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# Engagement between Creditors and Sovereign Debtors: Guidance on setting up Creditor Committees[1]

## I. INTRODUCTION

Creditor-debtor engagement has been a regular feature of sovereign debt restructurings. Possible advantages include efficiency gains, higher participation rates and procedural fairness. Creditor-debtor engagement with the debtor and creditors sharing information and with good faith negotiation by both sides can produce quicker results may also maximize the funds available to the debtor to pay creditors.

Creditor engagement can take place under three main frameworks, including (i) the insertion *ex ante* of contractual clauses in bond documentation for creditor committees (CCs), (ii) best practices for effective CCs or (iii) best practices for engagement between creditors and debtors. There are examples of successful debt restructurings that did not involve CCs (e.g. Uruguay in 2003), or where creditor committees, although formed, played no significant role (e.g. Iraq in 2005) CCs could be governed by detailed provisions – such as those described below in Section II – or in a minimalist fashion (see Annex A for an example); or be left to ad hoc arrangements ex post as was the norm in the resolution of the Latin American debt crisis in the 1980s.

The incentives of the main actors in sovereign debt differ with respect to creditor engagement, particularly as regards *ex ante* contractual clauses. Sovereign issuers may regard *ex ante* engagement clauses as reducing their flexibility and that shifts bargaining power towards creditors long before they need them. International financial institutions such as the IMF may be similarly skeptical that these clauses have any measurable benefit for financial stability. Creditors, particularly those who expect to hold the bonds in question at a time a future restructuring, tend to favour such clauses because they improve creditor coordination, promise engagement by the sovereign and shift bargaining power to them. Lead managers and underwriters are unlikely to recommend them to the issuer unless their inclusion has commercial advantages for the issuer (e.g. pricing), partly because they do not purchase the debt to hold themselves but to sell on and are fairly neutral on this point.

This synthesis guidance raises the broad spectrum of issues encountered when considering CCs and highlights key issues for consideration in whether and how to formalize debtor-creditor engagement by suggesting detailed provisions for CCs and setting out drafting considerations for these. However, creditor-debtor engagement can take many forms other than a Creditor Committee (CC) – the focus of this paper. It contains guidance for engagement with features that appeal to sovereign issuers and creditors. Key features include: a symmetrical obligation on both creditors and the debtor to negotiate in good faith, and to disclose relevant information, which is subject to third-party adjudication; robust conflict of interest rules; and payment of CC expenses by the sovereign only if the restructuring succeeds.

[1] Drafted by Michael Waibel, University of Cambridge with extensive inputs and comments from stakeholders and experts participating in the study group.

This guidance on creditor committees for engagement between debtors and creditors complement two private sector initiatives on creditor engagement by the International Capital Market Association (ICMA) and by the Institute of International Finance (IIF).

First, in 2004, ICMA published a template for a Noteholders' Committee under English law.[2] The ICMA provisions are detailed contractual provisions to be inserted into sovereign bond securities *ex ante*. Under this model, the debtor is contractually obliged to interact and engage with its creditors through one or more creditor committees ('CC'). In 2014, ICMA published a new template of the Noteholders' Committee provision in the form of supplementary provisions to its new model aggregated CAC. In 2015, it updated these provisions for inclusion in sovereign debt securities issued under both English and New York law.[3]

Second, the IIF published Principles for Stable Capital Flows and Fair Debt Restructuring of November 2004.[4] Unlike the ICMA approach, these Principles are not meant to be recommending much *ex ante*, and they are not binding, but rather designed to reflect best practice. The IIF refined these Principles in 2010 and in October 2013 supplemented them with an Addendum.[5] The Addendum states that creditors 'should organise themselves in a broadly based representative creditor committee as early as possible in the debt restructuring process, certainly before default' and emphasizes the need for 'early discussion' 'between the representative private creditor committee and the sovereign debtor, in close consultation with the official sector'.

The ICMA provisions and the IIF Principles are designed to achieve creditor engagement through different frameworks (but also can complement each other). The ICMA approach as well as the approach set out in this Synthesis note, as contractual solutions for creditor engagement, may prove problematic for they bind the issuer to a certain mode of debtor-creditor engagement *ex ante* that fail to take account of the variety of restructuring circumstances. By contrast, Guidelines such as the IIF Principles have the advantage of flexibility for the very reason that the guidelines are not binding. At the same time, they could be persuasive, and express an important yardstick in this market.

The question is not whether debtor-creditor engagement should play a significant role in the process – indeed it should, and it often does – but whether this should be organized *ex ante* and whether voluntary *ex ante* guidelines for CCs enhance creditor-debtor engagement in the interest of a successful and quick debt restructuring. This voluntary guidance on CCs developed under a UN project on sovereign debt restructuring based on inputs and comments from

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2 The ICMA provisions are template provisions in the ICMA Handbook and are included for guidance purposes. The ICMA Handbook comprises ICMA Recommendations, guidance and standard language and documentation, generally relating to offers of syndicated international bonds in the Eurobond primary market and to programmes under which such offers may be made. As one of the original trade association bodies which agreed the 2004 template CACs for inclusion in sovereign bonds following the shelving of the SDRM proposal, ICMA has continued taking a leading role in the contractual reform of sovereign bond documentation.

3 The model aggregated CAC resulted from the work by an Expert Group that the U.S. Treasury convened consisting of representatives from the official sector (including IMF staff), the ICMA, several debtor countries and buy side stakeholders, legal practitioners and academics. International Monetary Fund, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*, 2 September 2014.

4 Institute of International Finance, 'Principles for Stable Capital Flows and Fair Debt Restructuring', available at https://www.iif.com/topics/principles-stable-capital-flows-and-fair-debt-restructuring.

5 Until 2013 it is unclear whether there was an obligation at all to engage with a CC (the language is soft). In the 2005 Iraq restructuring, Iraq bypassed all CCs. The Addendum clarified that there is an obligation to engage with a CC.

stakeholders and experts could assist sovereign issuers and their creditors in their engagement process, and provide a roadmap of issues to consider on whether and how to establish CCs.

This guidance includes the following features that go beyond the state of play in the IIF Principles and the ICMA provisions: (1) possible representation of CDS protection sellers to be represented on the CC; (2) an obligation to negotiate in good faith for both creditors and the sovereign debtor, supervised by the courts of a competent jurisdiction or a specifically appointed supervisory body; (3) robust conflict of interest and disclosure requirements for both debtor and creditors, supervised by the courts of a competent jurisdiction or the supervisory body; (4) payment of CC fees and expenses only in case of a successful restructuring.

## II. GUIDANCE ON CREDITOR COMMITTEES

### (a) Definitions

i. **‘Debt securities’** means any notes, bonds, debentures or other debt securities issued by the Issuer in one or more series with a maturity of more than one year.[6]

***Commentary***

*This guidance as drafted includes only ‘debt securities’. Consideration could be given to include bank loans, trade debt, Paris Club debt and other official debt as well, insofar as this Guidance is used as voluntary best practice (rather than inserted as contractual language in documentation). In some future restructuring, these other types of debt are likely to play an important role.*

ii. **‘Series’** of debt securities means debt securities having the same terms and conditions and issued on the original issue date therefor, together with any further issuances of debt securities that, in relation to each other and to the original issuance, are (i) identical in all respects except for their issue date, issue price and the first payment date and (ii) expressed to be consolidated and form a single series, if any.[7]

iii. **‘Affected debt securities’** means debt securities that fulfill the conditions set out in (b) (*Appointment*)

iv. **‘Collective Action’** means a mechanism that enables the Holders of a series of debt securities to vote on the rescheduling or restructuring of all or some of these debt securities, whereby votes representing a certain percentage of the aggregate principal amount of outstanding debt securities may suffice to bind all Holders of this series.

### (b) Appointment

Holders of at least 30 per cent of the aggregate principal amount of the outstanding debt securities of all these series of affected debt securities (taken in aggregate), or CDS protection sellers accounting for at least 30 percent (of the notional amount) of CDS on the affected reference entity, may within 60 days of the events defined under paragraph ii below in A., B. or C., by notice in writing to the Issuer (with a copy to the [Fiscal Agent/Trustee/other bondholder representative]), signed by the Holders/CDS protection sellers or on their behalf by their authorized representatives, appoint any person or persons as a committee to represent the interests of such holders (as well as the interests of any holders of outstanding debt securities who wish to be represented by such a committee and the interests of any CDS protection sellers for the reference entity in question) (‘Creditor Committee’) if any of the following events has occurred:

[6] The 2015 ICMA clause on Standard Aggregated Collective Action Clauses ("CACS") for the Terms and Conditions of Sovereign Notes governed by English Law only includes those debt securities ‘with an original stated maturity of more than one year’. The restriction to original maturities in excess of a year in essence excludes T-Bill issuance and similar instruments. Sovereign are likely to want to exclude them as these provide the working capital/”super senior” line in the case of a restructuring. An issuer would rarely want to restructure them.

[7] This definition is from the 2015 ICMA clause on Standard Aggregated Collective Action Clauses ("CACS") for the Terms and Conditions of Sovereign Notes governed by New York Law. The English Law version does not provide a definition.

A. default is made in the payment of any principal or interest in respect of the debt securities (or any of them) of any series of debt securities (or any of them) and the default continues for a period in excess of any applicable grace period

B. a public announcement by the [authorised representative] of the Issuer, to the effect that the Issuer is seeking or intends to seek a rescheduling or restructuring of the debt securities (or any of them) of any series of debt securities (or any of them) (whether by amendment, exchange offer or otherwise); or

C. with the agreement of the Issuer, whilst the debt securities (or any of them) of any series of debt securities (or any of them) are outstanding. The Issuer shall extend an invitation to holders of all affected debt securities in writing 60 days prior to making a formal request to reschedule or restructure their debt securities.

***Commentary:***

*Some favour 25% (2015 ICMA clause), such that in theory creditors could form 4 committees; others prefer 50% (Congo CC; 2004 ICMA clause – but not in connection with aggregated CACs), which allows for 2 committees; still others favour 50+% (Belize Representative Committee) which permitted only a single committee.*

*An appropriate compromise is 30% (allowing for up to 3 CCs). As a rule, CCs promote efficient restructuring. Thus, the formation of CCs should not be unduly difficult. On the other hand, the CC needs to represent creditors holding a substantial amount of debt securities to be able to promote efficiency in the restructuring. The CC needs to be sufficiently representative. Furthermore, the CC does not lack legitimacy with regard to the creditors who have not joined the CC since it does not represent these creditors. If they wish, they can always join the existing CC.*

*The percentage necessary to form a CC does not need to be consistent with the voting thresholds for CACs. CAC voting thresholds are high. Requiring the same for forming CCs would be overly burdensome considering that CCs are generally conducive to a prompt and effective rescheduling or restructuring of debt. Although a CC formed by the holders of 40% or 50% of the affected debt arguably only speaks for these holders, in fact, the agreement negotiated by the CC might also encourage other, non-represented creditors to join the committee.*

*There is no need for setting a certain standard for the expertise of CC (steering group) member representatives. Creditors are likely to send capable individuals.*

*It could be stipulated that CCs have to be representative, either by investor type, by the nature of holdings (to ensure that all series of bonds are represented – the failing of the Ukraine committee) and, in appropriate cases, by geography. In the Congo debt restructuring, the issuer reserved the right to not recognize the committee if it did not consider it to be representative enough. In US corporate bankruptcy proceedings, the representativeness of creditor committees is also central. In the Ukraine Eurobond restructuring the problem was that the CC only represented 13 out of 14 issues, the 14$^{th}$ being the Russian issue. The CC agreed to the restructuring of 13 issues of sovereign Eurobonds; Russia did not agree to the restructuring of the 14$^{th}$ issue and later commenced litigation against the Ukraine. Notwithstanding, the work of the committee contributed to the successful restructuring of 13 issues. As pointed out*

> *above, forming a CC should not be made overly difficult. That a committee has to represent creditors from all issues or certain geographic origin means demanding too much. As in the case of the Ukraine Eurobond restructuring, no CC could have been formed at all given Russia's opposition. Also, the IMF values representative CCs. In the context of its lending into arrears policy the directors*
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>> *"emphasized that in assessing whether the member is making good faith efforts to negotiate, judgments would continue to be required in a number of important areas. These include a consideration of the complexity of the restructuring case, the extent to which a creditor committee is sufficiently representative, and whether a reasonable period has elapsed to allow for the formation of a representative committee."*

i. For all purposes of (b) *(Appointment)*, any debt securities which are for the time being held by or on behalf of the Issuer or by or on behalf of any person which is owned or controlled directly or indirectly by the Issuer or by any public sector instrumentality of the Issuer shall be disregarded and be deemed not to remain outstanding, where:

   A. '**public sector instrumentality**' means any department, ministry or agency of the government of the Issuer or any corporation, trust, financial institution or other entity owned or controlled by the government of the Issuer or any of the foregoing; and

   B. '**control**' means the power, directly or indirectly, through the ownership of voting securities or other ownership interests or through contractual control or otherwise, to direct the management of or elect or appoint a majority of the board of directors or other persons performing similar functions in lieu of, or in addition to, the board of directors of a corporation, trust, financial institution or other entity.

   A debt security will also be deemed to be not outstanding if the debt security has previously been cancelled or delivered for cancellation or held for reissuance but not reissued, or, where relevant, the debt security has previously been called for redemption in accordance with its terms or previously become due and payable at maturity or otherwise and the Issuer has previously satisfied its obligations to make all payments due in respect of the debt security in accordance with its terms.[8]

***Commentary:***

> *CACs usually exclude debt securities owned or controlled by the issuer for the purposes of voting eligibility, voting thresholds and other issues. Such exclusions should also apply with regard to the appointment of CCs.*

**ii.** Upon receipt of a written notice that a Creditor Committee (a Steering Group) has been appointed in accordance with paragraph (b) (*Appointment*) i. and/or ii. ((c) *(Steering Group)*), and a certificate delivered pursuant to paragraph (g) *(Certification of Appointment and Composition of the Creditor Committee (Steering Group)* the Issuer shall give notice of the appointment of such a committee to the Holders of each affected series of debt securities in accordance with the terms and conditions of such affected series of debt

[8] This clause is an almost exact copy of the 2015 ICMA clause on Standard Aggregated Collective Action Clauses ("CACs") for the Terms and Conditions of Sovereign Notes governed by English Law, *(Meetings of Noteholders, Written Resolutions)*, (i) *(Notes controlled by the Issuer)*.

securities, as soon as practicable after such written notice and such certificate are delivered to the Issuer.

### (c) Steering Group

If Holders of affected debt securities have established more than one Creditor Committee in accordance with the provisions of (b) *(Appointment)* i. and/or ii. and/or equivalent provisions set out in the terms and conditions of any affected debt securities, the Issuer does not have to engage with such committees[9] or have any obligations whatsoever towards any of them. Such committees may appoint a single Steering Group (to be comprised of representatives from such committees (the Steering Group), whereupon the Issuer shall engage with such Steering Group. The Steering Group shall comprise at least one member from each appointing Creditor Committee.

***Commentary:***

The Pros and Cons of a Steering Group:

> *Pros: The issuer needs to only engage and potentially bear the costs of one committee (the steering group). One possibility is that once the steering group is established, only costs incurred by the same are compensable.*
>
> *If two or more CCs operate without the benefit of a steering group, some CCs may demand preferential treatment and so block the entire process (a problem that occurred in Iraq's 2005 debt restructuring). Also, costs may increase because of the inefficiencies associated with more than one CC operating without guidance and management by a steering group.*
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> *Cons: The issuer may want to strike different deals with different CCs. This flexibility may be undermined by a steering group representing the interests of all CCs. Even in the absence of preferential treatment of one CC over another, one CC may have different concerns and interests than another CC.*

### (d) Powers

The Creditor Committee (the Steering Group)

i. may, by vote of members holding at least 90 per cent of the aggregate principal amount of debt securities represented in the committee (the group), adopt rules of conduct and operations which are appropriate in the circumstances and safeguard the legitimate interests of the Issuer and the Holders of the affected debt securities as a whole;

***Commentary:***

Unanimity may be impractical. The Belize Representative Committee reached its decisions (including the decision concerning the acceptability of the proposed restructuring terms) with the consent of members of the committee holding not less than 85 per cent of the total amount of the affected debt held by all committee members. For the decision on the acceptability of the proposed restructuring terms, 75 percent is a sensible threshold considering that much is at

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9 This draft omits the word 'separately' after 'committees'. Once several committees are formed, the Issuer should not have to engage with any creditor committee, but only with a steering group.

stake, but also considering that individual CC members should not be able to block acceptance by the CC.

ii. may, in its discretion engage legal, financial or other advisers to assist it in representing the interests of the Holders of the affected debt securities as a whole;

iii. may enter into discussions with other creditors of the Issuer not represented on the Creditor Committee; and

iv. shall enter into discussions with the Issuer and seek to reach an agreement on the terms of the rescheduling or restructuring of the affected debt securities to be presented to the Holders of the affected debt securities for their acceptance ('agreement'). The Creditor Committee (the Steering Group) and the Issuer shall have reached an agreement if members of the Creditor Committee (Steering Group) holding at least 75 per cent of the aggregate principal amount of debt securities represented in the committee (the group) vote in its favour.

Except to the extent provided in this paragraph (d) *(Powers)*, the Creditor Committee (the Steering Group) shall not have the ability to exercise any power or discretion which the Holders of the affected debt could themselves exercise.

### (e) Duties

The Creditor Committee (the Steering Group) shall

i. designate one or more members of the Creditor Committee (the Steering Group) to act as the main point(s) of contact with the Issuer and provide all relevant contact details to the Issuer.

ii. work with the debtor to resolve its financial difficulties expeditiously;

iii. show how the creditors' proposal affects medium and long-term debt sustainability, and consider the debtor country's proposal and its effect on medium and long-term debt sustainability;

iv. to accept individually and to endorse collectively and publicly the terms of any restructuring agreed (on a consensual basis) with the debtor, and to cooperate with the debtor to the best of its abilities in advising the Holders of the affected debt securities to accept the offer.

### (f) Engagement and Negotiation in Good Faith

The Issuer and the Creditor Committee (the Steering Group) shall engage and negotiate with each other in good faith.

***Commentary:***

> *Both the issuer and the CC (the steering group) should make a good faith effort in seeking a mutually acceptable agreement on the restructuring of sovereign debt, but there should be no obligation to agree. This goes hand in hand with the issuer's right to make proposals and reach agreements with individual creditors or all creditors via*

*CACs even against the opposition of the CC or the steering group. It is not feasible to give the 'good faith' standard specific content in this guidance.*

*Good faith on both sides is presumed. Hence, the burden of proving the absence of good faith falls on the party that alleges the breach of good faith. Good faith requires a serious attempt to reach a mutually acceptable agreement. Engagement should not be a farce. However, the standard cannot be given specific content ex ante since no one can anticipate all factual scenarios beforehand. Various systems of law have conceptions of good faith. Insofar as English law is concerned this is still an unusual and ill-defined concept (per Lord Bingham in Interfoto Picture Library Limited v. Stiletto Visual Programmes Limited, [1987] EWCA Civ 6, "English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness".*

*The Supervising Body or the courts of the competent jurisdiction would have to decide on the exact contours of the standard.*

### (g) Conflict of interest

The following instances shall constitute conflicts of interest that result 1) in the invalidity of the appointment of a party to the Creditor Committee (the Steering Group) or 2) the invalid representation of a member in the committee (the Steering group) if the conflict of interest concerns the representative or 3) a member's exclusion from the committee (the group) if the member's conflict of interest arises after its appointment:

i. Holding a plaintiff/ claimant position against the Issuer in pending litigation, arbitration or other legal proceedings that concern the affected debt securities, save where the creditor successfully demonstrates that it was under a legal obligation to commence litigation, arbitration or other legal proceedings (e.g. a trustee);

***Commentary:***

*The specter of concurrent litigation by committee members is a reasonable concern of issuers. The provision could specify a general conflicts of interest provision. However, the conflict of interest should be limited to litigation that is linked to the sovereign debt at issue. Litigation more generally does not create a conflict of interest.*

ii. Holding a credit default swap (CDS) or similar financial hedging or insurance instrument for the event of the Issuer's total or partial default on the affected debt securities.

***Commentary:***

*One of the main concerns of issuers are CC (steering group) members holding Credit Default Swaps (CDS) for the event of the issuer's partial or total default on the sovereign debt. Indeed, allowing those with CDS cover to serve on the CC amounts to a conflict of interest, regardless of the purpose for which the creditor in question purchased the CDS. However, CDS protection sellers should become members of the CC (see Section b on Appointment).*

*Whereas in a scenario without CDS the CC (the steering group) and the issuer will pull in broadly the same direction (they both are interested in a successful* *restructuring), the involvement of CDS protection potentially changes this state of affairs. CC (steering group) members with CDS protection may not be as interested in a successful restructuring, and be better off financially if the issuer defaults. This will be the case where the CDS have a higher value than what the CC (steering group) member could gain by a reasonable restructuring deal. This may result in obstructing the negotiations, rather than working together with the issuer on a mutually acceptable solution.*

*Ethical Walls or Lock-ups are possible solutions. However, they would only address part of the problem. Having an information barrier between the CC (steering group) member (the person) and the trading department of his/her financial institution may help to avoid insider trading with CDS (forbidden under the laws of most major jurisdictions). Yet, the CC member will still be fully aware that his/her institution holds CDS which may influence his/her actions in the way described above. Lock-ups are time periods in which an entity is 'not allowed to redeem or sell shares' or in this case sovereign debt. Again, this only addresses the trading problem, leaving a wider conflicts of interest problem untouched.*

*As a result, holding CDS for the event of the issuer's partial or total default on the sovereign debt at issue should be included in the CC guidance as a conflict of interest with all the consequences that such a conflict triggers. This line of thought is also reflected in US bankruptcy proceedings, where the committee is formed of creditors of unsecured claims. A more lenient approach for creditors would be to oblige CC members to disclose the CDS protection they hold. But mere disclosure does not suffice to alleviate the conflict of interest.*

### (h) Effect of Conflicts of Interest

The Issuer shall be entitled to discontinue engagement with the Creditor Committee (the Steering Group) until all members of the CC (Steering Committee) with a conflict of interest cease to participate in the CC (the Steering Group).

***Commentary:***

*In case a CC (the steering group) member with a conflict of interest does not leave the CC (the steering group), the issuer is entitled to discontinue engagement with the CC (the steering group). A supervisory body or courts in the competent jurisdiction could decide on disputes regarding conflicts. For the supervisory body, one member could be appointed by the issuer, one by the CC (the steering group), and the third member could be jointly appointed by the other two members. This supervising body should decide by majority.*

*Alternatively, a supervision function could be assumed by the courts. This could be implemented by including an agreement that disputes between the Issuer and the creditors represented by the CC (the Steering Group) concerning the application of these provisions may be referred to the competent courts of the jurisdiction to which the majority of the affected debt securities in the aggregate principal amount outstanding are subject. In practice, the courts will be those of either England and Wales or New York.*

*Creditors may be concerned that this approach unduly restricts the current flexibility in forming a CC. Yet, this procedure combined with a supervising body may be necessary to give the conflicts of interest provision teeth.*

*Such a mechanism might be unnecessary if the CC guidance were linked to a modified 'lending into arrears' policy of the IMF to the effect that the IMF would not make available funds if the issuer does not comply with the guidance on CCs. However, the IMF is unwilling to assume this task. In addition, the IMF – as a creditor – would be conflicted and not best placed to assess whether negotiations between its members and private creditors were in good faith. Moreover, the Fund only assesses the debtor state's behavior. It is difficult to see how the IMF could ever be able to assess the behavior of creditors, with the result that the assessment would be asymmetrical. Moreover, the IMF has no right to sit in the negotiations either, even if only to monitor the debtors. Accordingly, the IMF would be vulnerable to receiving incomplete and skewed information. Finally, the IMF is not in an equidistant position to arbitrate in conflicts. Nor does its policy of neutrality permit any involvement in debtor-creditor disputes.*

*A better solution is for the IMF to defer to the judgement of an independent supervising body when deciding whether the issuer adhered to the CC guidance. Nevertheless, the ultimate determination whether IMF policies have been met would still rest with the IMF's Executive Board.*

## (i) Provision of Information, Confidentiality and Trading

**i.** The Issuer shall communicate the proposed financial terms of a debt restructuring that the Issuer believes will result in a sustainable debt profile for the country under a non-disclosure agreement. In addition, the Issuer endeavors to supply any and all information that the CC (the Steering Group) can be expected to require for the rescheduling or restructuring negotiations (the negotiations) in a medium agreed with the CC (the group) in time for the CC (the Steering Group) to review the information before the negotiations commence.[10] The Issuer shall promptly comply with additional information requests by the Creditor Committee (the Steering Group) such as macroeconomics statistics, data on its public debt, fiscal performance and the treatment of different creditors, always provided the additional information is reasonably required for the negotiations.

The Issuer shall publish the result of the negotiations (either the agreement or the latest respective positions) in the same medium before expiry of the 48 hours or immediately thereafter. The Issuer and the Creditor Committee (the Steering group) shall keep any and all information other than the latest respective positions and/or the agreement confidential, provided that the information has been expressly classified as confidential by the providing party.[11] It is expected that CC members and the CC will enter into non-disclosure agreements.

***Commentary:***

[10] Based in part on clause 9 of the Belize 2006 Representative Committee rules. Clauses 6 and 8 of these Rules on the information to be provided by the Issuer were replaced by a broader clause. Belize is widely seen as an example where pre-default consultation has worked well.

[11] One could consider including paragraph (f) *(Information)* of the 2015 ICMA clause on Standard Aggregated Collective Action Clauses ("CACS") for the Terms and Conditions of Sovereign Notes governed by English Law to specify what kind of information is required.

*Should there be a cap on the time an issuer has to engage in good faith with the CC (the steering group)? The alternative seems to be that the issuer is only bound to negotiate as long as there is a reasonable chance of eventual agreement. Deciding whether there is such a reasonable chance (a possible responsibility for a supervising body) may be difficult. However, a time limit would not solve this problem, as the issuer would still have to be allowed to discontinue engagement with the CC if there is no reasonable chance of reaching an agreement, this even before the necessary time has passed. Refusing this right would be unreasonable given that continued engagement would bear no fruits. On the other hand, negotiations that have lasted for say 8 months should continue if there is still a reasonable chance to agree. Thus, as difficult as it may be to decide whether negotiations have broken down beyond repair, a limit on the negotiation period does not seem desirable.*

*Another major concern is that CC (steering group) members will use their information privilege to trade their sovereign bonds and that they thereby will gain an unfair advantage over other creditors. This insider trading is forbidden under the laws of most major jurisdictions. Nevertheless, issuers still question why they should give a class of creditors – and only this class – privileged access to information. Probably the best option is to conclude confidentiality agreements; or an agreement that CC members will not trade the affected securities while serving on the committee. These two proposals together yield a first approach that is restrictive for creditors. A second approach mirrors the one that Belize successfully employed in its restructuring. After a reasonable time period which is used for preparations, representatives of the issuer and the CC (steering group) meet on a weekend, when financial markets are closed, to try to reach an agreement within 48 hours. Within these 48 hours both sides have to keep the obtained information confidential and the CC (steering group) members could not trade their sovereign bonds.*

*In the case of the Belize restructuring an agreement was reached. But in principle this procedure could be repeated until there is no reasonable chance of reaching an agreement. This procedure has the evident advantage of keeping any limitations on the creditors' trading opportunities to a minimum, while ensuring equal trading opportunities for all creditors.*

*A third alternative is for CC (steering group) members to keep the information confidential, but their institutions could still trade the sovereign bonds because Ethical Walls are employed. Issuers could decide whether to engage with the CC (the steering group) under one of these three alternative approaches.*

ii. The members of the Creditor Committee (the Steering Group) may trade affected debt securities, provided that the individuals representing these members (institutions, enterprises or other entities) in the Creditor Committee (the Steering Group) shall not provide to their institutions or enterprises information that has been clearly classified as confidential by the Issuer, be it directly or indirectly. The member representatives in the Creditor Committee (the Steering Group) shall not use confidential information to trade affected debt securities.

iii. A breach of the confidentiality obligation by a member of the Creditor Committee (the Steering Group) results in its exclusion from the Creditor Committee (the Steering

Group) and the payment of a fine of 5 per cent of the respective member's holdings of the affected series of outstanding securities to the Issuer.

iv. Upon request, the members of the Creditor Committee (the Steering Group) shall provide the Issuer within reasonable time with the price at which they acquired the affected debt securities, the time of acquisition and the market value of their debt securities. The Issuer shall keep this information strictly confidential. Once such an initial request has been issued, the members of the committee (the group) shall provide the Issuer with this information (time, acquisition/sale price, price in account books) regarding any and all subsequent acquisitions or sales of affected debt securities. Non-compliance with these obligations, even if not mandated by any applicable policies, laws, rules and regulations, including without limitation information disclosure policies, laws, rules and regulations, results in the automatic exclusion of the member from the Creditor Committee (the Steering Group). If the former member, notwithstanding its exclusion, continues to participate in operations the Creditor Committee (the Steering Group), the Issuer is entitled to discontinue its engagement with the committee (the group).

***Commentary:***

*Issuer typically disclose to CCs delicate information regarding its economic and financial position. Currently no corresponding principle is in place for the CC members. Upon request, creditors shall provide information regarding the time and the price at which the CC (steering group) members acquired the affected securities and the market value of their holdings. Timely disclosure by creditors upon the issuer's request are an important part of the CC guidance.*

## (j) Payment of Fees and Expenses of the Creditor Committee (the Steering Group)

The members of the Creditor Committee (the Steering Group) shall not be entitled to charge fees. The Creditor Committee (the Steering Group) shall be reimbursed for its expenses, subject to the following conditions:

**i.** In the event of a rescheduling or restructuring of the affected debt securities (or any of them) of any series of affected debt securities (or any of them) (whether by amendment, exchange offer or otherwise) that is based on a proposal of a Creditor Committee (the Steering Group) or agreed with it, the Issuer shall pay any reasonable expenses of this committee (the Steering Group), as may be agreed in advance with it (including without limitation, the reasonable and documented expenses of the committee's advisers, if any) following receipt of reasonably detailed invoices and supporting documentation or such other documentation as may have been agreed in advance.

ii. If there is no rescheduling or restructuring of the affected debt securities (or any of them) of any series of affected debt securities (or any of them) (whether by amendment, exchange offer or otherwise), the creditors represented by the Creditor Committee (the Steering Group) shall bear the committee's (the group's) expenses according to each creditor's principal amount of affected debt securities as this amount is represented in the committee (the group) at the time a payment request is made to the Issuer. The Issuer shall reimburse the expenses of the Creditor Committee (the Steering Group) according to (l) *(Payment of Fees and Expenses of the Creditor Committee (the Steering Group)* i., but deduct a sum according to ii. from each payment to a creditor represented by the committee (the group), provided that the reimbursement sum is less than the aggregate sum paid to all creditors represented by the Creditor Committee (the Steering Group).[12]

***Commentary:***

*If the objective is rapid engagement between the debtor and creditors, reimbursement by the Issuer of a certain minimum of expenses, if not all, is probably advisable. However, even if expenses are not reimbursed, or only subject to certain limits, the incentive to become a committee (group) member may still be sufficiently high for creditors considering that they take part in the decision-making.*

*The 2015 ICMA clause provides that the issuer will pay all duly documented reasonable fees and expenses.*

*A second possibility is that issuer and CC (the steering group) to agree on costs in advance. Once the agreed limit is exceeded, members of the CC pay additional costs. Conversely, in the absence of agreement, no costs are reimbursed. A downside of this approach is that it may be a source of delay in committee formation.*

*A third, and possibly the most viable approach, is for the issuer to only pay CC costs in case of a successful restructuring. If there is no successful restructuring, the CC costs are shared among all restructured creditors according to their share of the aggregate principal. This approach has potentially three advantages. First, it incentivizes the issuer to engage with a CC in the first place. Costs and expenses only need to be reimbursed in the event of a successful rescheduling or restructuring and if they are – all things considered – reasonable. This takes account of issuers' concern that they would need to pay the costs of unsuccessful CCs without limit. Second, it incentivizes the CC to work towards an agreement with the issuer. It will also encourage the CC to work more quickly and more efficiently. Third, however, if no agreement can be reached the represented creditors cover the CC costs and not its members means the financial risk is evenly distributed among all creditors.*

*The Belize restructuring used a fourth approach. Belize deducted the expenses of the CC from the first coupon payment made to holders of the restructured bonds and then reimbursed these expenses to the committee members, ensuring that all restructured bondholders shared the costs of the committee equitably.*

## (k) Settlement of Disputes

Either the Issuer or the Creditor Committee (the Steering Group) may refer disputes concerning the application of these provisions to either

i. the competent courts of the jurisdiction to which the majority of the affected debt securities in the aggregate principal amount outstanding are subject.

ii. a specially appointed Supervising Body. The decision of the Supervising Body shall be final and binding on the disputing parties.

[12] Thus, reimbursement is only due if the expenses are less than what is paid to the represented creditors (the typical case).

Each party may request the appointment of such a Supervising Body. Any request shall be made available to the other party in writing. The request shall briefly outline the disputed issue, the declaration sought and appoint one individual as a member of the Supervising Body.

The responding party shall within 10 days after receipt of the request make available to the requesting party a reply. Therein it shall briefly respond to the outline and appoint an additional individual as a member of the Supervising Body.

Following the appointment of the second member of the Supervising Body, the two party-appointed members shall within 10 days after this date together appoint a third member.

If the responding party does not appoint the second member of the Supervising Body within 10 days after receipt of the request, the requesting party may appoint the second and third member of the Supervising Body within 10 days after this date.

The members of the Supervising Body shall be independent and impartial. Any member of the Supervising Body may be challenged by either party if circumstances exist that give rise to justifiable doubts as to the member's impartiality or independence. If a majority of the members grant the challenge, the challenged member shall be dismissed from the Supervising Body. A successfully challenged party-appointed member shall be replaced by the respective party within 10 days after that date. Failure to comply timely shall vest the other party with the right to appoint a replacement within 10 days after that date. A successfully challenged non-party-appointed member shall be replaced by the party-appointed members within 10 days after that date.

The Supervising Body shall decide on all issues with the absolute majority of its members.

Following the adoption of the rules of conduct and operations, the Supervising Body shall within 30 days after that date hear each party if it considers this appropriate and decide on the request.

Further requests shall be decided by the same Supervising Body if its members agree to this at the time. Members who do not agree shall be replaced by appointment following the above procedure.

The members of the Supervising Body are entitled to the payment of reasonable fees and the reimbursement of its reasonable expenses by the unsuccessful party. If a request is partially successful, the costs shall be equally borne by the parties to the dispute.

The members of the Supervising Body shall keep all information strictly confidential that was classified as such by the providing party.

***Commentary:***

*CCs as such do not require supervision. However, a supervising body could decide disputes between the CC and the Issuer under these provisions. The rules for such a Supervising Body could be a simplified and adapted version of the UNCITRAL Arbitration Rules. Alternatively, particularly if there are concerns that the supervising body leads to delay, courts could assume this supervision function (see above).*

## Annex A: Issuer/Holder Consultations

The Issuer and the holders from time to time of the Bonds acknowledge and agree that debtor/creditor consultations should precede any request by the Issuer for a Reserve Matter Modification (resulting from a deterioration in the creditworthiness or financial condition of the Issuer) affecting the Bonds of any series. Accordingly, not less than 60 days prior to making a formal request for such a Reserve Matter Modification affecting any series of Bonds, the Issuer shall:

(i) notify the holders of the Bonds of that series of its intention to seek such a Reserve Matter Modification;

(ii) provide the information defined in the Section [X] *(Information Delivery Requirement)*[13];

(iii) invite the holders of the affected series to form a single representative committee of holders;

(iv) if such a committee is formed within 21 days of the Issuer extending such an invitation (x) provide the members of the committee, subject to appropriate confidentiality restrictions, with details of the Issuer's proposed Reserve Matter Modification and (y) meet with committee members (and their advisers, if the committee elects to retain advisers) to discuss the Issuer's proposal and any amendments or counterproposals the committee members may wish to make; and

(v) if such a committee is not formed as described in clause (iv) above, make publicly available the details of the Issuer's proposed Reserve Matter Modification and provide an opportunity for comment by holders of Bonds of the affected series before seeking the consent of holders to the proposed Reserve Matter Modification.

[13] See the information delivery requirement in the ICMA clause on Standard Aggregated Collective Action Clauses.