains independent directors including a number of foreign experts.

Multi-lateral Agency Criteria May Shape Investment Decisions

There has been considerable activity at the multi-lateral level since the Asian financial crisis began in July 1997.

In April 2000 the Asian Development Bank (*ADB*) published a report entitled *Insolvency Law Reform in the Asian and Pacific Region.* The report involved a study of a number of economies and analyzed and compared the legal systems in those countries. These studies were reviewed and discussed at a symposium at the ADB in Manila in October 1999, which was combined, in part, with a symposium on Secured Transactions Law Reforms. This enabled a discussion of the intersection of corporate debt financing, secured transaction financing and corporate insolvency. The ADB also published a report entitled *The Need for an Integrated Approach to Secured Transactions and Insolvency Law Reform.* The ADB is presently engaged in a three year regional technical assistance focussing on three areas: cross border insolvency, informal workouts and the intersection between secured transactions and insolvency law regimes. The ADB has issued an issues paper in relation to this regional technical assistance which was recently discussed at a workshop at the ADB's headquarters in Manila on 30 September - 1 October 2002.

The IMF also published an important work in March 2000 entitled *Orderly and Effective Insolvency Procedures.* Drawing on the experience the IMF gained in providing technical assistance on insolvency procedures, the report identifies key issues that arise in the design

and application of orderly and effective insolvency procedures and attempts to identify the advantages and disadvantages of different approaches.

The Group of 30, a private non-profit organization of senior executives of global financial institutions and central banks, has published a comprehensive survey of the efforts by multilateral agencies. This report is entitled *Reducing the Risks of International Insolvency: A Compendium of Work in Progress*.

The United Nations Commission on International Trade Law (*UNCITRAL*) has also focussed on insolvency. Following on from UNCITRAL's work, completed in 1997, to produce a Model Law on Cross Border Insolvency, UNCITRAL ,and the International Federation of Insolvency Professionals (*INSOL International*) organized an International Insolvency Colloquium in Vienna in December 2000. At this colloquium it was resolved to recommend that UNCITRAL produce a legislative guide to assist countries with insolvency law reform. UNCITRAL has now commenced work on the preparation of Model Legislative Guidelines for an Insolvency Law (and also a Model Legislative Guidelines for Secured Transactions Law).

In October 2000 INSOL International also issued a Statement of Principles for a Global Approach to Multi-Creditor Workouts. This sets out eight principles, which are intended to be regarded as best practice for all multi-creditor workouts. It is hoped that these principles will be used in out of court workouts globally. The principles envisage a standstill, a moratorium on claims, coordinating committees, provision of information, confidentiality and priority for new funding – many of the concepts are already features of workout practices that have been adopted in Asia.

There has also been work in the secured transactions and insolvency law area by other organisations including the European Bank for Reconstruction and Development, the Organisation of American States, the American Law Institute and the International Bar Association.

The World Bank, as part of a wide effort to improve the future stability of international financial systems, led an initiative to identify principles and guidelines for sound and efficient insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets. It developed *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*

(Principles and Guidelines) based on a series of working papers at a symposium on Building Effective Insolvency Systems and regional workshops designed to provide specific and detailed information on the applicability of the draft principles and guidelines to specific countries, taking into account unique geographical practices, customs and experiences. The World Bank is now undertaking assessments of insolvency and creditor rights regimes in countries against these Principles and Guidelines under a programme called *Reports on Observance of Standards and Codes*, a joint World Bank-IMF initiative designed to assess systems against international standards and codes. The World Bank is also presently seeking to establish a Global Forum on Insolvency Risk Management (*FIRM*) which will bring together all of the above efforts.

As can be seen from the above, it is fair to say that the level of international focus on insolvency laws is at an unprecedented high mark. It may well be that, in the future, investor decisions, particularly in capital markets, will be determined with considerable regard to how a country's law and practice stands up when assessed against international benchmarks distilled by multilateral agencies.

There has also been discussion and some activity by multilateral agencies in funding the creation of specialised institutions to act as market movers in stimulating disposal and restructuring of NPLs. Preliminary suggestions of the creation of a collective AMC funded by multilaterals and banks, perhaps, to purchase NPLs on a country or regional basis have also been made.

International developments

There have also been significant developments in other regions of the world in insolvency law reform. Some have been quite striking.

The European Union issued the European Insolvency Regulation on 31 May 2002 - this is a first step to harmonising insolvency laws in Europe, although this regulation does not achieve harmonisation or a completely universal approach.

The United Kingdom introduced significant amendments to its insolvency law by the introduction of the Enterprise Act of 2002 on 7 November 2002 and other related

amendments. This introduced a number of significant amendments, adopting much from the Australian legislation. One remarkable change is that holders of floating charges will no longer be able to appoint an administrative receiver except in relation to capital market transactions and for those floating charges in existence at the date that the Act becomes law.

The United States of America is also considering significant amendments to its Bankruptcy Code, including adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

Regional Overview

The following is a brief summary of recent developments in selected countries in the Asian region. It is not exhaustive and merely provides an overview of some recent developments. It is intended to provide a thumbnail sketch of major developments.

China

The People's Republic of China introduced a Bankruptcy Law in 1986, which applies only to State enterprises. With subsequent movement to a more market oriented economy, privately owned enterprises have developed but still remain limited relative to State-owned enterprises. The Bankruptcy Law applies to international trust and investment corporations or "itics" such as "Gitic" whose insolvency is internationally reported. A liquidation team or liquidator committee, often made up of government officials, is appointed to administer the process. A restructuring process is also provided for but it has not been used. The protection and resettlement of employees in order to maintain order and stability in society is required by government directive as a first priority in application of the Bankruptcy Law.

The Corporate Law was enacted in 1994 to introduce the concept of shareholder rights. There is no comprehensive law dealing with the insolvency of corporations, but there is separate legislation for foreign-invested enterprises (*FIEs*). New rules for FIEs were introduced on 1 September 2002 - these envisage the appointment of an Enterprise Committee to conduct a restructuring, if appropriate.

Much of the bankruptcy activity in China to date has been policy directed bankruptcy under the National Plan - whereby the government effectively directs the bankruptcy of a state owned enterprise. China is really yet to use its Bankruptcy Law in a substantive fashion.

There have also been some alternative approaches to restructuring such as the so-called Changchuan Approach which involves the transfer of profitable assets into a new entity funded by the major creditor. The funds generated by the new entity are then used to repay that creditor. The process is similar to a technique known as a hive down. The major creditor who funds on-going operations is effectively preferred while other creditors receive nothing. The rationale underlying this approach is that the business continues in operation, jobs are saved and many of the other creditors who are either employees or trade creditors will benefit if the business continues in operation.

China's accession to the World Trade Organization in December 2001 and the expansion of private commercial activity will provide an impetus for China to improve insolvency and restructuring processes.

The Chinese government is drafting a new bankruptcy law, which does contain a corporate rescue procedure.

There has been limited activity in out of court informal workouts. Four AMCs have been set up to receive transfer of problem loans from State-owned banks but their attempts to restructure loans have been limited. There have been a few sales of NPLs and distressed assets by these AMCs although completion of the sales have drawn out. This has caused significant frustration to investors. A recent sale of a portfolio of approximately US$1 billion in assets was entered into by The Great Wall Asset Management Company to Goldman Sachs.

Restructuring efforts by the AMCs have been frustrated by lack of resources (even though the AMCs employ thousands of people) when compared to volume of NPLs in their portfolio. Some AMCs have over one million debtors in their portfolio spread across numerous provinces. There have also been significant barriers (such as hefty local government taxes) and lack of cooperation and a misunderstanding on the part of provincial governments as to the role and authority of the AMCs.

Hong Kong

Hong Kong has well-established laws dealing with the major types of insolvency procedures including compulsory and voluntary winding up and schemes of compromise and arrangement. These laws derive from the laws that applied in the UK prior to the introduction of the Insolvency Act 1986 as a result of the recommendations of the Cork Report in 1981. This means there is no corporate rescue regime in Hong Kong. Receivers may also be appointed pursuant to the terms of a security document or by a court.

Informal workouts are common and the Hong Kong Association of Banks and the Hong Kong Monetary Authority have developed Guidelines on Corporate Difficulties, which set out guidelines for workout procedures to be applied by members of the association. These guidelines are loosely derived from the so-called London Approach developed in the United Kingdom. The guidelines are useful in multi-creditor workouts, which are common due to the local lending culture.

Insolvencies and restructurings in Hong Kong often involve major Chinese creditors (the State, in the case of Chinese window companies which are established to enable Chinese State-owned enterprises to obtain foreign funding). Hong Kong companies also often have investments or assets in China – this often introduces an additional layer of complexity.

The corporate shells of insolvent listed companies are also used to enable investors to obtain a back door listing on the Hong Kong Stock Exchange. This has become a mini-industry in Hong Kong.

In January 2000, legislation revising Hong Kong's insolvency laws was submitted to the Hong Kong Legislative Council for approval. The main proposals under the Companies (Corporate Rescue) Bill are to:

(1) allow a company in financial trouble to apply for a moratorium for 30 days (extendable to six months) to protect it from civil proceedings, winding up petitions and proceedings to enforce securities;

(2) enable a company to be placed under the control of a provisional supervisor who would then prepare a proposal to creditors to put in place a voluntary scheme of arrangement for the company;

(3) provide for the provision of funds to pay employee wages and other entitlements - although the proposal that this provision must be established before the company can have access to the moratorium is controversial and may restrict the use of the procedure;

(4) facilitate action against directors and senior executives who are involved in insolvent trading; and

(5) provide for a priority for new money or capital injected into the company in the event of a subsequent winding up.

These proposals are intended to apply to all companies incorporated in Hong Kong and all foreign companies that have established a place of business in Hong Kong. The proposed legislation discussed above has been postponed for some time. There is some doubt as to whether the proposals will ever become law.

Chinese Taipei

Chinese Taipei, along with the Philippines, is one of the few economies where official NPL figures are increasing. It is acknowledged that Chinese Taipei adopts loose loan classification criteria and many suspect that the true figure of troubled loans is much more than official figures.

Chinese Taipei was able to withstand the initial effects of regional financial crisis that dramatically affected other, more top-heavy economies, such as Korea, Thailand and Indonesia. The recent global economic slowdown has however affected the banking sector in Chinese Taipei and asset quality has continued to deteriorate. The banking sector is now aggressively tackling these rising loan defaults, particularly over the last twelve months.

As part of a legislative reform package, the government has announced a series of measures to facilitate restructuring in the financial sector. The Financial Institutions Merger Act was enacted on 24 November 2000 to facilitate mergers and acquisitions within the finance sector. The move was aimed at helping address the banking sector's biggest headache: over-banking. Taiwan has around 53 domestic banks and around 39 foreign banks. Many now blame the

saturated banking market on the rush to deregulate in 1991. The Act created a legal framework for the establishment and operation of the Taiwan Financial Asset Service Corporation (*TFASC*) and Taiwan Asset Management Corporation (*TAMCO*). TAMCO is spearheaded by the ROC Bankers Association, and has been formed with a capital injection of NT$16 billion by a consortium of 33 banks.

There have been a number of high profile bank mergers in the last 12 months, including Fubon buying Taipei Bank and Cathay Financial Holding buying United World Chinese Bank. It is expected that Taishin Financial Holding Co will complete its merger with Taiwan Securities Corp and Taishin Bills Finance Corp in early January 2003.

In addition, there has been an influx of foreign investors including Goldman Sachs Group Inc, Morgan Stanley Dean Witter & Co, Lehman Brothers and Lend Lease Corp that have or are in the process of setting up private AMCs with individual banks. Some of the incentives provided to encourage to sell their NPLs to AMCs include allowing the banks to amortise their losses over 5 years, reducing business taxes and allowing transfers to be effected by public announcement.

The Ministry of Finance has demanded that the NPL ratio be reduced to less than 7% by the end of 2002 and 5% by the end of 2003.

Taiwan is presently a hotbed of activity in bulk NPL sales. As discussed above, the first sale by First Commercial Bank to Cerberus, Lone Star, GE Capital and TAMCO has stimulated a flurry of similar activity by other domestic banks.

The government has also established a quasi RTC-type fund called the Financial Restructuring Fund. The Fund was initially capitalised by a 2% tax and has been funded to the amount of NT$140 billion. The Fund is used at present to acquire NPLs from bankrupt financial institutions. It is proposed to enlarge the function of the Fund to deal with the overbanking problem and to permit the Fund to purchase NPLs from all financial institutions. The Ministry of Finance proposes to boost the amount of the fund through issuing public bonds, in addition to extending the time span for monetary institutions to pay business taxes from the originally designated four years to an unspecified period.

A law to facilitate securitisation has also been enacted, although is yet to be utilised.

Chinese Taipei has a formal liquidation and reorganisation procedure. The reorganisation procedure is limited to listed and public companies. There is no formal procedure for other companies. In the last four years, around forty listed companies have applied for reorganisation, with only a small number of these culminating in approved plans. The debtor must approve the reorganisation plan. The system is not regarded as being efficient and a number of amendments to the Bankruptcy Laws are presently being considered.

Indonesia

The formal restructuring and liquidation processes in force in Indonesia are contained in the Bankruptcy Ordinance 1905 although they were not used until the ordinance was amended by a Government Regulation in Lieu of Law in 1998 following the financial crisis.

Under the Bankruptcy Ordinance, the Commercial Court can suspend payments to unsecured creditors and appoint a licensed curator and supervisory judge to assist in the management of a debtor's assets.

The Commercial Court which was set up to administer the Bankruptcy Ordinance has not been consistent in its interpretation of Indonesia's bankruptcy laws. This has caused most creditors to negotiate with the debtors on an informal basis in preference to using formal rescue processes.

Confidence in the Indonesian Commercial Courts performance was not assisted by the debacle in the Manulife case where a solvent subsidiary of the Canadian insurer was placed into bankruptcy, although the decision was overturned on appeal. There is no insolvency test under the Bankruptcy Act as part of the commencement criteria. The initial decision flowed from an interpretation of the concept of debt. The Manulife subsidiary was held to owe a debt by reference to a shareholder's agreement to which it was not a party - under that agreement the shareholders had agreed to certain dividend entitlements. This followed earlier scandals involving the arrest of Canadian representatives of Manulife after their legitimate purchase of interests from an authorised curator.

One interesting development is the establishment of a group of seven local lawyers and judges known informally as 'Team 7'. This team was put together with funding from the IMF and the ADB. It's role is to evaluate decisions by the Commercial Court and will publish a report on those decisions.

To assist in this informal restructuring, JITF and the Financial Section Policy Committee (*FSPC)* were created. The JITF can force debtors to mediation. Debtors that fail to mediate can be reported to the FSPC, which may result in the government filing for bankruptcy of the debtor.

The Indonesian Bank Restructuring Agency (*IBRA*) was established, to acquire, hold and manage assets of closed banks and otherwise acquired NPLs. IBRA is a creditor in most restructurings – some of which have been frustrated by management changes at IBRA and delays in approval processes. The government is trying to strengthen Indonesia's poor economic recovery by accelerating the sale of the assets managed by IBRA. Investor interest has also been affected by safety concerns following the bombings in Bali.

IBRA is under pressure to wind down completely by the end of 2003. It's four thousand employees and contractors will slowly be dismissed. IBRA is the largest land owner in Indonesia and its wind-down will be a significant exercise.

Korea

Korean corporate liquidation law is contained in the *Bankruptcy Act 1962* (which was amended in 1998). Prior to the financial crisis, two rescue processes existed:

(1) a composition process governed by the *Composition Act* 1962 (amended in 1999); and

(2) a company reorganization governed by the *Company Reorganisation Act* 1962.

Korea is unusual in this respect as it had in place reorganization procedures at the time the crisis hit although these processes seem to be extremely slow.

More recently, Korea has established a range of vehicles that can acquire NPLs, distressed assets and assist in the restructuring and recovery process. There has been the creation of a variety of vehicles including mutual funds, Corporate Restructuring Specialist Companies, Real Estate Investment Trusts and Corporate Restructuring Vehicles (*CRVs*) that can acquire distressed assets and NPLs and faciliate restructuring efforts.

In 1998 an Agreement for the Promotion of Corporate Workouts (***Workout Agreement***) was agreed by financial institutions to set out a framework for out of court workouts. Like similar arrangements in other countries such as Thailand, it binds only those financial institutions who have signed it.

KAMCO has acquired over 98 trillion won worth of NPLs from financial institutions. It disposes of NPLs either by outright sale or by the issue of securities over healthy assets to generate liquidity.

There have been a number of high-profile restructurings of chaebols such as Daewoo and Hyundai.

The present insolvency law of Korea is contained in the Corporate Restructuring Promotion Law (*CRPL*), which has effect from 15 September 2001 and will be in force for a five-year period. It provides a statutory framework by which creditors grant a moratorium to debtors and allow them to prepare a Memorandum of Understanding for their restructuring. This is quite similar to the provisions of the Workout Agreement, however it requires the use of CRVs and therefore it is hoped that it will streamline the resolution of creditor disputes.

There is presently a move to produce a consolidated insolvency law. Drafts of this have been prepared this year. The drafts contain proposals or an individual rehabilitation procedure. There are also proposals to adopt the UNCITRAL model law on cross-border insolvency.

Malaysia

Malaysia has been very successful at dealing with its overbanking problem and in recapitalising its banking sector following the financial crisis.

The Malaysian government established a National Economic Action Council in 1998 which has introduced a number of measures to assist with corporate and financial restructuring. For example, the government owned Danaharta Corporation was established in 1998. A similar special purpose agency for the recapitalisation of banks, Danamodal Nasional Berhad was also established. Danaharta may, of its own accord or at the request of the company, acquire the assets and liabilities of a company in financial difficulty. Danaharta may also appoint a special administrator to operate a distressed company as a going concern. Danaharta has dealt with almost all of its total portfolio of NPLs.

In 2001 Danaharta entered into a securitisation program, issuing asset-backed securities that were hugely over-subscribed.

The CDRC was established following the financial crisis to assist creditors and debtors to agree on restructuring and work out programs. As at the end of July 2001, the CDRC was involved in the restructure of over 26 billion ringgit worth of debts, representing about 40% of the total value of debts referred to the CDRC. In 2001, the membership of the CDRC was expanded to include representatives of Danaharta and the Federation of Public Listed Companies. The revamp of the CDRC in August 2001, particularly the fact that Dato Azman, the chairman of Danaharta, was also appointed chairman of CDRC, materially affected the pace of restructuring. The process was made compulsory and significant pressure applied to finalise cases. Most cases have now been resolved and the CDRC has now been wound up.

In 2001, the Kuala Lumpur Stock Exchange (*KLSE*) also introduced practice notes and guidelines increasing the disclosure and reporting obligations of distressed companies listed on the KLSE.

Malaysia has had in place liquidation, scheme of arrangement and receivership laws since 1965. A company in financial difficulty can propose a scheme of arrangement to be approved by its creditors and the High Court, who may order all proceedings against the company to be suspended while the application is before the court.

A receiver can take over the management of a company under the terms of a security agreement. A court may also appoint a receiver, if a receiver cannot be contractually appointed

and the assets of the company are in danger of being diluted or disposed of or if the interests of creditors would otherwise be prejudiced.

One of the sleeping issues in the Malaysian insolvency system stems from the decision in Kimlin Housing Development, a 1997 case, where a receiver was held to no longer have powers of management over a debtor's secured assets following the appointment of a liquidator. The Malaysian courts expressly decided not to follow the position taken in Australia and the UK who have similar legislation. There are numerous instances where, before this decision, receivers continued to operate businesses and exercise rights in relation to secured assets following the appointment of a liquidator. There is a twelve year limitation period that applies in these cases where the receiver has sold land by private treaty and it is expected that there will be a flood of litigation relating to prior cases.

The restructuring of the financial sector has also been quite remarkable, with the central bank, Bank Negara, at one point directing the banks to merge and form 10 anchor banks. There are further consolidations expected, although the central bank has stated that it is not forcing mandatory mergers. The recapitalisation of the banks by Danamodal was successful - the recapitalisation loans made by it have been repaid.

Philippines

The Philippines initially seemed to weather the storm better than some of its neighbors, although it experienced lower growth in the decade after the crisis. Economic and political instability in 2000 and 2001 affected investment in the Philippines economy, marked by dramatic declines in the stock exchanges indices and devaluation of the Peso to an all time low of P 53 in July 2001.

Aspects of the underlying insolvency law and procedures in the Philippines are outdated, inconsistent, lacking in adequate detail, defective, subject to constitutional and jurisdictional uncertainties and simply do not provide sufficiently useful procedures to adequately assist in the solving of the growing NPL and distressed asset problem. A number of legislative changes coupled with the abrupt transfer of jurisdiction over insolvency cases from the Securities Exchange Commission (*SEC*) to the regional trial courts (*RTCs*) have further hampered efforts at restructuring. Recent proposals for insolvency law reform have been hotly debated with opposing policy views delaying progression of the proposals. Other

legislative initiatives designed to expedite restructuring and attract foreign investment such as proposed SPAV laws have been delayed or defeated by opposing policy objectives.

The Insolvency Law of the Philippines was originally enacted in 1909. It provides for two types of proceedings, being suspension of payments and insolvency (voluntary and involuntary) proceedings. It applies practically the same principles and procedures to corporations as it does to individual debtors and it contains no provision for reorganization or rehabilitation of corporate debtors and many of its other provisions are out of step with the modern approach to bankruptcy and insolvency proceedings in other jurisdictions. Very few proceedings have been brought under it.

In 1981 by a Presidential Decree from President Marcos known as PD 902-A, the SEC was given jurisdiction over suspension of payments. The Supreme Court clarified that suspension of payments cases under the SEC's jurisdiction were limited to intra-corporate disputes and not proceedings in respect of individual debtors. The SEC was given the power, among other things, to grant the remedy of rehabilitation in suspension of payment cases. There were a number of high profile cases, such as Philippine Airlines, administered by the SEC.

In August 2000, a new Securities Regulation Code was enacted that abruptly transferred the quasi-judicial jurisdiction of the SEC over suspension of payments and rehabilitation proceedings to the RTCs. The SEC's responsibilities were guided by the adoption in the year 2000 of procedural rules governing petitions for suspension of payments and rehabilitation known as the *Corporate Recovery Rules*. The Supreme Court developed Interim Rules of Procedure (Interim Rules) to govern rehabilitation cases under PD902-A (using the framework of the prior SEC rules), effective from December 15 2000. The Interim Rules assume that rehabilitation under PD902-A remains an available remedy. There are constitutional questions in relation to the Interim Rules.

There has been discussion led by the Capital Markets Development Council for the last 2 or so years of proposals for a new insolvency law. House Bill No.11867, first introduced in August 2000, contained a new insolvency regime. It was criticized as being unduly complex, overly protective of shareholder interests and novel or radical in many respects, particularly in relation to proposals for a so-called "fast track rehabilitation" system which involved complex transfer of assets and claims and a claim auctioning process. The latest draft of the proposed

law represents a far simpler approach than House Bill No.11867 and is more similar to rehabilitation approaches adopted in other jurisdictions.

The proposed law is called the Corporate Insolvency & Recovery Act contains 4 different remedies: (1) Suspension of Payments provides a moratorium, limited to 3 months, on debt repayment to enable a debtor to negotiate an out of court restructure with its creditors. (2) Court Supervised Rehabilitation involves preparation of a plan for approval by creditors and the court. (3) Pre-Negotiated Rehabilitation sets out an expedited procedure for a plan which has been pre-agreed with a majority of creditors with objecting creditors and shareholders being provided with an opportunity to object to the plan before it is approved by the court. (4) Liquidation and Dissolution - there is no ability to seek liquidation as an immediate remedy - it is only available on a defective filing for other relief or on conversion from other forms of relief.

There have also been proposals developed by investment banks and Bangko Sentral for legislation to support the creation of special purpose asset vehicles to acquire non-performing assets, including loan assets and real and other properties, currently burdening the financial sector. As discussed above, banks have been successful in obtaining large amounts of transferred real estate by dacion en pago, judicial and extrajudicial foreclosure. Much of this collateral, both core and non-core assets of debtors, now sits idle on bank balance sheets as market prices fall below the net book value of the loans. Banks, hoping for improvement in economic conditions and hoping to avoid capital write-downs, have held on to assets waiting for higher prices. As a result, assets and capital are not circulating in the economy and banks have become large inefficient holders of non-performing assets. Given this background, domestic banks have engaged in discussions with foreign investors for the disposition of their non-performing portfolios. However, to date, investors have been reluctant to proceed with investments.

The original intention of the proposed legislation was to create a positive legislative regime for the investment of foreign capital into non-performing loans and assets. The original intention was not to implement a general amendment of insolvency and creditor rights laws or provide for concessions or exemptions with broad perpetual application. It was envisaged that, building on similar legislation in Thailand and Korea, the legislation would provide for a limited prescribed eligibility period for the creation of a SPAV by eligible investors, a limited period from enactment to make investments, together with a limited disposition period for acquired assets. It is was originally envisaged that the SPAV would be a tax-exempt entity in terms of corporate income tax, capital gains tax and other taxes and duties but that all fee and

tax incentives expire within a specified period from enactment.. The SPAV was to be entitled to the benefit of special provisions which ensure expeditious implementation of the SPAV's objectives and prohibit the lower courts and the regional trial courts (but not the Supreme Court) from issuing temporary restraining orders and a power in instances where the SPAV holds more that 50% of the amount of debt within the secured creditor class, such that 75% of the secured creditors have the power to vote down a suspension of payments application, and then again has the right to vote down the plan when submitted – with no discretion to the court.

However, much of the original intention of the proposed legislation has been lost in amendments proposed in committee discussions such as mandatory provisions giving the debtor a 90 day period to restructure or renegotiate its loans or reacquire the properties before the financial institution can offer to sell them to a SPAV together with a mandatory bidding process, in which the borrower is able to participate, to apply to any proposed transfer to a SPAV, have led to revised SPAV bills being described as a farce. Many of the original incentives and tax waivers have been also been removed or watered down. It is unlikely that the revised SPAV bills, if passed in their present form, would attract foreign investment into distressed assets although they may well create serious impediments to other restructuring efforts and create opportunity for abuse and delay. It is envisaged that the form of the bill be settled in a bicameral committee shortly.

There has also been a new proposed securitisation law. Debate of this bill has, however, largely been outweighed by the focus on the SPAV bills.

Thailand

Thailand introduced a number of legislative reforms to its insolvency laws and practice following the financial crisis, including;

(a) enacting a new corporate reorganisation procedure in April 1998 (during the reorganization process, a "planner" is appointed to prepare a reorganization plan for consideration by a meeting of creditors and subsequently for court approval.), establishing a specialised Bankruptcy Court in June 1999 and by amendments in 1999 to enhance the efficiency of the bankruptcy and reorganisation procedures;

(b) implementing frameworks for out of court workouts which were agreed between a number of financial institution creditors under the auspices of the CDRAC, a committee established by the Bank of Thailand and various associations. Despite the legislative developments discussed above, most of the initial restructuring efforts continued to take place outside the court system and were perceived to be moving slowly. The pace of restructuring negotiations did not progress significantly until the implementation of binding frameworks for out of court workouts which were agreed between a number of financial institution creditors under the auspices of the CDRAC;

(c) establishing the FRA to take over the operations of 58 finance companies that were suspended following the financial crisis. All but two were closed down. The FRA held auctions of the assets of the finance companies, selling everything from cars and artwork, to housing loans and business loans. The auctions were touted as the biggest one-day sales ever seen in the world. The FRA was a very efficient disposition agency. However, due to some of the complex profit sharing arrangements entered into to maximise sale prices and other complexities, there has been delay and considerable difficulties in calculating dividends for creditors. These finance companies have now been placed into bankruptcy and their management has been handed over from the FRA to the official receiver; and

(d) introducing taxation and other incentives to promote restructuring and investment including legislation permitting the establishment of mutual funds to facilitate investment in distressed assets established. A number of AMCs were also established to enable banks to transfer NPLs off their balance sheets.

Most recently, as of September 2001, Thailand has established a national AMC known as the TAMC. The TAMC has had NPLs transferred to it by State banks and some commercial banks. It has been granted broad powers to manage and restructure those NPLs including the power to place the debtor into a reorganisation procedure. The TAMC may well significantly charge the landscape in restructuring in Thailand. Although, its impact is really yet to be felt, as few restructurings have really progressed under its management. Its portfolio is a troubled one, and it faces significant challenges in adequately resourcing itself to handle the role it has been designated. Its powers and procedures are subject to a number of constitution questions, although there have been no challenges to date.

There are also initiatives to amend the Bankruptcy Act – one proposal is to make creditors responsible for fees incurred in preparing and implementing a plan if the application for rehabilitation is brought by the creditors. Another proposal involves moving away from the

balance sheet test of insolvency as an entry requirement for access to the reorganisation procedure toward a liquidity test. A further proposal is to extend the stay to guarantors. There was also proposals to increase the plan approval thresholds, require that the Supreme Court rather than the Chief Justice of the Central Bankruptcy Court decide whether or not appeals may be made against court orders, clarify the priority of new money provided during the rehabilitation process.

There are, however, other proposals for amendments to the Bankruptcy Act, and some include movement to a clearly debtor in possession system. At present there is no clear policy position held by the government. These competing proposals will need to be reviewed and a policy decision taken by the government.

Ministerial regulations governing the regulation of planners have also been issued. These regulations require planners to be Thai entities, and set out a system of licensing. The planners are required to place deposits or other security prior to accepting an appointment in a reorganisation. The amount of security is significant in large cases. However, the licensing and security deposit requirements do not apply if the debtor or its executives are appointed as the planner. Consequently, these regulations have emphasized the movement in Thailand to more of a quasi debtor in possession system.

Accountants or other expert insolvency practitioners are reluctant to act as planners in contested cases due to the level of litigation, including vexatious litigation, that is often involved, difficulties in securing payment of their fees and expenses and personal security issues. More often than not, the debtor or a related party to it or its shareholders is appointed as the planner in many rehabilitation cases. Moreover, the number of expert financial advisors generally engaged in Thailand has decreased markedly since the end of 2001.

There have also been proposals to introduce a new type of "business security", although these proposals have been dormant for some time.

India

India is possibly the next major market for bulk NPL sales. It is a significant economy which has boomed in recent times. Its NPLs are significant and largely have arisen as a result of

heavy government regulation and directed lending. State banks hold a significant share of the finance market.

The Sick Industrial Companies (Special Provisions) Act regulates the rehabilitation of corporations, while the Companies Act regulates liquidation proceedings.

Lenders are faced with significant difficulties in recovering debts and traditionally have brought proceedings to the Debt Recovery Tribunals that specialise in handling debt recovery cases. The processes have generally not been efficient and a dynamic for out of court voluntary informal workouts has not developed.

A recent development has been the introduction in June/July 2002 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance. The purpose of this law is to enhance secured creditor rights and create a facilitating environment for asset reconstruction companies (*ARCs*), India's version of an AMC. There are some ARCs that have already been established and investors are involved in discussions to set up more.

In addition, there have recently been proposed amendments to the Sick Industrial Companies Act and the Companies Act. These proposals stem from the Eradi Committee, headed by Justice V.B. Eradi. The Committee is charged with the task of reforming India's insolvency laws. Under these proposed amendments, when an industrial company has becomes sick, the board of directors is required to file a reference with the proposed National Company Law Tribunal (*NCLT*) for determination of the measures which shall be adopted with respect to the company. This tribunal is designed to replace the existing Board for Industrial and Financial Reconstruction (*BIFR*). It is envisaged that NCLT will be equipped with greater powers than BIFR, and should fast track the process of referring companies to rehabilitation.

Pakistan

Pakistan has enacted a number of laws recently relating to insolvency and it is perceived that many of these laws are overly creditor-friendly and have not created an environment to facilitate co-operative or effective reorganization of viable businesses. Some laws are regarded

as being overly punitive on debtors and are regarded as having frustrated attempts at restructuring.

In 1997, a Recovery Act was enacted, and this was subsequently amended in 2001. The Act facilitated self-help mortgagee sales and required that debtors obtain leave of the court to defend against creditor actions.

In 1999, the National Accountability Bureau was established by the military regime, with rather drastic provisions which labeled a 30 day non-payment as a willful default which was punishable by imprisonment. The law was not implemented in a consistent fashion.

In 2000, the Corporate and Industrial Restructuring Corporation (*CIRC*) and the Committee for the Rehabilitation of Sick Industrial Units (*CIRSU*) were established. The CIRC is an AMC which has acquired a relatively small percentage of Pakistan's NPLs and the CIRSU is a committee for facilitating restructuring.

Most recently, the Banking Laws Review Commission of Pakistan (*BLRC*) commissioned the preparation of a new proposed Corporate Rehabilitation Ordinance (*CRO*). The CRO contains procedures for rehabilitation and liquidation. It is aimed at providing a balance between debtor and creditor rights. The rehabilitation procedures envisage the appointment of an administrator in certain circumstances, although it is acknowledged that there are few competent people who can fulfil this role without further training. The proposals contain a number of interesting aspects. The Act provides for the appointment of an Advisory Committee, which is to operate as an expert panel that the court may seek opinion from in relation to certain matters. This three man expert advisory committee effectively acknowledges that there is limited expertise in the judicial system in handling insolvency cases. In addition to advising whether a proposed plan is fair and equitable the role of the advisory committee includes advising on issues of adequate protection and advising as to possible modifications to a plan.

In reorganization cases the debtor remains in possession and control of its property unless the court orders otherwise. However, a party in interest or the Official Administrator (a government appointed position) may apply to appoint an Administrator in listed circumstances such as fraud or gross mismanagement of the affairs of the debtor or if it is in the interest of the creditors or equity security holders. One reason the Ordinance adopts the

formulation it has is to make the reorganization procedure attractive, at the entry point, to debtors. It is suspected that debtors will realize that other provisions of the Ordinance operate to provide for the management's powers to be superseded by the appointment of an Administrator. Nonetheless, the dynamic this may create is that if management realize that they can conduct the reorganization in a manner that is acceptable to creditors and devise a plan that creditors are happy with, they will be able to retain control of the business.

The Ordinance also provides that a statement of affairs must be audited by an auditor. Many countries exempt companies in a formal insolvency procedure from needing to have their accounts audited. The rationale for such exemptions is often that the auditing and accounting standards will not apply to a company in an insolvency proceeding and often cause unnecessary expense to a company which is controlled by an independent Administrator (who effectively provides an independent review similar to that provided by an auditor) and therefore decrease the ultimate return to creditors. Monthly statements which the Administrator is also required to file and detailed accounts every 6 months which must also be audited. Whilst this an interesting, and perhaps necessary, development from a corporate governance perspective, the onerous nature of it may well shock insolvency practitioners experienced in other markets. There are many other laudable aspects of the proposals including automatic conversion to liquidation proceedings if no rehabilitation plan is approved.

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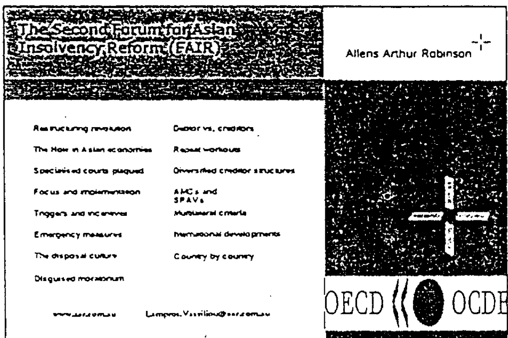
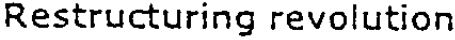


Restructuring revolution



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- Unrivalled prominence – the crisis was a good thing
- Not an insolvency revolution
- Rehabilitation Laws
- Out of court workout frameworks
- Inadequate focus on liquidation

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The Hole in Asian economies

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- Collapse imminent despite currency contagion
- Inflated prices and fraud concealed by momentum
- Distrust attacks finance sector
- Government intervenes via guarantee & recapitalisation
- IMF loans and AMC bonds surrogate for corporate sector losses

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Specialised courts plagued

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- Successful at outset – Thailand - TPI
- Temporary restraining orders - Philippines
- Constitutional & jurisdictional issues – NSM & Phil
- Rotation of judges – Thailand
- Corruption and inconsistencies - Indonesia

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Focus and implementation

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- Civil remedies and secured transactions
- Prevention of fraud and corporate governance
- Rescue models outstep practice and culture
- Inappropriate role of rescue laws as stick
- Implementation major problem

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Triggers and incentives

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- Insolvency laws alone inadequate
- Australian insolvent training and group tax
- Central Banks loan classification
- Triggers for sales – revaluation and provisioning

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Emergency measures

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- AMCs, rapid disposition agencies, RTC funds, CDRCs, SPAVs
- Limited lives – but remnants in culture
- New reckless lending – evidence of moral hazard
- Overliquidity – haircuts, the new dynamic
- Strong regulators – key to success

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The disposal culture

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- Focus on disposal rather than restructure
- Bad banks have not developed
- FRA - culture of bulk sale
- Short institutional memories

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Disguised moratorium

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- Fictional rescheduling, not real restructuring
- The disguised standstill
- Loose provisioning & classification will haunt
- Official NPL figures don't tell the true story

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Debtors vs. creditors

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- Happy restructurings
- Aggressive action limited
- Vexatious debtors – playing the man – 10 March
- The war is not over
- Misunderstood and undervalued advisors & foreigners

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Repeat workouts

OECD OCDE

- The job isn't over
- Restructurings will be repeated many times
- Plans are overly long term
- Should acknowledge uncertainty
- Not a failure, a natural function

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Diversified creditor structures

OECD OCDE

- AMCs, funds, vultures, traders etc.
- Each have own agenda at restructuring table
- Affect traditional approach
- Affect structuring of deals
- Only going to get more complex

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AMCs and SPAVs

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- Personal liability concerns as per state banks
- Best if recapitalisation separate
- Resources and procedures crucial
- Vehicles for investment in distressed assets
- Political advantage from institutions and committees

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Multilateral criteria

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- ADB, IMF, Group 30, UNCITRAL, INSOL, World Bank
- Best practice criteria shaping investment decisions
- Efficiency, uniformity and conditionality
- Role as market movers – collective AMC?
- The FAIR and FIRM

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International developments

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- European insolvency regulation
- UK Enterprise Act
- US Bankruptcy Act

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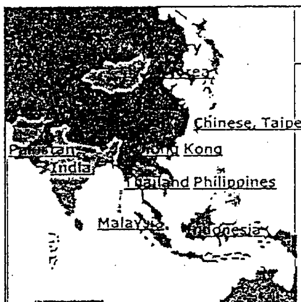

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India

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- Next NPL sale boom market
- Sick Industrial / Companies Act
- Eradi Committee – National Company Law Tribunal replacing Board for Industrial and Financial Reconstruction
- Asset reconstruction companies

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Pakistan

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- 1997 creditor friendly Recovery Act – 2001 amendment for mortgagee sales
- 1999 National Accountability Bureau – 30 day default and off to jail – inconsistent application
- 2000 CIRC, AMC and CIRSU committee
- Proposed Corporate Rehabilitation Ordinance – advisory committee, DIP entry, audited accounts, automatic conversion

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Thailand

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- Death of the Financial Sector Restructuring Authority (FRA) and Corporate Debt Restructuring Advisory Committee (CDRAC)
- Birth of the Thai Asset Management Corporation (TAMC)
- Proposals to amend the Bankruptcy Act
- Plight of planners and the TPI case

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Indonesia

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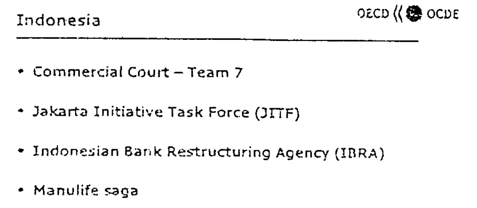

- Commercial Court – Team 7
- Jakarta Initiative Task Force (JITF)
- Indonesian Bank Restructuring Agency (IBRA)
- Manulife saga

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Philippines

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- 1981 - 2000 SEC sojourn
- Transfer of jurisdiction to courts
- Reality of distressed and acquired assets
- Proposed Corporate Recovery & Insolvency Act
- Corruption of Special Purpose Asset Vehicles proposals

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Chinese, Taipei

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- Bulk Sales of NPL portfolios
- Financial Institution Merger Law – bank mergers
- New Rehabilitation Law
- Taiwan Asset Management Company
- Financial Restructuring Fund – expanding role beyond insolvent banks

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China

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- 1986 Bankruptcy Act – SOEs – Liquidation Committee – more policy directed bankruptcy
- New Foreign Invested Enterprises – Enterprise Committee
- New Rehabilitation Law - Radical Changchun approach
- Four asset management companies – provincial barriers

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Hong Kong

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- No rehabilitation law
- Companies (Corporate Rescue) Bill – 30 day moratorium – provisional supervisor – employee priority – insolvent trading
- Back door listing industry
- Chinese window companies

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Korea

- Agreement for the Promotion of Corporate Workouts
- Korean Asset Management Corporation (KAMCO)
- New Corporate Restructuring Promotion Law (CRPL)
- CRVs and REITs
- New proposals for consolidated laws – individual rehabilitation and UNCITRAL

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Malaysia

- Bank Mergers – 10 anchor banks
- Turmoil facing receivers and banks – Kimlin Housing Development
- Secret to success of CDRC – August 2001 revamp
- Danaharta / Danamodal – Dato Azman

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In partnership with

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and

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THE SECOND FORUM FOR ASIAN INSOLVENCY REFORM (FAIR)

THE GLOBAL REFORM AGENDA:

WORLD BANK PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS

AND

GLOBAL FORUM FOR INSOLVENCY RISK MANAGEMENT

Bangkok, Thailand
Shangri-la Hotel
16-17 December 2002

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GLOBAL REFORM AGENDA: PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS AND FIRM[1]

INTRODUCTION

Over the past five years, since the financial crises in emerging markets in the late 90s, considerable progress has been made in identifying the components of the global financial system and in articulating and applying standards and assessment methodologies for core system elements. The Financial Stability Forum has identified reliable insolvency and creditor rights systems as one of twelve core areas integral to financial system stability in which standard assessments should be undertaken to promote compliance with international best practice.[2] The World Bank has taken the lead in collaboration with other partner institutions in developing a set of principles for this purpose and has been engaged in benchmarking domestic country systems around the globe, with a view to elevating awareness of best practice and promoting comprehensive system reforms in these areas.

Effective and reliable credit and corporate recovery systems are fundamentals for the sound functioning of domestic markets and for reducing the risks and costs of systemic instability. In view of the growing recognition of the importance of knowledge sharing, capacity building and international cooperation to accomplish the goals established by the Financial Stability Forum and other international bodies, the World Bank has been developing the Global Insolvency Law Database (GILD) and is now preparing to launch the Global Forum on Insolvency Risk Management (FIRM). While considerable progress has been made in raising awareness and embarking on legal and institutional reforms, the assessments conducted to date by the World Bank reveal that the challenge faced by domestic policy makers and the international community is immense.[3]

This paper offers a brief overview of initiatives undertaken by the World Bank in the area of insolvency and creditor rights reform. Section I discusses the role of insolvency and creditor rights systems. Section II discusses the process in developing the Principles and summarizes key features. Section III outlines the assessment methodology and some preliminary results from the Bank's pilot program of country assessments. Section IV discusses other efforts of the Bank to disseminate best

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[1] Sections I and II of this paper contain excerpts from The World Bank's report entitled *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, which are reprinted here by permission of The World Bank. The entire report can be accessed on The World Bank's website (www.worldbank.org/gild) or by contacting Mr. Johnson, Lead Counsel, Legal Department of the World Bank (gjohnson@worldbank.org). The policy report has now been translated into French, Spanish and Russian (in addition to English), which enables a more robust and informed dialogue on reforms with policy makers in countries where these languages are dominant.

[2] The twelve core areas in which standards assessments are now being undertaken by the World Bank (IBRD) and the IMF include: Market Infrastructure – Accounting & Auditing (IAS/ISA); Corporate Governance (OECD); Insolvency and Creditor Rights (IBRD); Financial Systems: Monetary and Financial Policy; Banking Supervision (BIS); Insurance Supervision (IAIS); Securities Regulation (IOSCO); Payment and Settlement Systems (CPSS); Transparency and Public Debt Management: Fiscal Transparency (BIS); Public Debt Management (IBRD/IMF); Data Dissemination (IMF); Market Integrity: Anti-Money Laundering (IBRD/IMF).

[3] Assessments undertaken (or in progress) include: Argentina, Bolivia, Brazil, Croatia, Czech Republic, Honduras, India, Kyrgyz Republic Lithuania, Mauritius, Morocco, Philippines, Russia, Slovak Republic, South Africa, Thailand, Turkey, Ukraine. Other assessments requested, planned or proposed in next six months include: Algeria, Egypt, Kenya, Mexico, Romania, Sri Lanka, and United Kingdom. In addition, the European Commission has launched a project on '*Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy*' to identify the issues with regard to business restructuring, bankruptcy and fresh start in the European Union, in which the World Bank *Principles* were used as a benchmarking exercise for all of the member countries of the European Union and the United States.

practice through its global database and the Global Forum on Insolvency Risk Management. The Annex to the paper contains the full Principles.

I. ROLE OF INSOLVENCY AND CREDITOR RIGHTS SYSTEMS

There are two dimensions to the global financial system. On the one hand, national financial systems operate autonomously and respond to domestic needs. On the other, national systems are tied to and interact daily with the systems of their trading partners. Insolvency and creditor rights systems lie at the juncture of this duality.

The country dimension. National systems depend on a range of structural, institutional, social and human foundations to make a modern market economy work. There are as many combinations of these variables as there are countries, though regional similarities have created common customs and legal traditions. The principles espoused in the report embody several underlying propositions:

- *Effective systems respond to national needs and problems.* As such, these systems must be rooted in the country's broader cultural, economic, legal and social context.
- *Transparency, accountability and predictability are fundamental to sound credit relationships.* Capital and credit, in their myriad forms, are the lifeblood of modern commerce. Investment and availability of credit are predicated on both perceptions and the reality of risks. Competition in credit delivery is handicapped by lack of access to accurate information on credit risk and by unpredictable legal mechanisms for debt enforcement.
- *Legal and institutional mechanisms must align incentives and disincentives across a broad spectrum of market-based systems—commercial, corporate, financial and social.* This calls for an integrated approach to reform, taking into account a wide range of laws and policies in the design of insolvency and creditor rights systems.

The international dimension. New methods of commerce, communication and technology are constantly reshaping national markets and redefining notions of property rights. Businesses routinely transcend national boundaries and have access to new types of credit. Credit and investment risks are measured by complex formulas, and capital moves from one market to the next at the tap of a computer key. Capital flows are driven by public perceptions and investor confidence in local markets. Effective insolvency and creditor rights systems play an important role in creating and maintaining the confidence of both domestic and foreign investors.

II. THE PRINCIPLES

The *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* contributes to the effort to strengthen global financial stability by establishing a uniform framework to assess the effectiveness of insolvency and creditor rights systems, offering guidance to policymakers on the policy choices needed to strengthen them. The principles in *Principles and Guidelines* are the product of a broad international collaboration and were developed against the backdrop of earlier and ongoing initiatives to promote cross-border cooperation on multi-jurisdictional insolvencies, modernization of national insolvency and secured transactions laws, and development of principles for out-of-court corporate workouts. The principles draw on common themes and policy choices of those initiatives and on the views of staff, insolvency experts and participants in regional workshops sponsored by the Bank and its partner organizations.[4]

The consultative process on the *Principles and Guidelines* has been among the most extensive of its kind, involving more than 70 international experts as members of the Bank's Task Force and

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[4] The *Principles and Guidelines* was prepared by Bank staff in collaboration with the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Finance Corporation, International Monetary Fund, Organisation for Economic Co-operation and Development, United Nations Commission on International Trade Law, INSOL International, and International Bar Association (Committee J).

working groups, and with regional participation by more than 700 public and private sector specialists from approximately 75 mostly developing countries. Papers and consultative drafts from the initiative were placed on the Bank's website to obtain feedback from the international community.[5]

The Principles *and Guidelines* emphasize contextual, integrated solutions and the policy choices involved in developing those solutions.[6] The principles are a distillation of international best practice in the design of insolvency and creditor rights systems. Adapting international best practices to the realities of developing countries, however, requires an understanding of the market environments in which these systems operate. The challenges include weak or unclear social protection mechanisms, weak financial institutions and capital markets, ineffective corporate governance and uncompetitive businesses, and ineffective laws and institutions. These obstacles pose enormous challenges to the adoption of systems that address the needs of developing countries while keeping pace with global trends and international best practices. The application of the principles in this paper at the country level will be influenced by domestic policy choices and by the comparative strengths (or weaknesses) of laws and institutions.

The *Principles and Guidelines* builds on a simple premise that sustainable market development relies on access to affordable credit and capital investment. The principles themselves build on this premise by articulating core elements and features of the systems that underpin credit access and enable parties to enforce their rights and manage the downside risk credit and investment relationships. The initial chapters of the report emphasize the relationship between the cost and flow of credit (including secured credit) and the laws and institutions that recognize and enforce credit agreements. Subsequent chapters focus on key features and policy choices relating to the legal framework for corporate insolvency and the informal framework for consensual debt workouts, which must be implemented within sound institutional and regulatory frameworks.

The principles have broader application beyond creditor rights and corporate insolvency regimes, as well. The ability of financial institutions to adopt effective credit practices to resolve or liquidate non-performing loans depends on having reliable and predictable legal mechanisms that provide a means for more accurately pricing recovery and enforcement costs. Where non-performing assets or other factors jeopardize the viability of a bank, or where economic conditions create systemic crises, these conditions raise issues that deserve special consideration. Annexes I and II to the *Principles and Guidelines* report discuss issues relevant to bank exit and restructuring strategies and management of systemic financial crises, areas in which the Bank will continue to collaborate with the Fund and the international community to develop principles.

Following is brief summary of the key elements of the *Principles and Guidelines*:

Role of enforcement systems. A modern, credit-based economy requires predictable, transparent and affordable enforcement of both unsecured and secured credit claims by efficient mechanisms outside of insolvency, as well as a sound insolvency system. These systems must be designed to work in harmony. Commerce is a system of commercial relationships predicated on express or implied contractual agreements between an enterprise and a wide range of creditors and constituencies. Although commercial transactions have become increasingly complex as more sophisticated techniques are developed for pricing and managing risks, the basic rights governing these relationships and the procedures for enforcing these rights have not changed much. These rights enable parties to rely on contractual agreements, fostering confidence that fuels investment, lending and commerce. Conversely, uncertainty about the enforceability of contractual rights increases the

[5] The papers can be accessed in the Best Practice directory on the Global Insolvency Law Database at www.worldbank.org/gild.

[6] Effective systems rest on details as well as broad principles. The Bank is preparing a companion technical paper with more detailed guidelines on aspects of this paper. Other organizations, specifically UNCITRAL (in collaboration with INSOL International and Committee J of the International Bar Association), are also developing guidelines to help legislators design effective insolvency laws.

cost of credit to compensate for the increased risk of nonperformance or, in severe cases, leads to credit tightening.

Legal framework for creditor rights. A regularized system of credit should be supported by mechanisms that provide efficient, transparent and reliable methods for recovering debt, including seizure and sale of immovable and movable assets and sale or collection of intangible assets, such as debt owed to the debtor by third parties. An efficient system for enforcing debt claims is crucial to a functioning credit system, especially for unsecured credit. A creditor's ability to take possession of a debtor's property and to sell it to satisfy the debt is the simplest, most effective means of ensuring prompt payment. It is far more effective than the threat of an insolvency proceeding, which often requires a level of proof and a prospect of procedural delay that in all but extreme cases make it not credible to debtors as leverage for payment.

While much credit is unsecured and requires an effective enforcement system, an effective system for secured rights is especially important in developing countries. Secured credit plays an important role in industrial countries, notwithstanding the range of sources and types of financing available through both debt and equity markets. In some cases equity markets can provide cheaper and more attractive financing. But developing countries offer fewer options, and equity markets are typically less mature than debt markets. As a result most financing is in the form of debt. In markets with fewer options and higher risks, lenders routinely require security to reduce the risk of nonperformance and insolvency.

Legal framework *for secured lending.* The legal framework should provide for the creation, recognition and enforcement of security interests in all types of assets—movable and immovable, tangible and intangible, including inventories, receivables, proceeds and future property, and on a global basis, including both possessory and non-possessory interests. The law should encompass any or all of a debtor's obligations to a creditor, present or future and between all types of persons. In addition, it should provide for effective notice and registration rules to be adapted to all types of property, and clear rules of priority on competing claims or interests in the same assets.

Legal framework *for corporate insolvency.* Though approaches vary, effective insolvency systems should aim to:

- Integrate with a country's broader legal and commercial systems.
- Maximize the value of a firm's assets by providing an option to reorganize.
- Strike a careful balance between liquidation and reorganization.
- Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors.
- Provide for timely, efficient and impartial resolution of insolvencies.
- Prevent the premature dismemberment of the debtor's assets by individual creditors.
- Provide a transparent procedure that contains incentives for gathering and dispensing information.
- Recognize existing creditor rights and respect the priority of claims with a predictable and established process.
- Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation. The rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the enterprise, potentially produces a return for owners and obtains for the country the fruits of the rehabilitated enterprise. The rescue of a business should be promoted through formal and informal procedures. Rehabilitation should permit quick and easy access to the process, protect all those involved, permit the negotiation of a commercial plan, enable a majority of creditors in favor of a plan or other course of action to bind

all other creditors (subject to appropriate protections) and provide for supervision to ensure that the process is not subject to abuse. Modern rescue procedures typically address a wide range of commercial expectations in dynamic markets. Though such laws may not be susceptible to precise formulas, modern systems generally rely on design features to achieve the objectives outlined above.

Framework for informal corporate workouts. Corporate workouts should be supported by an environment that encourages participants to restore an enterprise to financial viability. Informal workouts are negotiated in the "shadow of the law." Accordingly, the enabling environment must include clear laws and procedures that require disclosure of or access to timely and accurate financial information on the distressed enterprise; encourage lending to, investment in or recapitalization of viable distressed enterprises; support a broad range of restructuring activities, such as debt write-offs, reschedulings, restructurings and debt-equity conversions; and provide favorable or neutral tax treatment for restructurings.

A country's financial sector (possibly with help from the central bank or finance ministry) should promote an informal out-of-court process for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure—especially in markets where enterprise insolvency is systemic. An informal process is far more likely to be sustained where there are adequate creditor remedies and insolvency laws.

Implementation of the insolvency system. Strong institutions and regulations are crucial to an effective insolvency system. The insolvency framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions—recognizing that the integrity of the insolvency system is the linchpin for its success. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.

Ongoing work. Substantial progress has been made in identifying links between the corporate insolvency and creditor rights systems and bank insolvency (and restructuring) and financial crisis, and the policy issues affecting the treatment of the later. The World Bank in collaboration with the International Monetary Fund, and the Bank for International Settlements (Financial Stability Institute), together with a core consultative group of experts, is developing a set of principles on the insolvency of financial institutions, expected to be completed toward the end of 2003. Similar to the process on corporate insolvency systems, the work to develop principles on bank and systemic insolvency is being vetted in a series of regional workshops in which relevant public and private sector specialists from developed and developing countries are invited.

III. Assessment Methodology and Pilot Program Results

Under the aegis of the International Financial Architecture program, the World Bank has launched a series of assessments based on the Principles and Guidelines in connection a joint initiative between the Bank and the IMF to develop Reports on the Observance of Standards and Codes (ROSC). To date, the Bank has launched ROSC assessments in nearly 20 countries, with another 6-7 planned by June 2003 of which half are complete or near completion.

Methodology for Assessments. Divided into four parts, the ROSC report describes the findings and conclusions of the assessment: (i) executive summary and introduction, (ii) description of country practice in four areas (legal framework for creditor rights and enforcement, legal framework for corporate insolvency, regulatory framework, and credit risk management and corporate workouts), (iii) summary of assessment findings and conclusions, and (iv) policy recommendations. A matrix assessing the degree of compliance with each of the 35 World Bank Principles is provided as an annex to the report, together with additional annexes that are useful in elaborating procedures for dialogue. In cases where pending legislation has been prepared, an annex is included assessing the proposed legislation against the World Bank Principles in the "legal framework" section, Principles 6-24.

The Principle-by-Principle assessment contains a detailed evaluation of the compliance with each World Bank Principle based on quantitative and qualitative standards. "Observed" means that all essential criteria are generally met without any significant deficiencies. "Largely observed" means that only minor shortcomings are observed, which do not raise any questions about the authorities' ability and intent to achieve full observance within a prescribed period of time. "Materially non-observed" means that, despite progress, the shortcomings are sufficient to raise doubts about the authorities' ability to achieve observance. "Non-observed" means that no substantive progress toward observance has been achieved. In each case where a Principle carries less than an "Observed" rating, the assessment provides a justification for the rating, indicating the areas in which compliance has not been achieved. The Principle-by-Principle assessment also contains policy recommendations and alternatives for achieving compliance. Sometimes the recommendations include the modification of existing laws or rules or the adoption of new ones. Policy recommendations are construed as interdependent measures, as often the improvement in one area will not be sufficient to promote an overall strengthening of the legal and regulatory framework.

Pilot Program Results. The pilot program for ROSC assessments included geographically and economically diverse countries, with emphasis on countries where insolvency reforms have been made a priority or were deemed integral to the World Bank operational program or Economic Sector work. In addition, in some cases, countries were selected to integrate the ROSC exercise with the broader needs of the Financial Sector Assessment program needs for a country. In a few cases, the ROSC was used as a means for developing an assistance strategy in connection with current structural adjustment or operational programs of the Bank (Argentina, Brazil, Slovakia, Turkey). In nearly half of the pilot program countries, assessment follow-up has led to or been linked with technical assistance programs to promote legal and regulatory reforms on insolvency and creditor rights systems (Argentina, Brazil, Czech Republic, Lithuania, Slovakia, Turkey). In a few other countries, insolvency reforms were underway and the ROSC was instrumental in providing inputs and feedback to the government on legislative proposals (Philippines and Russia). Independent of the full scale ROSC, some countries have requested an independent review of their legislation using the *Principles* to measure compliance with best practice (Croatia, Kosovo, Poland, Serbia)

The ROSC assessment was linked with the broader Financial Sector Assessment Program in at least six (6) countries, mainly in Europe and Central Asia (Croatia, Czech Republic, Lithuania, Russia, Slovakia, and Ukraine). In each of these countries, the more detailed ROSC was requested due to the central nature and ongoing importance of insolvency and enterprise restructuring issues in these countries. In certain of these countries, the ROSC was intended to promote preparations for accession candidate countries to the European Union, and has been backed or supported by complementing efforts of the EU PHARE project. In several other countries, the preliminary conclusions were used to support Financial Sector Assessments conducted subsequently or independent of the ROSC (Brazil, Mauritius and Philippines).

The Philippines assessment was undertaken in collaboration with the Asian Development Bank and designed to complement ROSCs on accounting and auditing and corporate governance. South Africa was the first country to be assessed simultaneously by the three World Bank-led ROSC modules: Accounting/auditing, corporate governance, and insolvency/creditor rights. In this regard, recent high profile bankruptcies have highlighted the important linkages between the three market infrastructure assessments.

Follow-up and applications. The insolvency and creditor rights assessments have a number of applications for International Financial Institutions, policy makers and the private sector. They support diagnostic and strategic work, underpin policy dialogue and lending operations, and provide input to technical assistance and capacity building efforts. These assessments can be seen as building blocks for diagnostic work, such as investment climate assessments, where creditor rights and enforcement systems are viewed as pivotal to assessing non-performance and regulatory risks for lending and investment. They also provide useful inputs into key policy documents, such as sectoral strategies for the private and financial sectors or country wide development strategies. The strength of the insolvency and creditor rights assessment lies in the systematic standardized coverage and ability

to benchmark against an internationally recognized standard. As such, the ROSC provides an easy guide to policy dialogue and reform.

In addition to their diagnostic and strategic value, insolvency and creditor rights assessments are valuable inputs into structural adjustment and programmatic lending operations. In the World Bank, for example, the country program cycle has become the most important business model. Programmatic adjustment lending has been found to be a cost-effective vehicle for supporting the Bank's policy dialogue with its clients on the social and structural agenda and for partnering with other agencies. The country has replaced the project as the critical focus of implementation. An example of the importance of the insolvency and creditor rights assessment in lending operations can be seen from the strategic and central role that the assessment has served in Turkey, where it forms a cornerstone for the real sector strategy on enterprise restructuring and distressed asset resolution. Similarly, in Argentina, it has been viewed as one of the linchpins to developing a corporate sector strategy to promote debt resolution and enterprise restructuring.

Insolvency and creditor rights assessments also identify technical assistance and capacity building needs, which can be financed through operations from International Financial Institutions, bilaterals or the private sector. As indicated above, follow-up technical assistance is being provided by the Bank in at least six countries (Argentina, Brazil, Czech Republic, Lithuania, Slovakia, Turkey). In Argentina and Turkey, accelerated reforms are underway to assist with the implementation of corporate workout programs to assist with debt resolution and enterprise restructuring in the midst of financial crises. In the other countries, the assistance ranges from advice on modernizing the insolvency legislation (Brazil, Czech Republic, Slovakia) to implementation and institutional capacity building measures (Lithuania and Slovakia). In the case of Slovakia, the assistance is further supported by an Institutional Development Framework grant aimed at strengthening the institutional and regulatory framework for insolvency, while in Croatia the Bank has extended a substantial Learning Innovation Loan to strengthen the bankruptcy and commercial courts. The insolvency and creditor rights assessment is uniquely suited as a tool for promoting assistance through the Institutional Development Framework grant program, given its particular focus on strengthening institutional capacity and reinforcing the regulatory frameworks to promote integrity in the system.

IV. Public and Private Sector Partnerships: GILD and FIRM

Global Insolvency Law Database (GILD). GILD is a multi-partnership effort between the World Bank and numerous outside organizations, associations, professional firms, and individuals designed to promote awareness of best practice, foster knowledge sharing and learning, and help build capacity by providing access to resources and research. It offers legislators and policy makers on-line access to a wide range of information and data on the world's insolvency laws and systems and provides the international community a forum for research, dialogue and transparency in the fields of insolvency and debtor-creditor systems. One objective of the GILD is to help bridge the gap in institutional capacity that exists in many developing and emerging economies, by providing a broad base of fundamental training and other materials for local officials, judges and professionals. By partnering with local professional associations, the GILD also hopes to promote growth among the domestic practitioner and bar associations.

The primary directories in the GILD include Best Practice, Countries, International, and a Training Center. The GILD aspires to cover insolvency systems for as many jurisdictions as possible, while tracking developments on leading international initiatives, cases and other matters of significance in the cross-border context. In addition, there are the usual features that provide useful information and access to links of other organizations relating to insolvency, and tracking of key developments, conferences and workshops. With the breadth and scope of the contents, the GILD should serve as a seminal resource and research tool for government officials, practitioners, and the international business community. With access to the most current and extensive resources, tools and information in this field, the GILD is expected to enhance international awareness of and the benchmarking of systems against international best practice, which should encourage better informed policy setting and law development reform practices in this area. In this respect, the GILD provides a

critical interface with the World Bank's other insolvency project on *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. Assessments conducted under the ROSC program are expected be made publicly available on the Bank's web site and possibly on the GILD to promote system transparency.

The GILD will contain a growing collection of relevant information on domestic and international insolvency law. On the domestic side, each country site will provide an overview of the domestic insolvency process on a range of themes following a uniform template for all countries. The template is designed to promote internal and comparative search capabilities by words, phrases, keywords, topic, numbers and eventually concepts. The legal overviews are supplemented by legislation in electronic format (insolvency and relevant excerpts of statutes governing creditor rights), and to the extent available, bankruptcy rules, official forms and examples of significant pleadings (e.g., plan of reorganization, or a composition or scheme or arrangement), articles for additional reading and relevant links. The international content will contain international treaties, conventions, model laws and other materials relevant to the cross-border and international dimensions of insolvency. The GILD will also feature an ever growing library of information on a range of insolvency-related subjects. Finally, the GILD eventually hopes to maintain one of the largest media-based training centers for use in long distance learning for developing countries and the international community.

Global Forum on Insolvency Risk Management. FIRM is expected to take international collaboration and cooperation on insolvency and commercial reform to the next level. As part of the longer term strategy carrying forward the work in this area, the Bank is exploring the feasibility of establishing the Global Forum or FIRM as an independent trust to raise donor funding for use in promoting global awareness, reform assistance and capacity building. As an independent trust, the FIRM would be guided by an independent Board and funding.

FIRM would serve as a global think tank whose business strategy would be shaped largely by an international alliance of the leading developmental and standard setting institutions, in strategic partnership with the private sector and non-governmental organizations. The purpose of the Forum is to promote global, regional and local initiatives that aim at improving the legal, institutional and regulatory frameworks and practices relative to investment climates, creditor rights and insolvency systems. FIRM would contribute to the efforts of the international community to promote the private sector as an engine of growth, reduce the vulnerability of developing and transition economies to financial crises, and provide incentives for investment and lending by improving the systems that impact commercial confidence, investment and lending and that assure efficient and effective debt recovery and resolution mechanisms. It fosters partnerships with the programs of other relevant institutions and plays a coordinating role among donors and other relevant institutions. FIRM would also seek to address investment climate and debt recovery weaknesses of middle income and low income countries in the context of broader national or regional economic reform programs, which it seeks to complement and enhance. Thus, the Global Forum's activities would promote sustainable economic growth and poverty reduction within the framework of agreed international development targets.

The main pillars for carrying out the objectives of FIRM would include: 1) dissemination of best practice through annual regional roundtable discussions, like FAIR, that the Global Forum would support or sponsor in each of five major geographic regions; 2) helping to build-out and maintain the GILD; 3) providing follow-up technical assistance for policy reform related to legal, institutional and regulatory changes; and 4) sponsoring innovative and cutting edge research and training programs.

The Bank is planning to host the first of its Global Forum's on January 28-29, 2003, in Washington DC to take stock of the Experience in the ROSC program, update world developments, and develop strategies for the next decade. This will be followed by a regional roundtable meeting in Latin America in April, and a Global Judges Forum to take place on May 19-23, 2003 in Malibu, California. For information on any of these programs and efforts, contact the author (gjohnson@worldbank.org).

Annex

(The Principles)

	LEGAL FRAMEWORK FOR CREDITOR RIGHTS
Principle 1	**Compatible Enforcement Systems** *A modern credit-based economy requires predictable, transparent and affordable enforcement of both unsecured and secured credit claims by efficient mechanisms outside of insolvency, as well as a sound insolvency system. These systems must be designed to work in harmony.*
Principle 2	**Enforcement of Unsecured Rights** *A regularized system of credit should be supported by mechanisms that provide efficient, transparent, reliable and predictable methods for recovering debt, including seizure and sale of immovable and movable assets and sale or collection of intangible assets such as debts owed to the debtor by third parties.*
Principle 3	**Security Interest Legislation** *The legal framework should provide for the creation, recognition, and enforcement of security interests in movable and immovable (real) property, arising by agreement or operation of law. The law should provide for the following features:* ▪ *Security interests in all types of assets, movable and immovable, tangible and intangible, including inventory, receivables, and proceeds; future or after-acquired property, and on a global basis; and based on both possessory and non-possessory interests;* ▪ *Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons;* ▪ *Methods of notice that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost;* ▪ *Clear rules of priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible.*
Principle 4	**Recording and Registration of Secured Rights** *There should be an efficient and cost-effective means of publicizing secured interests in movable and immovable assets, with registration being the principal and strongly preferred method. Access to the registry should be inexpensive and open to all for both recording and search.*
Principle 5	**Enforcement of Secured Rights** *Enforcement systems should provide efficient, inexpensive, transparent and predictable methods for enforcing a security interest in property. Enforcement procedures should provide for prompt realization of the rights obtained in secured assets, ensuring the maximum possible recovery of asset values based on market values. Both nonjudicial and judicial enforcement methods should be considered*
	LEGAL FRAMEWORK FOR CORPORATE INSOLVENCY
Principle 6	**Key Objectives and Policies** *Though country approaches vary, effective insolvency systems should aim to:* • *Integrate with a country's broader legal and commercial systems.* • *Maximize the value of a firm's assets by providing an option to reorganize.* • *Strike a careful balance between liquidation and reorganization.* • *Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors.* • *Provide for timely, efficient and impartial resolution of insolvencies.* • *Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments.* • *Provide a transparent procedure that contains incentives for gathering and dispensing information.* • *Recognize existing creditor rights and respect the priority of claims with a predictable and established process.* • *Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.*

Principle 7	**Director and Officer Liability** *Director and officer liability for decisions detrimental to creditors made when an enterprise is insolvent should promote responsible corporate behavior while fostering reasonable risk taking. At a minimum, standards should address conduct based on knowledge of or reckless disregard for the adverse consequences to creditors.*
Principle 8	**Liquidation and Rehabilitation** *An insolvency law should provide both for efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors, and for rehabilitation of viable businesses. Where circumstances justify it, the system should allow for easy conversion of proceedings from one procedure to another.*
Principle 9	**Commencement: Applicability and Accessibility** *A. The insolvency process should apply to all enterprises or corporate entities except financial institutions and insurance corporations, which should be dealt with through a separate law or through special provisions in the insolvency law. State-owned corporations should be subject to the same insolvency law as private corporations.* *B. Debtors should have easy access to the insolvency system upon showing proof of basic criteria (insolvency or financial difficulty). A declaration to that effect may be provided by the debtor through its board of directors or management. Creditor access should be conditioned on showing proof of insolvency by presumption where there is clear evidence that the debtor failed to pay a matured debt (perhaps of a minimum amount).* *C. The preferred test for insolvency should be the debtor's inability to pay debts as they come due—known as the liquidity test. A balance sheet test may be used as an alternative secondary test, but should not replace the liquidity test. The filing of an application to commence a proceeding should automatically prohibit the debtor's transfer, sale or disposition of assets or parts of the business without court approval, except to the extent necessary to operate the business.*
Principle 10	**Commencement: Moratoriums and Suspension of Proceedings** *A. The commencement of bankruptcy should prohibit the unauthorized disposition of the debtor's assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets. The injunctive relief (stay) should be as wide and all embracing as possible, extending to an interest in property used, occupied or in the possession of the debtor.* *B. To maximize the value of asset recoveries, a stay on enforcement actions by secured creditors should be imposed for a limited period in a liquidation proceeding to enable higher recovery of assets by sale of the entire business or its productive units, and in a rehabilitation proceeding where the collateral is needed for the rehabilitation.*
Principle 11	**Governance: Management** *A. In liquidation proceedings, management should be replaced by a qualified court-appointed official (administrator) with broad authority to administer the estate in the interest of creditors. Control of the estate should be surrendered immediately to the administrator except where management has been authorized to retain control over the company, in which case the law should impose the same duties on management as on the administrator. In creditor-initiated filings, where circumstances warrant, an interim administrator with reduced duties should be appointed to monitor the business to ensure that creditor interests are protected.* *B. There are two preferred approaches in a rehabilitation proceeding: exclusive control of the proceeding by an independent administrator or supervision of management by an impartial and independent administrator or supervisor. Under the second option complete power should be shifted to the administrator if management proves incompetent or negligent or has engaged in fraud or other misbehavior. Similarly, independent administrators or supervisors should be held to the same standard of accountability to creditors and the court and should be subject to removal for incompetence, negligence, fraud or other wrongful conduct.*

Principle 12	**Governance: Creditors and the Creditors' Committee** *Creditor interests should be safeguarded by establishing a creditors committee that enables creditors to actively participate in the insolvency process and that allows the committee to monitor the process to ensure fairness and integrity. The committee should be consulted on non-routine matters in the case and have the ability to be heard on key decisions in the proceedings (such as matters involving dispositions of assets outside the normal course of business). The committee should serve as a conduit for processing and distributing relevant information to other creditors and for organizing creditors to decide on critical issues The law should provide for such things as a general creditors assembly for major decisions, to appoint the creditors committee and to determine the committee's membership, quorum and voting rules, powers and the conduct of meetings. In rehabilitation proceedings, the creditors should be entitled to select an independent administrator or supervisor of their choice, provided the person meets the qualifications for serving in this capacity in the specific case.*
Principle 13	**Administration: Collection, Preservation, Disposition of Property** *The law should provide for the collection, preservation and disposition of all property belonging to the debtor, including property obtained after the commencement of the case. Immediate steps should be taken or allowed to preserve and protect the debtor's assets and business. The law should provide a flexible and transparent system for disposing of assets efficiently and at maximum values. Where necessary, the law should allow for sales free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed.*
Principle 14	**Administration: Treatment of Contractual Obligations** *The law should allow for interference with contractual obligations that are not fully performed to the extent necessary to achieve the objectives of the insolvency process, whether to enforce, cancel or assign contracts, except where there is a compelling commercial, public or social interest in upholding the contractual rights of the counter-party to the contract (as with swap agreements)*
Principle 15	**Administration: Fraudulent or Preferential Transactions** *The law should provide for the avoidance or cancellation of pre-bankruptcy fraudulent and preferential transactions completed when the enterprise was insolvent or that resulted in its insolvency. The suspect period prior to bankruptcy, during which payments are presumed to be preferential and may be set aside, should normally be short to avoid disrupting normal commercial and credit relations. The suspect period may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners.*
Principle 16	**Claims Resolution: Treatment of Stakeholder Rights and Priorities** *A. The rights and priorities of creditors established prior to insolvency under commercial laws should be upheld in an insolvency case to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy supporting rehabilitation or to maximize the estate's value. Rules of priority should support incentives for creditors to manage credit efficiently.* *B. The bankruptcy law should recognize the priority of secured creditors in their collateral. Where the rights of secured creditors are impaired to promote a legitimate bankruptcy policy, the interests of these creditors in their collateral should be protected to avoid a loss or deterioration in the economic value of their interest at the commencement of the case. Distributions to secured creditors from the proceeds of their collateral should be made as promptly as possible after realization of proceeds from the sale. In cases where the stay applies to secured creditors, it should be of limited specified duration, strike a proper balance between creditor protection and insolvency objectives, and provide for the possibility of orders being made on the application of affected creditors or other persons for relief from the stay.* *C. Following distributions to secured creditors and payment of claims related to costs and expenses of administration, proceeds available for distribution should be distributed pari passu to remaining creditors unless there are compelling reasons to justify giving preferential status to a particular debt. Public interests generally should not be given precedence over private rights The number of priority classes should be kept to a minimum.*

	FEATURES PERTAINING TO CORPORATE REHABILITATION
Principle 17	**Design Features of Rehabilitation Statutes** *To be commercially and economically effective, the law should establish rehabilitation procedures that permit quick and easy access to the process, provide sufficient protection for all those involved in the process, provide a structure that permits the negotiation of a commercial plan, enable a majority of creditors in favor of a plan or other course of action to bind all other creditors by the democratic exercise of voting rights (subject to appropriate minority protections and the protection of class rights) and provide for judicial or other supervision to ensure that the process is not subject to manipulation or abuse.*
Principle 18	**Administration: Stabilizing and Sustaining Business Operations** *The law should provide for a commercially sound form of priority funding for the ongoing and urgent business needs of a debtor during the rescue process, subject to appropriate safeguards.*
Principle 19	**Information: Access and Disclosure** *The law should require the provision of relevant information on the debtor. It should also provide for independent comment on and analysis of that information. Directors of a debtor corporation should be required to attend meetings of creditors. Provision should be made for the possible examination of directors and other persons with knowledge of the debtor's affairs, who may be compelled to give information to the court and administrator..*
Principle 20	**Plan: Formulation, Consideration and Voting** *The law should not prescribe the nature of a plan except in terms of fundamental requirements and to prevent commercial abuse. The law may provide for classes of creditors for voting purposes. Voting rights should be determined by amount of debt. An appropriate majority of creditors should be required to approve a plan. Special provision should be made to limit the voting rights of insiders. The effect of a majority vote should be to bind all creditors.*
Principle 21	**Plan: Approval of Plan** *The law should establish clear criteria for plan approval based on fairness to similar creditors, recognition of relative priorities and majority acceptance. The law should also provide for approval over the rejection of minority creditors if the plan complies with rules of fairness and offers the opposing creditors or classes an amount equal to or greater than would be received under a liquidation proceeding. Some provision for possible adjournment of a plan decision meeting should be made, but under strict time limits. If a plan is not approved, the debtor should automatically be liquidated.*
Principle 22	**Plan: Implementation and Amendment** *The law should provide a means for monitoring effective implementation of the plan, requiring the debtor to make periodic reports to the court on the status of implementation and progress during the plan period. A plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors. The law should provide for the possible termination of a plan and for the debtor to be liquidated.*
Principle 23	**Discharge and Binding Effects** *To ensure that the rehabilitated enterprise has the best chance of succeeding, the law should provide for a discharge or alteration of debts and claims that have been discharged or otherwise altered under the plan. Where approval of the plan has been procured by fraud, the plan should be subject to challenge, reconsidered or set aside.*
Principle 24	**International Considerations** *Insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, cooperation and assistance among courts in different countries, and choice of law.*

INFORMAL CORPORATE WORKOUTS AND RESTRUCTURINGS	
Principle 25	**Enabling Legislative Framework** *Corporate workouts and restructurings should be supported by an enabling environment that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An enabling environment includes laws and procedures that require disclosure of or ensure access to timely, reliable and accurate financial information on the distressed enterprise; encourage lending to, investment in or recapitalization of viable financially distressed enterprises; support a broad range of restructuring activities, such as debt writeoffs, reschedulings, restructurings and debt- equity conversions; and provide favorable or neutral tax treatment for restructurings.*
Principle 26	**Informal Workout Procedures** *A country's financial sector (possibly with the informal endorsement and assistance of the central bank or finance ministry) should promote the development of a code of conduct on an informal out-of-court process for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure—especially in markets where enterprise insolvency has reached systemic levels. An informal process is far more likely to be sustained where there are adequate creditor remedy and insolvency laws. The informal process may produce a formal rescue, which should be able to quickly process a packaged plan produced by the informal process. The formal process may work better if it enables creditors and debtors to use informal techniques.*
IMPLEMENTATION OF THE INSOLVENCY SYSTEM	
Principle 27	**Role of Courts** *Bankruptcy cases should be overseen and disposed of by an independent court or competent authority and assigned, where practical, to judges with specialized bankruptcy expertise. Significant benefits can be gained by creating specialized bankruptcy courts.* *The law should provide for a court or other tribunal to have a general, non-intrusive, supervisory role in the rehabilitation process. The court/tribunal or regulatory authority should be obliged to accept the decision reached by the creditors that a plan be approved or that the debtor be liquidated.*
Principle 28	**Performance Standards of the Court, Qualification and Training of Judges** *Standards should be adopted to measure the competence, performance and services of a bankruptcy court. These standards should serve as a basis for evaluating and improving courts. They should be enforced by adequate qualification criteria as well as training and continuing education for judges.*
Principle 29	**Court Organization** *The court should be organized so that all interested parties—including the administrator, the debtor and all creditors—are dealt with fairly, objectively and transparently. To the extent possible, publicly available court operating rules, case practice and case management regulations should govern the court and other participants in the process. The court's internal operations should allocate responsibility and authority to maximize resource use. To the degree feasible the court should institutionalize, streamline and standardize court practices and procedures.*
Principle 30	**Transparency and Accountability** *An insolvency systems should be based on transparency and accountability. Rules should ensure ready access to court records, court hearings, debtor and financial data and other public information.*
Principle 31	**Judicial Decision making and Enforcement** *Judicial decision making should encourage consensual resolution among parties where possible and otherwise undertake timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law. The court must have clear authority and effective methods of enforcing its judgments.*
Principle 32	**Integrity of the Court** *Court operations and decisions should be based on firm rules and regulations to avoid corruption and undue influence. The court must be free of conflicts of interest, bias and lapses in judicial ethics, objectivity and impartiality.*

Principle 33	**Integrity of Participants** *Persons involved in a bankruptcy proceeding must be subject to rules and court orders designed to prevent fraud, other illegal activity or abuse of the bankruptcy system. In addition, the bankruptcy court must be vested with appropriate powers to deal with illegal activity or abusive conduct that does not constitute criminal activity.*
Principle 34	**Role of Regulatory or Supervisory Bodies** *The body or bodies responsible for regulating or supervising insolvency administrators should be independent of individual administrators and should set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability.*
Principle 35	**Competence and Integrity of Insolvency Administrators** *Insolvency administrators should be competent to exercise the powers given to them and should act with integrity, impartiality and independence.*

附件四

The Second Forum for Asian Insolvency Reform (FAIR)

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In partnership with

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CROSS-BORDER INSOLVENCY AND INFORMAL WORKOUTS: A VIEW FROM CHINESE TAIPEI

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CROSS-BORDER INSOLVENCY AND INFORMAL WORKOUTS: A LOOK AT CHINESE TAIPEI

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I. Introduction

For good reasons, Chinese Taipei has an archaic insolvency regime, which is being revamped. A short explanation for this phenomenon is that insolvency system was not necessary during high economic growth period, when the policy pattern was encouraging export by small and medium-sized enterprises. But Chinese Taipei has to globalize, it has opened up and diversified the domestic market, and both industrial upgrading and financial reform policies demand more national investment in insolvency reform.

Antiquity and Rigidity

Antiquity and rigidity of the insolvency regime in Chinese Taipei come in several forms. First, insolvency matters are treated as "non-litigious matters", that is, matters that would not involve lawsuits and disputes. This cannot be farther from truth and reality: all practitioners and economists understand the high stakes involved in insolvency proceedings, and the human instinct to dodge and play mischief. But this is not how Chinese Taipei received its insolvency law as part of the Civil Law transplant that began at the turn of the last century in China proper.

Second, the system has suffered from "code fragmentation". There has not been a unified code of insolvency laws. For example, the Company Law enforced and maintained by the Ministry of Economic Affairs contains a chapter on corporate reorganizations. But only public reporting companies (including listed companies) are entitled and subject to its application. Not even their subsidiaries can be included (although in informal workouts, practitioners can deal with this constraint through private negotiations).

The Bankruptcy Code, on the other hand, is a separate code in Chinese Taipei, and is maintained by the Judicial Yuan, its judiciary. In other words, liquidation and composition proceedings are governed by a statute separate from the corporate reorganization proceedings.

Third, the government has heavily controlled the banking sector until the early 1990s. Conservatism had led to asset-based lending without much emphasis on understanding the firm value and risks (including insolvency risks and costs).

Fourth, there is no special bankruptcy court. Judges are not well trained. Nor were they expected under the "non-litigious matter" mode to be fully educated in matters

involving industry and finance so as to intelligently rule on important bankruptcy cases. In addition, courts in Chinese Taipei are usually congested. Therefore, often the proceedings in major corporate reorganization cases and outright bankruptcy (that is, liquidation) cases are long drawn out. Judges also often move on to their next rotational assignment without closing the pending insolvency docket.

Fifth, like many other Asian or emerging markets, Chinese Taipei has not developed the necessary institutional arrangements for a credit industry. Fraudulent conveyance is always a concern in all foreclosure-type proceedings and workout situations. Collection, retrieval and processing of credit information is underdeveloped and fragmented, in part because article 48 of the Banking Law prohibits banks from sharing information with non-bank institutions.

Pressure for Reform and Progress Thus Far

This archaic insolvency system has persisted, frankly speaking, because the high-growth economy has not felt the need for massive national investment to improve it until recent years. Other than business cycles and global oil crises, Chinese Taipei has not experienced major bankruptcies.

Of course, this all changed by the late 1990s. Industries began to experience the pains of global economic downturn. Banks started to accumulate nonperforming loans. The government had to rush through receivership and debt resolution legislation (like the 2000 Banking Law amendment and 2001 Financial Restructuring Fund Law) and take over community financial institutions (like credit departments of fishery associations and farmers associations).

Despite some earlier, ill-conceived efforts to apply administrative guidance on banks to grant moratoriums to big borrowers, since 2001 the government has demanded NPL cleanup under a "2-5-8" plan. Financial institutions on the whole are to reduce their NPL levels to below 5% and increase their capital adequacy levels to the BIS-mandated 8%. These results are to occur within two years after passage of a pending amendment to the FRF fund law that would authorize more than NT$1 trillion of tax dollars for debt resolution.

In addition, the 2000 Financial Institutions Merger Act authorizes the formation of asset management companies to buy NPLs from banks. The Securitization Law enacted in mid 2002 permits and encourages banks to securitize performing loans. In November 2001 the Company Law underwent a major amendment including improvement of the corporate reorganization provisions. Since 2000, the Judicial Yuan of Chinese Taipei has embarked on an overhaul of the Bankruptcy Law, and currently there is already a discussion draft.

Unfortunately, the draft amendment to the Bankruptcy Law still follows the mode of separate codes before. In its effort to reform the bank sector, the FIMA law sponsored by the Ministry of Finance allows AMCs to enjoy foreclosure powers that are at odds with general bankruptcy law principles.

Warts and all, Chinese Taipei has begun to reform its outdated insolvency system. It is still too early to see the directions and impact of this reform effort. However, this

effort will definitely affect cross-border insolvency proceedings and informal workouts in Chinese Taipei.

II. Cross-Border Insolvency Rules

Proper Context for Analysis

In discussing cross-border insolvency rules in Chinese Taipei, it is important to note that there are very few cases, formal or informal. In addition, most foreign investors in Chinese Taipei and most Chinese Taipei investors investing abroad set up local subsidiaries, which are separate legal entities.

Where a Chinese Taipei company (albeit a wholly-foreign owned subsidiary) is involved, one can say that technically there is no "cross-border" insolvency, because no foreign companies are involved. Similarly, when a foreign subsidiary of a Chinese Taipei company files for insolvency proceedings abroad, there is technically no "cross-border" insolvency concerns.

The exceptions are trading companies, banks, insurance companies, securities firms, air lines, shipping companies, and other businesses which for business or regulatory reasons (like landing rights) have to use the "branch" model for their investment in Chinese Taipei.

What this means is that, technically speaking, cross-border insolvency matters in Chinese Taipei can only involve Taiwan branches of foreign companies. This is a very limited scenario, but there is still likelihood of its occurrence. For example, if United Air Lines were to seek Chapter XI protection in the U.S., its Taiwan branch would need to deal with cross-border insolvency issues arising from Chinese Taipei's bankruptcy laws.

Bankruptcy Law and Related Rules Currently in Force

Under the Bankruptcy Law, the concept of bankruptcy means liquidation and dissolution of the bankrupt firm. In addition, article 4 of Chinese Taipei's Bankruptcy Law does NOT accord any binding effect on the bankrupts' assets in Taiwan. As a result, for example, a stay order arising from Chapter XI of the U.S. Bankruptcy Code will not be applicable with respect to assets of a Chinese Taipei branch of the American company seeking protection under Chapter XI. No courts in Chinese Taipei has opined on the issue of whether such a Chapter XI proceeding would constitute a bankruptcy within the meaning of article 4 of Chinese Taipei's Bankruptcy Law. In light of the vintage of this legislation and the pattern of narrow interpretations, courts most likely would not draw such a conclusion.

In addition, a stay arising from a foreign insolvency proceeding is not a foreign JUDGMENT within the meaning of article 402 of Chinese Taipei's Code of Civil Procedure. Under this rule, Chinese Taipei courts would not review a judgement *de novo* if:

(1) the foreign court has competent jurisdiction (as viewed under Chinese Taipei laws);

(2) in proceedings leading to the foreign judgment against a defendant in Chinese Taipei, it has been properly served (personally or through Chinese Taipei's "letter rogatory" judicial assistance procedures);
(3) the foreign judgment does not contravene Chinese Taipei's public order or good morals; and
(4) the foreign court accords reciprocity over judgments made by Chinese Taipei courts.

Most importantly, such a judgement has to be final and non-appealable. By contrast, a stay order is only interim in nature and are not final judgments. In other words, under Chinese Taipei laws, creditors of a foreign company may still seek relief over assets of the foreign company located in Chinese Taipei.

The foreign company then would have to consider petitioning, through its Chinese Taipei branch, for protection under Chinese Taipei's insolvency laws. There are several problems. First, a branch is not a full legal entity. Secondly, the Company Law's corporate reorganization rules only apply to public reporting companies. As such, they cannot be invoked. Third, the Bankruptcy Law of Chinese Taipei only contemplates outright liquidation and dissolution. This could create a problem when the proceedings in the home state are, instead, reorganization in nature.

In addition, a Chinese Taipei or foreign creditor may seek enforcement against the local assets of that foreign company. Such enforcement actions include attachment from final judgment, pre-trial provisional attachment (requiring a bond of usually one-third of the claim and a lodging a definitive complaint within seven days of such levy).

In sum, the current state of cross-border insolvency law is a case of straightforward irrelevance. The current insolvency laws in Chinese Taipei do not contemplate cross-border insolvency situations at all. They do not reach over assets located outside Taiwan. For assets of a foreign company that are located in Taiwan, Chinese Taipei's insolvency laws would give effect to only local legal proceedings.

III. New Proposal under the Preliminary Bankruptcy Law Amendment Bill

Chinese Taipei's Judicial Yuan has publicized for discussions and comments a preliminary Bankruptcy Law amendment bill in 2002. This draft contains rules which are a significant from both the current law and the 1999-2000 draft, in which cross-border rules were short and ill-conceived. Indeed, I had to occasion to comment on the 1999-2000 version and suggested that the Judicial Yuan look into the work of the UNCITRAL, that is, Model Law on Cross-Border Insolvency.

Allowing Recognition of Foreign Proceedings

The 2002 preliminary bill allows a procedure to recognize a foreign court order permitting composition or declaring bankruptcy through an application filed by the representative of the composition or bankruptcy proceedings. (art. 208) Once recognized, the law of the foreign proceedings will determine the procedure and effect of the disposition of assets of the foreign debtor that are located in Chinese Taipei. (art. 213) The recognition will be binding upon the debtor, bankrupt and affiliates

with respect their assets in Chinese Taipei. As a result of the recognition order, the representative of the foreign composition or liquidation proceedings will have power over the assets of the foreign debtor located in Chinese Taipei in accordance with Chinese Taipei's Bankruptcy Law. (art. 214)

Parallel Proceedings

Cryptically, the 2002 preliminary bill contains extensive provisions dealing with parallel proceedings. They cover foreign proceedings and are the subject of a recognition order, and proceedings in Chinese Taipei that arise under the Bankruptcy Law. This can be very confusing.

For example, the 2002 preliminary bill contains a rule that, despite a recognition order by a Chinese Taipei court, the same composition, liquidation or bankruptcy proceedings in Chinese Taipei would not be affected. Representatives of the foreign proceedings covered by the recognition order, however, would be entitled to participate in the parallel Bankruptcy Law proceedings in Chinese Taipei. (art. 217) If the text means what it says, a recognition order does not mean much.

Where a Chinese Taipei court has pending before it an application for permitting composition or declaring bankruptcy in the parallel Bankruptcy Law proceeding in Chinese Taipei, the 2002 preliminary bill requires it to stop and think. In other words, before it makes a non-appealable decision in the parallel proceeding under the Bankruptcy Law, it shall discontinue the review of the application for the recognition order, except when recognition would be more advantageous to creditors in Chinese Taipei. (art. 218) Again, this rule could create problems in actual cases.

Because the 2002 preliminary bill essentially allows parallel proceedings to co-exist, it also contains rules governing the distribution of the estate where a creditor has been paid or will be paid out of the foreign proceeding. In such a situation, that creditor will not be entitled to participate in distributions under the Chinese Taipei parallel proceedings unless other creditors enjoying the same seniority have been paid proportionately. (art. 219, 220).

The 2002 preliminary bill further provides that local representatives in the parallel Chinese Taipei proceedings may participate in the foreign proceedings. In addition, They may provide assistance and information to the foreign representatives and demand the same from foreign representatives. (art. 221, 222).

In sum, the parallel proceedings rule of the 2002 preliminary bill gives some, but not priority or exclusive effect to foreign proceedings. It then essentially weakens the recognition mechanism.

Foreign Reorganization Proceedings Not Covered

One of the major problems with this recognition procedure is that it does not apply to recognition of foreign orders in a reorganization proceeding. This seems to be a ill-conceived corollary of the premise that the Bankruptcy Law can only deal with liquidation proceedings. Therefore, it would not be appropriate to include foreign reorganization proceedings when the Bankruptcy Law does not contemplate (local)

reorganization proceedings.

Time Gap

In addition, there always will be a time gap between (at least) the foreign court permitting composition or declaring bankruptcy and the Chinese Taipei court's recognition order. The 2002 preliminary bill allows good faith (meaning unknowing) counter parties dealing with the debtor and providing consideration for transactions with the debtor involving assets located in Chinese Taipei to assert the validity of the transaction against the estate. Where the counter party knowing engages in such a transaction, it may still assert the validity of such transaction to the extent the estate has benefited from it. (art. 215) This rule could create problems in actual cases.

Requirements for Recognition Order

The 2002 preliminary bill also requires certain documents for such a recognition procedure. (art. 209) The more important documents are:

(1) translations and originals or authenticated photocopies of the foreign court orders permitting composition or declaring bankruptcy;
(2) credentials of the representative in the composition or bankruptcy proceedings and translation thereof;
(3) a full description of the financial status of the foreign debtor, including its assets, creditors and debtors, and translation thereof; and
(4) the original full statutory text of the foreign insolvency law on whose basis the foreign court order was rendered, or a translation of the relevant statutory text.

While this rule is clear, it seems slightly more demanding than the requirement of the Model Law. (art. 15-18) Once recognized, the foreign court order and the recognition order as well as relevant documents shall be publicized. (art. 211)

Decision With Respect To Application for Recognition

The 2002 preliminary bill contains an important provision on the criteria to determine whether to recognize a foreign court order permitting composition or declaring bankruptcy. The Chinese Taipei court shall deny recognition if:

(1) under Chinese Taipei laws, the foreign court does not have jurisdiction;
(2) recognition would unjustifiably harm the interest of creditors in Chinese Taipei; or
(3) if the foreign order contravenes Chinese Taipei's public order or good morals.

In addition, where the foreign court does not grant reciprocity to comparable orders of Chinese Taipei courts, the Chinese Taipei court may refuse recognition.

This rule follows article 402 of the Code of Civil Procedure governing the recognition of foreign judgments in general. A slight improvement is relaxing the reciprocity requirement (which has been the rule under Chinese Taipei's Arbitration Law for

recognizing foreign arbitration awards). However, the test of "unjustifiably harm the interest of creditors in Chinese Taipei" is potentially a Pandora's box well liked by creative practitioners to forestall recognition attempts.

Provisional Relief

Before a Chinese Taipei court renders a recognition order and an application is already pending, the court may in its own discretion or upon the application of the representative of the foreign composition or bankruptcy proceeding grant the following provisional relief:

(1) prohibit or discontinue foreclosure proceedings against the debtor;
(2) prohibit any transfer, mortgage or other dispositions of assets by the debtor; and
(3) other necessary provisional relief.

Unless otherwise stated in the definitive recognition order, such provisional reliefs will not be effective on rendering such an order. (art. 212)

Rescission of Recognition Order

Where justified, a Chinese Taipei court may rescind a previously rendered recognition order. Such justifications are:

(1) where conditions under article 210 for denying recognition existed;
(2) where the foreign proceeding has been terminated or rescinded;
(3) where the representative provided false documents or representations; or
(4) where the representative has materially breached its duty under the Bankruptcy Law. (art. 216)

IV. Informal Workout: The Wang Laboratory Case

As mentioned above, there have been only a few cross-border insolvency cases of note in Chinese Taipei. The context of such cases is also instructive: Chinese Taipei branches of foreign companies do not play any central role in such debt resolution.

However, an interesting cross-border insolvency case in the late 1980s is noteworthy. This matter involves Wang Laboratory Taiwan (WLT), a subsidiary of Wang Laboratory, Inc. (WLI) founded by Chinese American Dr. An Wang. WLI had owed significant amounts of trade payables to WLT, which had been its dominant oversea manufacturing plant. In an attempt to restructure and strengthen the business, WLI then invited President Enterprise Company (PEC), a leading food processing company from Chinese Taipei, to be a minority shareholder in WLT. But WLI soon experienced significant losses resulting from competition from personal computers and sought Chapter XI protection in America. How to deal with WLT and PEC in the WLI reorganization proceeding thus became an issue.

The Company Law of Chinese Taipei at that time prohibited share buyback, with one major exception. A company incorporated in Chinese Taipei may buy back its shares from a shareholder who is bankrupt, if that shareholder owes debt to the company.

This is a very unique rule that allows debt-equity cancellation. Indeed, it may not be consistent with insolvency law principles. But it has been in the Company Law, and was invoked in the WLT case.

In this case, WLT applied with the MOEA for a ruling and was assured that it could repurchase shares held by WLI so as to cancel the debt owed by WLI to it. As a result of this buyback, WLT would be essentially taken over by PEC. Bank of Boston acted as financial adviser in this informal workout, which proceeded smoothly. Importantly, even though the relevant Company Law rule (art. 167) only mentions bankruptcies (which usually mean liquidations) as the triggering condition, the MOEA had no problem including reorganization (and indeed a foreign reorganization) proceedings in the ambit of this unique rule.

Technically, this is not a cross-border insolvency case because WLT is a Chinese Taipei company, and WLI itself has no other assets in Chinese Taipei. However, the importance of this case is that WLT had been run as if it was a branch. Also, although one can quibble about the policy of having a debt-equity cancellation rule like article 167, the fact of the matter is that the parties were able to efficiently and speedily resolve their financial claims and consummated a workout/buyout to everyone's satisfaction.

The 2002 preliminary bill of the Bankruptcy Law, however, does not show this much flexibility. Therein lie the opportunities to further improve the bill.

V. Conclusion

Chinese Taipei will continue its insolvency reform in earnest. The reason is obvious: the administration realizes that it has to engage in financial reform for Chinese Taipei to stay competitive globally. Increasingly, the insolvency system is viewed as part and parcel of the financial system. Therefore, insolvency reform has to be a part of the financial reform.

The key to this reform is judges in the Judicial Yuan. They have the responsibility in Chinese Taipei for both administering bankruptcy and reorganization cases and updating the Bankruptcy Law by sponsoring amendments. In this regard, problems in the cross-border insolvency chapter of the 2002 preliminary bill mentioned above need to be addressed in line with the Model Law on Cross-Border Insolvency as soon as possible. Indeed, there should be a more ambitious attempt to explore, for example, the work emerging from the UNCITRAL process on the draft Legislative Guide for Insolvency Law.

The executive branch in Chinese Taipei also has a large role to play. It needs to somehow design a model for a unitary insolvency legislation that includes all kinds of insolvency proceedings. This is important because the MOEA is charged with updating the corporate reorganization rules of the Company Law. But this fragmentation approach is not desirable. Again, the executive branch could monitor and explore the current work of the UNCITRAL on a unitary, modern insolvency regime. It also needs to be patient with insolvency reform initiatives of the judiciary, and meanwhile not seek "quick fixes." One of such quick fixes is to write hastily crafted special insolvency rules into banking legislation like FIMA so as to favor

banks or privately held AMCs in usual corporate insolvency cases.

The private bar and the financial service community in Chinese Taipei have demonstrated much maturity in recent years where local reorganization cases are concerned. Since they operate in the private sector and have to react to market forces, they have been very responsive and adaptive to foreign practices and new concepts. For this reason, one would not be surprised if the private sector comes to lead the effort in meaningful insolvency reform in Chinese Taipei.

附件五

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Paper by:
Mr. Jean Chui, Assistant Director General
Ministry of Finance Bureau of Monetary Affairs, Chinese Taipei

Profile of Taiwan's Financial Institutions

- Overall picture

    - There are 52 local banks, 36 foreign banks plus 38 credit unions and 278 farmers and fishermen credit department in the market. Over banking situation is significant.
    - Average capital ratio for banks reached 10.4% net worth plus reserves for banks reached 1.75 trillion NT dollars.
    - Decreasing Profits (ROE: 3.61%, ROA: 0.26%) and increasing non-performing loans 8.28%.

NPL Cleanup

- Business Tax lower down

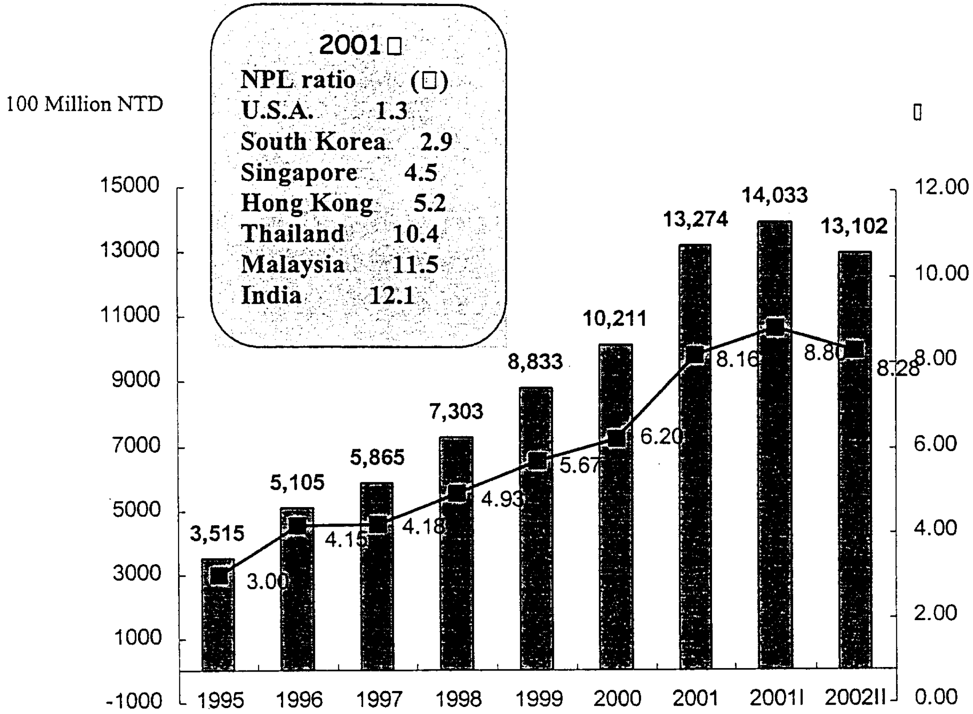
    - The Ministry of Finance(MOF) reduced the Gross Business Revenue Tax (GBRT) for banks from 5% to 2% in February 1999. Banks are accordingly required to use tax savings to write off bad loans.
    - NPL write off: Till June 2003, commercial bank's NPL write off reached 7.56 times of the GBRT Tax lowered down resources.

AMC Mechanism

- Financial Institution Merge Act

    - Promulgated on Dec. 13.2000.
    - Create AMC mechanism.
    - The AMCs may dispose of assets through an impartial third party without going through the counts.
    - The losses of the NPL sale by banks can be amortized for 5 years.

- NPL Chart



Taiwanese Financial Institutions Sell NPL to AMC selected

Dated Oct. 28,2002

Unit: million NT$

Financial Institution Seller	AMC Buyer	NPL sale book value
First Commercial Bank	Lone Star Asia-Pacific, Ltd.	13,280
First Commercial Bank	Lone Star Asia-Pacific, Ltd.	12,803
First Commercial Bank	GE Capital Commercial Finance, Inc.	13,278
First Commercial Bank	TAMCO	6,533
First Commercial Bank	Cyberus	10,931
First Commercial Bank	Lehman Brothers	3,993
Chio-Tung Bank	Merrill Lynch and Salomon Brothers	3,741
Chio-Tung Bank	Deutsche Bank AG, London	4,788
Fubon Commercial Bank	Lehman Brothers	5,040
Cosmos Bank	Chung Hwa-Lone Shon Joint Venture Co.	6,240
Cosmos Bank	TAMCO	2,195
Tai-Shin Bank	Taishin AMC .	7,524
China Development Industrial Bank	China Development AMC	3,251
Cathay United Bank	TAMCO	1,895.11
United World Chinese Commercial Bank	China Development AMC	8, 097

RTC Law

- Promulgate on July 9,2001.
- Establish NT$140 Billion public funds.
- Deal with problem financial institutions with negative net worth.
- Provide 100% protection to depositors only in limited time frame time limited to3 years if permitted from Congress can be extended up to 4 years.
- In year 2001 the MOF successfully using RTC funds taken over 36 problem financial institutions.

RTC Law Amendment

- The vision of Taiwan's financial reform:

(1) Capital adequacy ratio: more than 8%.
(2) NPLs ratio: less than 5%.
(3) Coverage ratio 40%(Provisioning /NPLs).
(4) Improve over-banking situation.
(5) Establish market exit mechanism and enhance financial safety net.

In order to achieve above objectives, the action we will take is to amend the Statute Governing the Financial Restructuring Fund (RTC Fund). The goals and key points of the RTC law amendment are as follows:

- Goals -

(1) Solve problem financial institutions with negative net worth.
(2) Clean up NPLs.
(3) Facilitate mergers in banking industry.
(4) Help economic growth.

- Key points

(1) Enlarge fund base of the RTC from NT 140 billion to 1.05 trillion.
(2) Expand the RTC's function to cover NPLs purchase.
(3) Expand the RTC's function to cover capital injection in banks with preferred shares.

- Complementary Regulatory Actions

(1) Follow International Loan Classification & Provisioning.
(2) Adopt prompt corrective action.
(3) Enhance corporate governance, risk management & information transparency

There are three main measures the RTC will takes to handle financial institutions:

(1) If a financial institution shows negative net worth, the RTC will closedown or takeover the institution and fill asset-liability gap of the institution to protect the depositors. The RTC estimates the funds needed to compensate the losses of financial institutions will up to about NT 450 billion financed by lower business tax, government budget and other incomes of the RTC.

(2) If the NPLs ratio of a financial institution is higher than the regulatory requirement and unable to improve, the RTC will purchase the NPLs, but a committee under the RTC will decides both of the purchase price and object of NPLs.

(3) If the capital adequacy ratio of a financial institution is lower than the requirement and unable to improve, the RTC will inject capital to viable financial institutions with preferred shares. The funds used to purchase NPLs and inject capital totally will cost NT 600 billion. The RTC will take loans from banks or issue self-financing government bond to finance the funds, the Central Deposit Insurance Corporation also can issue financial debentures to finance the funds.

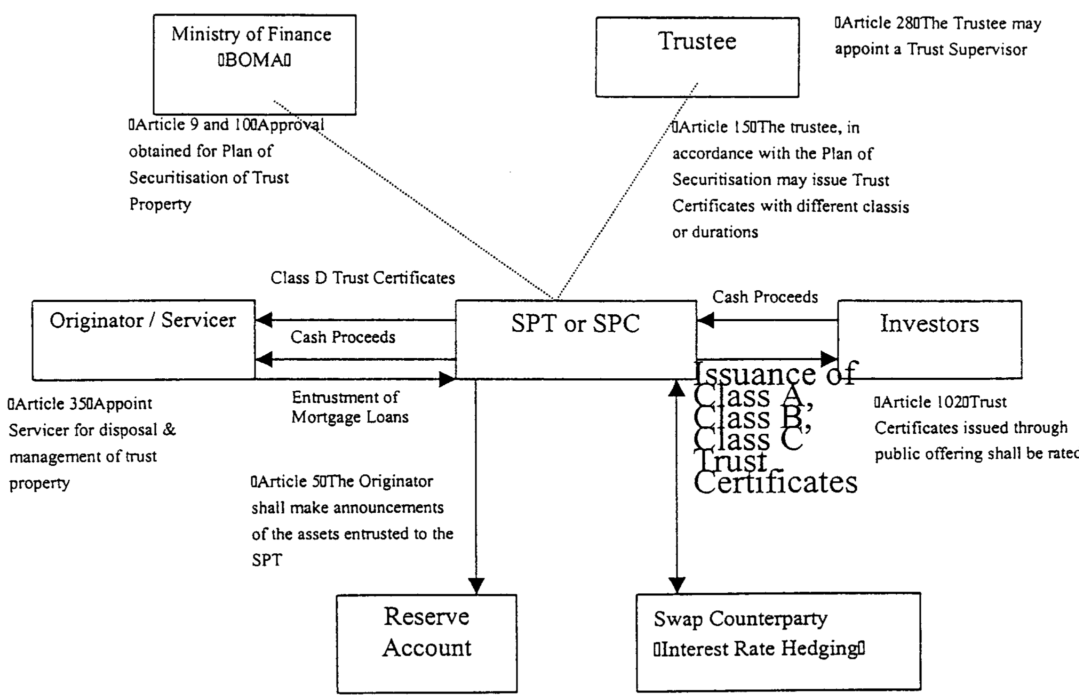
Securitization

The Financial Assets Securitization Law

The Financial Assets Securitization Law was promulgated on 24th July, 2002 in Taiwan. The main thrust of the law are as following:

1. to create Special Purpose Trust□SPT□structure and Special Purpose Company□SPC□structure as the conduit for asset securitization.
2. to remove the legal barriers concerning the transfer of asset and provide taxation incentives to promote the circulation of securitized trust certificates and Asset-backed securities.
3. to establish the prudent supervisory mechanism to protect the investors. Besides, in order to enhance the liquidity of the security, the withholding tax of income from the securitized securities is decided 6%.

- Structure



Observation and lessons learned on Efficient Cleanup of NPLs

- Regulatory Requirements:

Regulatory requirement of loan provisioning and adopting NPL ratio as a supervisory index will provide a continuous pressure also a driving force for banking industry's cleanup their NPL.

- AMC as a channel: Role of a private AMC

1. Providing its expertise to efficiently cleanup NPL.

2. Injecting liquidity to banking industry to help bank's perform its intermediary function through NPL purchase.

3. Helping bank's target their human resources on business strategy instead of dealing with NPL.

- Ingredients for a successful AMC operation:
- From the NPL purchase side:

1. Transparent market price
   Transparent market price help to build buyers and sellers trust. If there is no market price there is no NPL deals.

2. Government shall help to create the NPL market
   Regulatory requirement on provisioning and NPL control will create NPL volume trading in the market.

3. Government shall help to find market price

4. Taking Korean case as an example, Korea divided its national land into 24 using purpose and 242 zone based on using purpose of the land and zoning. Monthly courts will publicly notice the average auction price, and the bit rate on each zone land for different using purpose. This price would be reference as a purchase price.

5. Losses on NPL sales can be amortized for several years as an incentive.
   Banks suffer big losses in a bulk of NPL sale. Amortization losses in a period of time rather than in one year would encourage banks to sell. However striking balance between pushing NPL sale and financial information transparency is crucial.

In Taiwan, we adopted:

Disclosure the losses on financial statement while the losses before amortized shall be reserved. No dividend payment is allowed on this losses reserve portion.

- From the NPL sale, restructuring side:

1. Efficient Bankruptcy Law
   Shorten courts' reviewing period for a bankruptcy application.
   Creditors have more roles in bankruptcy procedure.

2. Create a mechanism that realizes real estate collaterals do not need to go to the courts.

Create an impartial third party to evaluate and bit the property to substitute court's auction function.

Empowered by Law that courts' auction function can be outsourcing to a private AMC.

3 Out of court workout

AMC needs to analyze the business and financial viability of a company and to choose between restructuring and liquidation.

AMC shall require expertise to negotiate approval of , implement, and monitor the restructuring plan and to manage operations of the company.

4. Securitization

Assets securitized based on NPL shall be cautious on its cash flow. After restructuring the debts to a relatively stable situation, the assets' cash flow would then become clear. Because the NPL backed securities embedded a high risk nature, how to protect investors or when a bank as an investor how to calculate its capital adequacy needs continuously making efforts on it.

➢ Public fund RTC as a supplement channel for NPL purchase

Regulatory requirements on NPL control could place a great pressure on bank's continuing selling of NPL. If there are no other supporting measures, the market would be a buyer's market. Banks will suffer big losses.

RTC is able to soften the price bias by acting as a NPL purchase competitor. Besides, a relatively longer NPL stocks resale returned plan would ease the collapse of the real estate market. The RTC role hereby in the NPL market is able to play as a Watergate role on the NPL pricing and its supply. In implementation, however, it shall be cautious that regulatory authority gives banks enough time to meet the NPL control requirement either by selling it to AMC or write of f with their own funds. That is, commercial-based approach before RTC.

➢ The future of RTC

NPL purchase shall be retuned to market-based approach. Using public fund RTC to purchase NPL shall be limited to a time frame. In terms of problem financial institutions resolution, RTC function shall also be back to depositor insurance scheme. Accordingly, regulatory authority may consider taking prompt corrective action as a supervisory tool to let financial institutions clearly know when and what regulatory action will impose on them.

附件六

The Second Forum for Asian Insolvency Reform (FAIR)

Bangkok, Thailand 16 – 17 December 2002

In partnership with

The Government of Japan

and

Hosted by the

The Ministry of Justice of the Kingdom of Thailand

Paper by:
Mr. Philip Chen, Partner
Deloitte Touche Tohmatsu and Howard, CDIC, Chinese Taipei

The second Forum for Asian Insolvency Reform
Paper for Session 7
November 29th 2002

By Howard N.H.Wang, CDIC and
Philip W.Y.Chen, Deloitte&Touche

1. How have bulk sales of NPLs /distressed assets been approached across the region?

NPLs in the Taiwan banking system have risen sharply since the 1997 "Asian Financial Crisis." In view of the increasing NPL ratio, the Taiwanese banks have strengthened credit risk management and made use of the provision of loan loss reserves to write off bad loans in recent years. The NPLs written off by domestic banks amounted to US$4 billion in 1999 and US$4.7 billion in 2000. However, NPLs continued to increase dramatically in the recent years. The Taiwanese government decided to assist the banks in reducing their NPL ratios in order to prevent a financial crisis. Government involvement in NPL resolutions has taken in various forms.

The first measure taken by the government included the Central Bank's announcement of the decrease in the reserve ratio on deposits for banks in February 1999. This was followed by a tax reduction for banks. The Ministry of Finance reduced the gross business receipt tax (GBRT) for banks from 5% to 2% in July 1999. The GBRT rate will be further reduced to zero effective January 2006. The additional income derived from lowered the required reserve ratio and the decrease in the gross business receipt tax rate, estimated to be NT$35 billion (or equivalent US$1 billion) per year, has been earmarked exclusively for the write-off of bad loans.

In addition to the above, the government has provided a friendly legal environment to accelerate the disposition of banks' non-performing assets. The Merger Law of Financial Institutions (MLFI) was enacted on November 24, 2000. The Law provides the legal framework for the establishment and operation of the Taiwan Financial Asset Service Corporation (TFASC) and Taiwan Asset Management Corporation (TAMCO). Commercial banks may dispose NPLs through TAMCO and an independent third party, TFASC, without going through lengthy court procedures.

To provide the financial sector with a high-quality operating environment, the government also set up a quasi-Resolution Trust Corporation (RTC) mechanism. The Statute for the Establishment and Management of the Financial Restructuring Fund was enacted on June 26, 2001. The Statute provides for the establishment of a Financial Restructuring Fund in the amount of NT$140 billion (or US$4.1 billion). Of the amount, NT$120 billion or US$3.4 billion will be generated from the collection of the existing 2% gross business receipt tax on financial institutions over the next four years, and the remaining NT$20 billion or US$0.57 billion will be generated the proceeds of the increased deposit insurance premiums over the next ten years. The Fund will purchase the bad assets of the distressed financial institutions. In September 2001, the government used part of the Fund to restructure and liquidate NPL assets of 36 community financial institutions.

The current size of the quasi-RTC is insufficient to deal with Taiwan's distressed loan situation. The administrative department is tried to expand the quasi-RTC scale to 10% of Taiwan's GDP to clean up the banking sector; however, it is still under planning stage.

The following describes the financial crisis and resolution mechanism of Taiwan

Causes	Measures Taken and Outcome
✧ Over-banking and extreme competition caused credit quality to decline. ✧ Excessive dependence on mortgage of real estate of which value declines. ✧ Taiwan trading business was declining as a result of global economy downturn. In order to save costs and to approach the market of Mainland China, many companies moved their bases to China by financing from the Taiwan banking system.	RTC system is in function already. As to AMC, TAMCO and TFASC were incorporated (by 33 financial institutions) in 2001. First NPL transaction was completed in March 2002. In 2002, it is expected that NPLs with total book value of US$ 6 billion will be sold. Deal prices fell between 20%~40% of UPB for transactions completed.

Taiwan banks bulk sales of NPLs in 2002 and expected bulk sales in 2003 are listed in the following tables:

NPL Seller	Bid Date	NPL Sales Amount (expressed USD in millions)
First Commercial Bank	March 2002	120
	March 27, 2002	380
	July 30, 2002	1,600
Cathay United Bank	March 22, 2002	500
Fubon Commercial Bank	End of May 2002	1,400
Cosmos Bank, Taiwan	June 2002	4,100
Taiwan Business Bank	July 5, 2002	1,700
China Bills Finance Corp.	July 15, 002	1,400
En Tie Commercial Bank	September 2002	1,400
Ta Chong Bank Ltd.	End of September 2002	1,700
Chiao Tung Bank	September 2002	5,900
United World Chinese Commercial Bank	October 24, 2002	2,300
Chang Hwa Commercial Bank	December 4, 002	7,200
Taiwan Business Bank	December 7, 2002	7,200
Jih Sun International Bank	Early November 2002	2,100
Land Bank of Taiwan	December 6, 2002	1,400 - 1,800
Hua Nan Commercial Bank	Anticipated 2003	5,700 - 8,600
Taiwan Cooperative Bank	Anticipated 2003	8,600
The Farmers Bank of China	Anticipated 2003	1,700
Bank of Overseas Chinese	Anticipated 2003	1,700
En Tie Commercial Bank	Anticipated 2003	900
Asia Pacific Bank	Anticipated 2003	2,000
Far Eastern International Bank	Anticipated 2003	2,300
The Chinese Bank	Anticipated 2003	1,300

2. **What factors are affecting buyer/seller interest in bulk NPL sales?**

The factors that affect the value of loans will affect buyer/seller interest in the bulk NPL sales, which are degree of risk, overdue period, and level of the completeness of information. If banks expect to obtain favorable prices from the bulk NPL sales, the following factors should be considered:

(1) Degree of risk. The purposes for investors investing in NPLs are to make profits from future cash inflows. Sources of future cash inflows include the sale of collateral, repayments of principal and interest by debtors, and formal or informal restructuring/ reorganization. Therefore, the quality and difficulties of liquidation of the collateral, all factors of affecting debtors' revenue and costs, and possibilities and difficulties of negotiation between debtors and other creditors, can become the risk factors affecting the loans.

(2) Overdue period. Generally, the longer the overdue period is, the lower possibility of recovery. This results in the value decrease. In addition, updated information is less likely to be as complete, further deteriorating the value.

(3) Degree of information completeness and transparency. During review periods of loans files, if investors understand the information thoroughly, and are able to estimate the degree of risk of loans more clearly, they will bid aggressively and more willing to acquire at higher prices.

3. **What are the benefits/dangers of bulk sales at the micro level (for the parties involved) and at the macro level for the economy and economic recovery?**

Benefits

Benefits	Micro	Macro
Creditor	-Lower NPL ratios for banks -Cash flow injection -Improved financial structure	Overall improvement in the financial industry and general economy
Borrower	-Lower financial burden on the repayment of principal and interest -Restructure opportunity	-Overall improvement in the general economy - Positive industry outlook
AMCs	-Acquire relative lower price assets	Create flexibility in assets transactions , and increased circulation of assets

Dangers

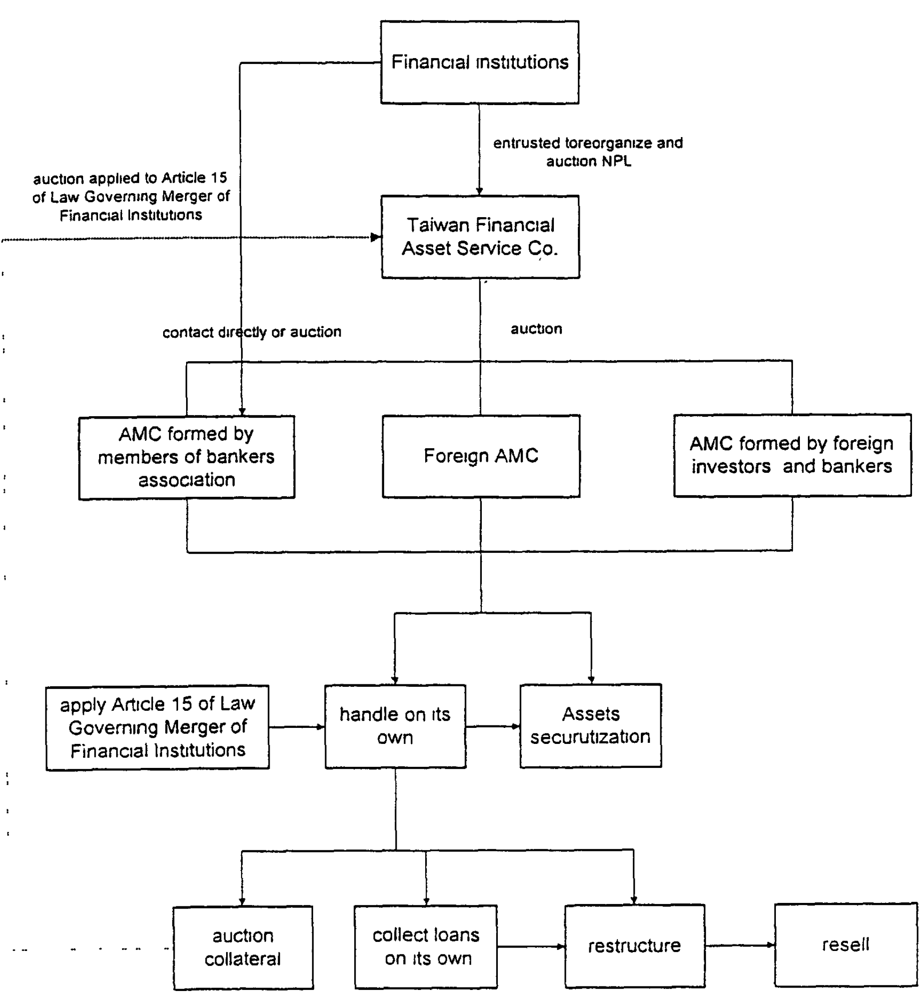
Dangers	Micro	Macro
Creditor	-Sales of NPL at lower prices	Deteriorate value of collateral
Borrower	-Resistance of borrower in dealing with new parties/creditors	Formation of price subsidy and result in unfair competition
AMC	-Acquisition of worthless assets	Deteriorate value of collateral

4. How have AMCs been involved?

In Taiwan, TAMCO commenced operation on November 2, 2001, and its services include three areas the purchase of NPLs from financial institutions, the management of NPLs entrusted by financial institutions, and other related activities. The details of the activities are indicated as follows:

(1) Purchase of NPLs from financial institutions
In accordance with Laws Governing the Merger of Financial Institutions, there are two methods for financial institutions to sell their NPLs. The first method is to sell (via auctions) to AMCs after appraisal performed by third-party auction institution (TFASC) the other is for financial institutions to negotiate the prices with AMCs directly. (Please refer to the diagram of the management of NPLs below).

Diagram of handling NPLs



(2) Management of NPLs entrusted by financial institutions

TAMCO'S paid in capital is currently NTD17.62 billion, and is insufficient to acquire large amount of NPLs. Therefore, TAMCO primarily handles NPLs of categories 3,4 and personal housing loans entrusted by banks on the initial stage, and it assists financial institutions to restructure distressed companies, and dispose collaterals. Although TAMCO handles NPLs entrusted by financial institutions, the ownerships of NPLs are not transferred, and its right and obligation still belong to the banks.

TAMCO is assigned or entrusted to manage the real estate collaterals of the NPLs. When the collateral has not been auctioned successfully after compulsory enforcement, TAMCO will accept it if it estimates to be profitable. TAMCO will provide management services (including the cooperation with professionals) to enhance the quality of the real estate property. Subsequently, it will dispose or rent out to create value.

(3) Other related activities

In addition to the core activities stated above, TAMCO will participate in other related activities. These activities include appraisals, financial advisories (corporate restructuring, reorganization, planning of financial management, and real estate investment consulting), general advertising services (i.e. advertisements of compulsory enforcement from financial institutions, and leasing activities. Foreign AMCs also purchased about 70% of NPLs sold in 2002.

5. What structures for AMCs have been successfully? What are the keys to their success/failure?

There are currently three types of AMCs in Taiwan with various structures. These include a joint venture formed by several banks, sole proprietorships formed by foreigners, and wholly owned subsidiaries formed by single banks. However, since the AMCs merely commenced operation in 2002, it is difficult to conclude at this point in time which structure is most appropriate.

6. What have been the successful/unsuccessful ingredients in the establishment and operation of AMCs?

Common factors that contribute to the success of AMCs include a supporting legal and regulatory environment; strong leadership, operational independence, appropriate and structured incentives, and commercial orientations. In addition, the operations should be guided ultimately by the objective of profit maximization (or loss minimization), taking into full account market conditions as well as the funding cost to the AMCs. Experience has shown that AMCs with clearly defined, focused, and consistent goals are more likely to be effective.

7. How have RTC type bodies and restructuring funds been involved? What do you see as their future?

The Taiwan government is still evaluating the merits of the restructuring funds. Please refer to Question 1 and the paper of Ms. Jean Chiu of Bureau of Monetary Affairs.

8. **How have special purpose vehicles (e.g. CRF/CRC/CRVs in Korea, REITs in Korea, SPAVs in Philippines, mutual funds in Thailand) and securitisation techniques been utilized. What factors have assisted/limited use of these techniques?**

Korea has established a range of vehicles (e.g. CRV/CRC/REIC/ABS) to acquire NPLs, distressed assets and assist in the restructuring and recovery process.

The purpose of a Corporate Restructuring Vehicles (CRVs) is to purchase NPLs from creditors/financial institutions. These CRVs are managed by AMCs registered with the Financial Supervisory Commission. The distressed debtors then deal with the CRVs to formulate a workout process.

Corporate Restructuring Companies (CRCs) may invest in or purchase the assets or businesses of non-financial companies, which are in the workout or restructuring programs. CRCs are eligible for tax concessions and may issue debt securities up to 10 times the value of its net assets. There are presently approximately 70-80 CRC operating in Korea.

Corporate Restructuring Real Estate Investment Companies (REIC) for the restructuring of the property holdings of distressed companies are eligible for tax concessions relating to the acquisition and disposal of property assets.

From the experiences of Korea, KAMCO has operated CRCs in partnership with the winning bidders and has shared investment interest with the winning bidders. Through the CRC operations, KAMCO has learned the foreign advanced asset management measures and is able to successfully maximize the effect of the resolution of NPL.

Managing distressed assets through special purpose vehicles or companies (SPV SPC) has some key advantages in the areas of tax reduction, prevention of disposal at low prices, maximize rate of recovery. In addition, the put-up capital of SPC/SPV enables the sharing of the future increased profit from assets.

Generally, the usage of the above vehicles can be described as follow:

- CRC Used to purchase businesses which restructuring is required. After acquisition, attempts to improve operation bring in foreign capital and advanced technology through joint venture; subsequently sell it with profit when the business operates smoothly.

- CRV Lower society costs through domestic and foreign civil capital and entrust professional AMCs for paper company with fund pattern, a type of financial institutions but with time constraint.

- ABS issuance
  Advantages - lower financing cost, improved finance structure through brand new financing method, lowered risk and broaden investor level;
  Disadvantages - complexity of transaction structure
  Limitation – assets that are suitable must have predictable cash liquidation (i.e. liquid, bankruptcy segregation, payments on recovery of assets need to be separated from ownership of assets, and debtors with good credit)

9. **Has there been too much focus on disposal and inadequate focus on restructuring?**

The Taiwan AMCs operate with a focus on the disposal of NPLs. These AMCs functioned as rapid disposition vehicles quickly selling assets to the private sector. In all cases, the goal was to dispose of the asset as quickly as possible so as to avoid further deterioration in value and to minimize the carrying cost of the government.

In other countries, the government set up vehicles with focus on restructuring. In some cases, the emphasis was on restructuring the non-performing loans so as to make them marketable. In others, the goal was to achieve broader corporate restructuring of the borrowers and the government owned banks.

Successful bank restructuring entails preserving the payment system, assuring that they are functioning banks, and that the residual troubled assets are managed and disposed of appropriately. While loan workouts are part of the normal banking business, if the size of the distressed assets reaches systemic proportions, there are a number of reasons for the necessity of setting up separate AMCs, not the least of which is to assure that corporate restructuring occurs. When AMCs hold a large percentage of the financial sector assets, corporate workouts and restructuring should become a key part of their mission.

10. **What will be the next development in use of the above techniques?**

Proper management and disposition of NPLs is one of the most critical and complex aspects of successful AMCs and speedy bank restructuring. The government's overarching objectives should be to maximize the value of the impaired assets in the system, while at the same time preventing credit discipline of borrowers from deteriorating. AMCs, with proper governance and incentive structures and practical operating strategies, could play an essential role in achieving the government's objectives.