

DEED OF VARIATION OF PRIORITY

THIS DEED OF VARIATION OF PRIORITY is made the day of Two Thousand and One BETWEEN C. MEHTA & COMPANY LIMITED a Limited Liability Company incorporated in the Republic of Kenya and of Post Office Box Number 80314 Mombasa in the said Republic (hereinafter called "the Borrower" which expression shall where the context so admits include its successors and assigns) of the first part **AND BANK N. A.** a Banking Company incorporated in the United States of America and registered as a bank pursuant to the provisions of the Banking Act (Chapter 488 of the Laws of Kenya) in the said Republic and having its registered office in Nairobi in the said Republic and of Post Office Box Number 30711 Nairobi aforesaid (hereinafter called "the Senior Creditor" which expression shall where the context so admits include its successors and assigns) of the second part **AND CREDIT AGRICOLE INDOSUEZ** a Societe Anonyme incorporated in the Republic of France and carrying on the business of banking through its branches in the aforesaid and whose address for the purposes of this instrument is Post Office Box Number 87941 Mombasa in the aforesaid Republic (hereinafter called "the Junior Creditor" which expression shall where the context so admits include its successors and assigns) of the third part:

WHEREAS:

The Junior Creditor has granted and continues to grant to the Borrower loan, credit, financial or other facilities on the security of (inter alia) a Debenture dated the 4th day of August One Thousand Nine Hundred and Ninety Seven (hereinafter called "the Junior Debenture") more particularly described in the Schedule hereto and made between the Borrower of the one part and the Junior Creditor of the other part.

The Senior Creditor has granted and continues to grant to the borrower loan, credit, financial or other facilities on the security of (inter alia) a Debenture dated the 10th day of July Two Thousand and One (hereinafter called "the Senior Debenture") more particularly described in the Schedule hereto and made between the Borrower of the one part and the Senior Creditor of the other part.

3. The Borrower and the Junior Creditor agree with each other and each of them agrees with the Senior Creditor to execute this Deed for the purpose of postponing the Junior Debenture to the Senior Debenture so that the Senior Debenture shall rank prior to the Junior Debenture in all respects.

NOW IN CONSIDERATION of the premises and in pursuance of the said agreements this

DEED WITNESSES as follows:

1. Definitions

1.1 In this Deed the following words and expressions shall have the following meanings unless otherwise expressly provided or the context otherwise requires:

“Arrangement” means any kind of transaction, contract, arrangement or understanding.

“Creditors” means both the Senior Creditor and the Junior Creditor and includes their respective successors in title to the Securities and their assigns whether immediate or derivative and “the Creditor”, “a Creditor” and “each Creditor” means any one or both of them as the context may admit.

“Distribution Monies” means all cash, securities and other property received by the Creditors or any one of them representing the proceeds of (a) any distribution among creditors generally of the assets of the Company by virtue of any provisions or process of law (including without limitation the proceeds of winding-up, dissolution or liquidation of the Company, however such dissolution or liquidation may occur), and (b) any recovery and/or enforcement under the Security (including without limitation, the proceeds of any insurance policies covering any of the property or assets of the Company in respect of which the Creditors are designated payees).

“Junior Charges” means the mortgages or charges created by the Junior Debenture which at the date of this Deed or at any later date secures any Junior Debt.

“Junior Debt” means all monies obligations and liabilities whatsoever whether for principal interest or otherwise which at the date of this Agreement or at any time in the future be due owing or incurred (whether future actual or contingent) by the Borrower to the Junior Creditor under the terms of or on the security of the Junior Debenture.

“Receiver” includes a receiver and manager.

“Security” means the security created or to be created by the Borrower in favour of the respective Creditors pursuant to the Security Documents to secure the obligations owing to the respective Creditors under the Security Documents.

“Security Documents” means collectively the Junior Debenture and the Senior Debenture, and any and all consents, notices and other instruments executed in connection with such debentures.

“Senior Charges” means the mortgages or charges created by the Senior Debenture which at the date of this Deed or at any later date secures any Senior Debt.

“Senior Debt” means all monies obligations and liabilities whatsoever whether for principal interest or otherwise which at the date of this Agreement or at any time in the future be due owing or incurred (whether future actual or contingent) by the Borrower to the Senior Creditor under the terms of or on the security of the Senior Debenture.

1.2 References in this Deed to a creditor's enforcing a security interest include references to: its retaining or applying in or towards the discharge of a liability of the Borrower any amount which it receives by virtue of an assignment of, or other security interest over, an insurance policy or receivable owned by the Borrower; taking or retaining possession of any movable property, including any negotiable instrument, document of title or other document owned by the Borrower.

In this Deed (unless the context otherwise requires):

References to a person are to be construed to include references to a corporation, firm, company, partnership, joint venture, unincorporated body of persons, individual or any state or any agency of a state, whether or not a separate legal entity;

Words importing the singular are to include the plural and vice versa;

The words "other" or "otherwise" are not to be construed *ejudem generis* with any foregoing words where a wider construction is possible;

References to any liability are to include any liability whether actual, contingent, present or future;

Clause headings are for ease of reference only and are not to affect the interpretation of this Deed.

2. Duration

2.1 The Junior Creditor ratifies and consents to the existence of the Senior Debt and the creation of the Senior Charge.

2.2 The provisions of this Deed shall apply until the day after:

2.2.1 the date on which the Borrower makes the payment (hereinafter referred to as the "last payment") that results in its having no obligation (present, prospective or contingent) under or in respect of the Senior Debts if the Borrower produces evidence which satisfies the Creditors that the Borrower was not unable to pay its debts for the purposes of sections 220 of the Companies Act (Chapter 486 of the Laws of Kenya) on the date of the last payment and will not become so as a result of the last payment;

2.2.2 the second anniversary of the date of the last payment, if the Borrower does not produce evidence which so satisfies the Creditors unless on or before that second anniversary a petition is presented on which an administration order is made in relation to the Borrower or a winding up

of the Borrower commences;

2.2.3 in any other case, the date on which the administration order is discharged (unless a winding up of the Borrower has commenced) or the winding up of the Borrower is concluded for the purposes of the Companies (Winding Up) Rules or, if later, the last payment date.

2.3 The Creditors may by notice to the Borrower make any modifications to the previous sub-clause which the Creditors consider appropriate if:

2.3.1 any amendment is made to the Companies Act (Chapter 486 of the Laws of Kenya) or the Companies (Winding Up) Rules (or either is replaced) in a manner which the Senior Creditor considers is relevant to the previous sub-clause; or

2.3.2 the Creditors consider that if the Borrower were to become insolvent it (or some or all of its affairs or assets) would be or would probably be within the scope of the insolvency law of a jurisdiction outside Kenya.

3. Priorities

The Borrower and the Junior Creditor agree with each other and each of them agrees with the Senior Creditor as follows:

The Senior Debts shall rank prior to the Junior Debts in all respects.

The Senior Charges shall rank prior to the Junior Charges in all respects.

The Junior Debenture shall accordingly be varied so that the Junior Debenture shall be deemed to have been postponed to the Senior Debenture and the Senior Debenture shall rank prior to the Junior Debenture in all respects.

Clauses 3.1 and 3.3 apply:

as between the Senior Creditor and the Junior Creditor; and

as between the Borrower and each of the Senior Creditor and the Junior Creditor.

3.3 Nothing in this Deed shall affect the status of the Junior Charges and the Senior Charges as continuing securities nor shall the provisions relating to the ranking of the Junior Charges and the Senior Charges contained in this Clause 3 be affected by any of, or any combination of, the following:

the nature of the various securities comprised in the Junior Charges and the Senior Charges and the date of their execution and registration;

any provision contained in any of the Junior Charges and the Senior Charges;
the respective date or dates on which any person received notice of the existence or creation of the Junior Charges and the Senior Charges;
the respective date or dates upon which moneys may be or have been advanced or become owing or payable or secured under the Junior Charges and the Senior Charges;
any fluctuation from time to time in the amount of the moneys secured by the Junior Charges and the Senior Charges (which shall be continuing securities in favour of each chargee respectively) and in particular, but without limitation, any reduction to nil of the moneys so secured;
the existence at any time of a credit balance on any current or other account of the Borrower; or
the appointment of any Liquidator or receiver, administrator or other similar officer in respect of the Borrower or over all or any part of the Borrower's assets.

4. Consultation and other Actions by the Junior Creditor

4.1 Subject to the provisions of clause 4.4 and except as the Senior Creditor and the Junior Creditor may otherwise agree in writing from time to time, the Junior Creditor shall comply with the procedures in this clause 4 in taking any of the following actions:

servicing on the Borrower a demand for the payment of a Junior Debt; or

servicing on the Borrower a notice to the effect that a Junior Debt is immediately due and payable;

or

taking any step which might affect the ranking of a Junior Charge as regards any asset which it covers; or

taking any step to enforce a Junior Charge.

The Junior Creditor shall comply with the following procedures in taking any of the actions contemplated in clause 4.1:

It shall give the Senior Creditor at least three (3) days prior notice by facsimile of the intention to exercise any of its rights or remedies in respect of the Junior Debt or the Junior Charge or generally under the laws of the Republic of Kenya ("the First Notice") with details of the action proposed to be taken and the reasons for wishing to do so set out in the First Notice.

Within five (5) days from receipt of the First Notice, the Senior Creditor may request consultation with the Junior Creditor by sending to the Junior Creditor a notice by facsimile ("the Consultation Notice") indicating in the Consultation Notice the specific points on which the Senior Creditor wishes to consult.

Within five (5) days of the receipt of the Consultation Notice from the Senior Creditor, the Junior Creditor shall consult with the other Creditor by telephone, facsimile or at a meeting. Upon the expiration of the consultation period referred to in this clause 4.2.3, the Junior Creditor may, subject to clause 4.3, determine at its sole discretion whether it will enforce the Junior Charge. In case the Junior Creditor determines to enforce the Junior Charge the Junior Creditor shall, prior to taking any steps to enforce the Junior Charge, notify the Senior Creditor of the action that the Junior Creditor intends to take.

Upon receipt of a notification from the Junior Creditor of the Junior Creditor's intention to take enforcement action, the Senior Creditor, upon request by the Junior Creditor, agrees to take all timely and appropriate action in all matters connected with the enforcement of the Junior Charge which requires the participation or assistance of the Senior Creditor.

If either Creditor ("the Opposed Creditor") is opposed to the other Creditor ("the Enforcing Creditor") taking any enforcement action under that Creditor's Security, the Opposed Creditor may irrevocably undertake in writing to discharge within Twenty-one (21) days thereafter the amount due and owing by the Borrower to the Enforcing Creditor under that Creditor's Security. The Opposed Creditor's undertaking as aforesaid shall keep the Enforcing Creditor indemnified against any loss, costs or expenses arising in respect of the Enforcing Creditor's obligations.

Subject to clause 4.3, nothing contained in clause 4.2 shall prevent the Junior Creditor from taking any action to enforce its rights and remedies under the Junior Charge or under the laws of the Republic of Kenya if, in its judgment, the Junior Debt or Junior Charge or its rights and remedies in respect thereof are in jeopardy or might be prejudiced or impaired by the observance of the provisions of clause 4.2, provided that the Junior Creditor shall, in any event and notwithstanding the provisions of this clause, notify the Senior Creditor of the action that the Junior Creditor intends to take.

Subject to the provisions of clause 5.2 and clause 6 of this Deed, all matters referred to in this Deed which may require the consultation between the Junior Creditor and the Senior Creditor shall be agreed upon between the Junior Creditor and the Senior Creditor to the intent that:

in the case of the exercise of any power of sale (whether through auction or otherwise), the Creditors shall execute such release or other necessary document so as to permit good title, free from either the Junior Charge or the Senior Charge, to be passed to a purchaser;

in the case of an appointment of a Receiver, the same person shall, if possible, be appointed as such by the Senior Creditor and the Junior Creditor, but if at least two persons shall be appointed they shall, so far as practicable, act jointly to give effect to this Deed. Unless otherwise agreed, no person shall be appointed as a Receiver unless such person is a partner in a reputable firm of chartered accountants practising in Nairobi and/or certified public accountants.

Except as mandatory under the relevant laws of the Republic of Kenya until the Borrower has fully discharged the Senior Debt and the Junior Debt no part of the amount received or realised by any of the Creditors shall be applied towards the payment of any indebtedness of the Company other than in accordance with clause of this Deed.

5. Enforcement by Senior Creditor

5.1 Subject to clause 6, if and to the extent reasonably practicable, the Senior Creditor shall consult the Junior Creditor before:

it serves on the Borrower a demand for the payment of a Senior Debt (other than a demand for payment on the due date); or

it serves on the Borrower a notice to the effect that a Senior Debt is immediately due and payable; or

it takes any step to enforce any Senior Charge; or

it presents, or joins in, a petition for an administration or winding up order to be made in relation to the Borrower; or

a receiver appointed by the Senior Creditor sells, leases or disposes of an asset secured by a Senior Charge or grants an interest in, or a right in respect of, such an asset.

5.2 However, no such action taken by the Senior Creditor or a Receiver shall be invalid or ineffectual because of any failure to consult in accordance with clause 6. 1.

5.3 When consulted under clause 6.1, the Junior Creditor shall respond as quickly as is reasonably practicable.

6. No Consultation In Certain Cases

6.1 Clause 5 does not apply to the appointment of a Receiver by the Senior Creditor if both the conditions described in clause 6.2 and 6.3 are satisfied.

6.2 The first condition is that the Receiver or, in the case of a joint appointment, each person

appointed is a partner in a reputable firm of chartered accountants practising in Nairobi and/or certified public accountants.

6.3 The second condition is that one or more of the following events has occurred:
a petition has been presented to the court for an administration order to be made in relation to the Borrower, unless the petition was presented by a creditor or creditors and it was clearly not the case that the Borrower was or was likely to become unable to pay its debts (within the meaning given to that expression by section 220 of the Companies Act, Chapter 486 of the laws of Kenya); or
the Borrower or its directors has presented a petition to the court for the winding up of the Borrower, or it has been wound up on the petition of any other person or the Borrower has taken any steps with a view to its members passing a winding up resolution; or
the Borrower's directors have requested the Senior Creditor to appoint a Receiver.

6.4 Clause 6 does not require the Senior Creditor or a Receiver appointed by it to consult the Junior Creditor about any sale, lease or other disposition of any assets of the Borrower, or the grant of an interest in or a right in respect of, any such assets if the assets concerned:
are not covered by a Junior Charge; or
are not material in the context of the assets covered by the Junior Charges, taken as a whole.

6.5 Clause 6 shall cease to apply in the event that the Junior Creditor fails to observe or perform any of its obligations under this Deed unless it shows that the failure was inadvertent and has not resulted, and cannot result, in the Senior Creditor's position being adversely affected.

7. Co-operation by the Creditors

7.1 Each Creditor shall execute any deeds or documents and take any steps which the other Creditor ("the Enforcing Creditor") may request:
for the purpose of enabling or facilitating any exercise by the Enforcing Creditor, or by any Receiver appointed by it, of any of its or his powers under the Security or the general law; or
for any similar or related purpose.

7.2 Without limiting its generality, clause 7.1 requires the other Creditor to execute any deed or document or take any other step which the Enforcing Creditor may request for the purpose of ensuring that (or avoiding any uncertainty as to whether) a person who is to acquire under an Arrangement with the Enforcing Creditor or a Receiver appointed by it an asset covered by the

Security, or any interest in or right relating to such an asset, will acquire good title to the asset, interest or right free from the Junior Charges or the Senior Charges.

7.3 The other Creditor shall comply as quickly as reasonably practicable with any request by the Enforcing Creditor under this clause.

7.4 A deed or document which the other Creditor is to execute under this clause may be in any form and terms which the Enforcing Creditor has grounds to believe are necessary or expedient.

7.5 Subject to clause 7.6, the amount of any legal or other expenses which the other Creditor incurs in connection with complying with such a request shall be paid to it on demand by the Enforcing Creditor.

7.6 Clause 7.5 does not apply:
to an expense which it was clearly unreasonable for the Enforcing Creditor to incur; or
to the extent that the amount of any expense which it incurs clearly exceeds what would have been reasonable.

8. Distribution Arrangements

8.1 Unless and until the whole of the Junior Debt and the Senior Debt shall have been fully paid off, all Distribution Monies received by the Creditors or by any one of them or by any Receiver appointed by them shall, as between the Creditors, be applied and distributed in the following order of priority:

FIRST in paying all proper costs and expenses necessarily incurred or to be incurred by any of the Creditors in or about the sale, realisation and carrying on the business of the Company or otherwise in the performance or exercise of the trusts, powers and duties vested in the Creditors under any or all of the Security Documents or otherwise in respect of the Security, including the remuneration of any Receiver appointed by the Creditors, to the extent not reimbursed by the Borrower;

SECONDLY in paying the Senior Debt;

THIRDLY in paying the Junior Debt;

LASTLY in paying the surplus (if any) to the person or persons legally entitled thereto.

In the event that any Creditor shall receive any Distribution Monies in excess of its entitlement

under this Clause 8, such Creditor shall hold any such excess monies in trust for the other Creditor, to whom it shall account therefor and pay over as soon as the respective entitlement of each Creditor has been established pursuant to the provisions of this Deed.

The Creditors shall co-operate with each other in realizing the assets charged to them and ensuring that the net proceeds after deduction of the expenses of realization are paid and applied in accordance with the provisions of this Deed;

9. Creditors' Rights

9.1 The Creditors are entitled (as the case may be):

to make any variation to a deed or document relating to a Junior Debt or a Senior Debt, including variations which increase or reduce the obligations of the Borrower and/or lengthen or shorten their duration;

to enter into any re-scheduling, refinancing or reorganisation of a Junior Debt or a Senior Debt;

to take, vary, release or enter into any other Arrangement in relation to any guarantee, mortgage or other security for or connected with the Junior Debt or a Senior Debt.

9.2 None of the arrangements referred to in clause 9.1 will impair any of the obligations of the Borrower or the Creditors under this Deed.

10. Representations and Warranties

10.1 The Borrower represents and warrants to the Creditors:

that this Deed is in all respects binding on it; and

that during the three months before the date of this Deed it has not entered into any Arrangement which would have contravened this Deed if it had been entered into after the date of this Deed.

The Borrower and each of the Creditors hereby represent and warrant to the other Creditor as follows:

that it is a company duly registered and existing under applicable laws and has the corporate power to conduct its business as presently conducted and to enter into and perform its obligations under this Deed;

that this Deed has been duly authorised and executed by it and constitutes the valid and binding obligations of such party; and

that neither the making of this Deed nor the compliance with its terms will conflict with or result in a breach of any of the terms, conditions or provisions of, or constitute a default or require any

consent under any indenture, mortgage, agreement or other instrument to which it is a party or by which it is bound, or violate any of the terms or provisions of its charter of incorporation or constitutive documents or any judgment, decree or order of any court or administrative body or any statute, rule or regulation applicable to it.

11. Transferability

The Junior Creditor may not effect any disposition in respect of any of its rights in relation to a Junior Debt or a Junior Charge, or the interest on it, unless the person in whose favour the disposition is to be made and the Borrower have first executed a deed in terms satisfactory to the Senior Creditor by which they each undertake to be bound by terms similar to those contained in this Deed.

The Senior Creditor is freely entitled to effect any disposition of the Senior Debts, its rights under the Senior Charges, this Deed or any deed executed under the previous sub-clause.

In this clause 'disposition' includes an equitable charge and a floating charge.

12. Variation

12.1 No variation to this Deed is effective for any purpose unless it has been specifically agreed to in writing by the Senior Creditor.

12.2 The Senior Creditor does not need:

the Junior Creditor's consent to effect a variation to this Deed which alters only the obligations of the Borrower and the corresponding rights of the Senior Creditor;

the Borrower's consent to effect a variation to this Deed which alters only the obligations of the Junior Creditor and the corresponding rights of the Senior Creditor.

13. No Rights to Borrower

This Deed is not intended for the benefit or protection of the Borrower.

Accordingly, the Borrower may not bring any proceedings based on any provision of this Deed or set up such a provision as a defence to any proceedings or as a ground of objecting to any action taken or omitted by a Senior Creditor, the Junior Creditor or a receiver appointed by either of them.

14. Miscellaneous

14.1 Any notice, request or other communication to be given or made under this Deed to the parties to this Deed shall be in writing and shall be deemed to have been properly served if delivered or sent by any party by registered post, hand, telex or facsimile (with confirmation by letter posted within 24 hours) to the other party at the address stated below or such other address as may from time to time be notified in accordance with the provisions of this Clause.

For the Senior Creditor: Bank N. A.

Bank House
Upper Hill Road
P. O Box 30711
NAIROBI

Telephone: 711221
Facsimile: 714811

Attention: Assistant General Manager – Corporate Banking Group

For the Junior Creditor: Credit Agricole Indosuez

Nairobi Branch
Reinsurance Plaza
Taifa Road
P. O Box 69562
NAIROBI

Telephone: 211175
Facsimile: 214166

Communications shall be deemed to have been received:

if sent by registered post: 10 business days after posting exclusive of the day of posting; notwithstanding that it be undelivered or returned undelivered.

if delivered by hand: on the day of delivery within the official banking hours;

if sent by facsimile transmission: at the time of transmission.

14.1.2 In proving service:

by delivery by hand: it shall be necessary only to produce a receipt for the communication signed by or on behalf of the addressee;

by post or facsimile transmission: it shall be necessary only to prove that the communication, or letter of confirmation, was contained in an envelope which was duly addressed and posted in accordance with this clause.

This Deed shall be binding upon and inure for the benefit of the respective successors of the parties hereto, but each Creditor undertakes with the other Creditor that in the event of its assigning or transferring its interests under the Facilities Agreements, the Security Documents or this Deed, such assignment or transfer shall be made expressly subject to the terms of this Deed, and such Creditor shall procure that any assignee or transferee shall undertake, in form and substance to the reasonable satisfaction of the other Creditor, be bound by the provisions of this Deed.

This Deed shall continue to be in force until such time as all the Security have been discharged or shall have become vested in one of the Creditors.

This Deed is governed and shall be construed in accordance with the laws of Kenya.

In the event of any dispute arising between the parties hereto or between any of the parties and a Receiver or Receivers appointed by any or both of the Creditors then such dispute (if not resolved by mutual agreement within thirty (30) days) shall be referred for arbitration to a single arbitrator chosen by mutual agreement of the parties. In default of agreement or failing such agreement upon an arbitrator within seven (7) days from the time when the appointment of an arbitrator is proposed by either party to the other, then the dispute shall be referred to a single arbitrator (being a Chartered Accountant, a Certified Public Accountant or an Advocate of the High Court of Kenya of not less than 15 years standing in practice) appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) and the provisions of the laws of Kenya then in force as to arbitration shall apply to such dispute but so that pending resolution of any dispute as to the possession of any property or assets charged by the Security then the same shall be deemed to be held (in whomsoever's possession it may be) in trust for the benefit of the parties jointly.

IN WITNESS whereof the parties hereto have executed this Deed on the date first above written.

THE SCHEDULE

Particulars of the Security

Description of Instrument	Date of Instrument	Date of Registration	Amount Secured
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Junior Debenture	4/08/1997	12/08/1997	KShs. 5,000,000.00
Senior Debenture	10/07/2001	25/07/2001	KShs.75,000,000.00

SIGNED SEALED AND DELIVERED)
 by)
 the duly constituted Attorney of)
BANK N. A. in the presence of:)
)
)
 Advocate)

SIGNED SEALED AND DELIVERED)
 by)
 by the duly constituted Attorney of)
CREDIT AGRICOLE INDOSUEZ)
 in the presence of:)
)
)
 Advocate)

SEALED with the Common Seal of)
C. MEHTA & COMPANY LIMITED)
 in the presence of:)
)
 Director)
)
 Director/Secretary)

DRAWN BY:

**ROMBO & COMPANY ADVOCATES
SHANKARDASS HOUSE, NEW WING, 1ST FLOOR,
MOI AVENUE,
P.O BOX 2704 – 00100,
NAIROBI.**