

THIRD MENA JUDICIAL AND FINANCIAL COLLOQUIUM ON RESTRUCTURING- TURNAROUND AND INSOLVENCY

18-19 March 2014, Dubai - UAE

An initiative of the Forum for Insolvency Reform in the Middle East and North Africa (FIRM)

Second Edition – 2014



*Article by - Dr. Sameer Al Ansari
Acting CEO and Board Member, Hawkamah*

The Role of Corporate Governance in Strategic Restructuring

I am pleased to announce the release of the second edition of the Forum For Insolvency Reforms Newsletter. This newsletter covers highlights of the Third MENA Judicial and Financial Colloquium which Hawkamah organised in partnership with the Dubai Economic Council, Dubai Judicial Institute, The World Bank Group, INSOL International and the Commercial Law Development Program Department of Commerce, USA on March 18-19, 2014 at DIFC, Dubai.

The Colloquium was held under the umbrella of the Forum For Insolvency Reform in MENA (The FIRM) and was attended by ministries, senior government officials, judges, lawyers, regulators, judicial departments, insolvency professionals, accountants and other professionals from UAE, USA, UK, Turkey, Bahrain, Morocco, Tunisia, Oman and Yemen. The theme for the two day event was ‘Restructuring, Turnaround and Insolvency’ of businesses. Over 100 delegates attended this event.

FORUM FOR INSOLVENCY REFORMS IN MENA-THE FIRM

The design and implementation of sound insolvency systems are key components of building effective business enabling environments that respond to both investment promotion and crisis prevention.

The FIRM was founded in 2009 by the Hawkamah Institute for Corporate Governance jointly with the World Bank, IFC, INSOL International and OECD to move the Insolvency Reform agenda forward in the MENA region.

The FIRM is organised around periodic meetings that facilitate and deepen the dialogue on insolvency and restructuring reform in the region. The shared goal of the FIRM is to make sound and effective policy recommendations and to ground them in the situation of each country of the region.

The FIRM is a membership organisation and the multi-stakeholder approach of the FIRM allows for its members to have access to key regional decision makers and enable them to be at the forefront of the regional dialogue driving insolvency and creditor/debtor framework reforms. The European Bank For Reconstruction and Development (EBRD) are also members of the FIRM.

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- *The Role of Corporate Governance in Strategic Restructuring – Dr. Sameer Al Ansari*
- *Insolvency and Restructuring from a Judge’s Perspective – Justice Alastair Norris*

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In the UAE we have two Insolvency frameworks in place; one is for the DIFC and the other for the UAE. This Colloquium served as a platform to discuss and debate the insolvency and restructuring systems effective not just within the UAE, but also across various countries of the MENA region providing an opportunity to learn about global best practices and how we can tailor these to develop and improve upon our existing Legal and financial frameworks for Insolvency and Restructuring.

The fear of failure and the stigma attached with Insolvency may tend to hinder entrepreneurs and corporations entering into new businesses and new markets, as they may see the financial and social costs of failure outweighing the benefits of success. Implementing a modern Bankruptcy and Restructuring legislation can send a signal to the market that it recognises the risks inherent in a modern enterprise and can provide exit mechanisms and restructuring frameworks, providing confidence to the business community by giving them a possibility for a fresh start.

One of the key elements for a successful restructuring are having an effective policy framework balancing the interests of all parties involved such as Banks, the Business, Debtors, Creditors and other stakeholders. A supportive legal, regulatory, and accounting environment is necessary for successful corporate restructuring, which brings me to another very important topic and that is Corporate Governance.

“Corporate governance and restructuring are intertwined”

Corporate Governance is largely associated with compliance. Indeed, compliance is an integral aspect of governance but, it is not the only one. The sphere of Corporate Governance is quite broad and mainly covers five aspects i.e The Commitment at the Top meaning, vision, foresight and strategy; The Functioning of the Governing Body; Internal Controls which is the internal and external audit function; Transparency and Disclosure and last but certainly

not least Stakeholder and Shareholder rights. All these five areas put together, provide the complete picture of governance within an organisation.

While the merits of corporate governance as a driver of sustainable corporate performance is sometimes debated by sceptics, corporate failures are almost invariably attributed to poor corporate governance.

Governance mechanisms if efficiently developed and effectively implemented throughout the organisation, can play a very important role in the smooth running of an organisation.

Improving governance is always one of the most important aspects of an organisational restructuring plan. A restructuring may include splitting a company, mergers, acquisitions or reorganisation of businesses within a company. In each of these, governance plays a key role.

There is **no ‘one size fits all’ approach to corporate governance** however, organisations must restructure with an appropriate governance plan in place, to meet the challenges and avail of the opportunities presented by an ever-changing environment. As put by Johnson and Scholes, ***“A particular structure will not itself ensure the success of a company’s corporate strategy, however an inappropriate structure can impede its achievement.”***

During the restructuring journey, most organisations make three mistakes. The first is that they adjust organisational structure only occasionally and in large steps rather than incrementally to meet changing needs. The second is that restructures are too often drastic measures of cost cuts rather than well-considered and thought out re-evaluation of steps that are needed to adapt to current market conditions. Retrenchments can be costly business, as

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they can damage the trust in organisations and will entail a heavy loss of company knowledge and history. The third is that organisations often manage their restructures in ways that leave the stakeholders uncertain about the impact of the restructuring on them.

A well thought of business re- organisation and corporate restructuring plan with clearly defined roles and responsibilities of individuals and clearly articulated communication strategy can certainly make the restructuring process viewed as useful and can be seen to reinforce the company’s purpose and values as it sets itself on a new path. It is important to ensure that all stakeholders in the restructuring process should feel involved. The process should have a definite end date, there should be a clear implementation plan such that the restructured organization should be able to tackle the challenges envisaged with confidence and optimism. The entire restructuring process must be clearly articulated, monitored, adapted and controlled as effective governance is essential for long-term corporate success.

At the Country level, the success of any new insolvency regime will depend on a number of factors, in addition to the drafting of the relevant laws. Building institutional and professional capacity to implement the legislation is critical as Courts and the judiciary play a central role in any effective insolvency regime. ↗

Insolvency and Restructuring from a Judge’s perspective

When asked to offer “A Judicial Perspective on Insolvency and Restructuring” the first thought that struck me was how many matters were within view! But I much enjoyed meeting fellow judges (and particularly working with Justice Shamlan Al



Article by
Justice Alastair Norris
Judge
H.M. High Court of Justice of
England and Wales (Chancery
Division), UK

Sawalehi) at the FIRM meeting in Dubai. Guided by that I decided to share some thoughts about the basic building blocks in the mature insolvency jurisdiction in which I sit (England and Wales) so that readers could compare them with their own systems and experience. Most of the points I make apply to the insolvency both of individuals and companies.

“Insolvency is a dramatic event”

For the debtor it deprives him of control (and sometimes ownership) of his property. For his creditors it replaces their individual contractual rights with a right to share in a distribution of the debtor’s property. People’s rights are changed without their agreement. Such a change in legal rights should ordinarily only happen within a judicial process, either as the result of Court orders or under Court supervision.

“The judge’s role in this process requires a wide range of skills”

In my jurisdiction the job of the judge is to decide issues that are raised by the parties: but I think what I say will apply with equal force to jurisdictions where the judge has a more inquisitorial role.

First, has an insolvency event occurred?

This may involve a decision about whether there is a debt: and whether the debtor’s liabilities exceed his assets. As to whether there is a debt, this is familiar legal territory: the job of the judge is to be sure and to be quick. Sure, because declaring an insolvency has such dramatic consequences. Quick because everybody (the world at large) needs to know where

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they stand: can I deal with the debtor or not? As to whether liabilities exceed assets, this requires the judge to consider both legal questions and to be confident in handling expert accounting and valuation evidence.

Second, what is the size of the insolvency estate?

This might involve looking at the property that is there, and also at the property that should be there. As to what is there, the judge needs to be familiar with property law, the law of securities and the law of transactions (especially the point at which property in an asset passes). As to what should be there, often members of the debtor’s family will claim that an asset in the apparent ownership of the debtor in fact belongs to his wife or brother and so is not available to creditors. In these cases sometimes hard decisions have to be taken: but the judge must decide the issue on principle and under the law, and not on the basis of sympathy for one side or the other. Or sometimes the debtor may have disposed of his property shortly before the bankruptcy, and the question is whether it can be recovered for the benefit of the creditors: the judge may then have to balance the interests of a third party who has acquired the property with the interests of the creditors as a whole.



Mock Court Session: “Regional Financial Restructuring Case Study”

Richard G. Mason (Wachtell, Lipton, Rosen & Katz), Elaine Nolan (Kirkland & Ellis), Justice Shamlan Al Sawalehi (DIFC Courts), Steve Zelin (The Blackstone Group, USA) and Paul Basta (Kirkland & Ellis)

Third, how should the insolvency estate be administered?

To some extent this requires the judge to be

someone of business sense, able to balance risk and reward and to understand the difference between cost and value. In England most of the commercial decisions are taken by the insolvency practitioners who are acting as trustees, or administrators or liquidators, and judges are only called upon to review the decisions if someone alleges they are unfair. But in the US and Canada insolvency judges are called upon to make detailed commercial decisions.

Fourth, what claims should be admitted?

This involves the judge having an understanding of the law of obligations, so that an assessment can be made as to the extent of the debtor’s liabilities. Sometimes the judge must be prepared to decide the liability questions within the insolvency proceedings themselves, where being decisive and being quick are again vital. But

sometimes the only fair course is to say to the creditor “Go and prove your case by ordinary process and come back with a judgment”.

Fifth, how should the estate be distributed?

This will generally be provided by the insolvency rules themselves; but the judge must understand the law of securities and of priorities. Some very technical issues can arise which the judge must have the courage and intellectual integrity to address.

That is quite a demanding role. And so far I have not addressed cross-border issues.....

Perhaps another time. ↗

In this Issue:

- ↗ ***Trends in International Reform – Regional & International Perspectives – James Sprayregen***
- ↗ ***Financial re-structuring Government-related entities in the UAE – James Farn***



Article by:
James H.M. Sprayregen
President,
INSOL International

Trends in Insolvency Reforms: Regional & International Perspectives

Countries around the world recently have enacted or currently are developing new or amended insolvency legislation. These reform efforts are prompted in part by restructurings and insolvencies caused by the recent global economic slowdown and continued capital markets dislocation in many regions. Appreciating new trends arising out of these legislative efforts—including the effect these trends will have on transactions and business operations—will be critical to public and private actors across industries and the world.

Middle Eastern and North African countries, like others, are pursuing reforms that may provide distressed companies with more standardized options for effecting restructurings with greater certainty.

In March 2014, I moderated and participated in a panel that considered and discussed trends in insolvency reforms. I was joined on the insightful panel—conducted as part of the Hawkamah MENA Judicial & Financial Colloquium in Dubai—by Milo Stevanovich, Program Manger MENA Region IFC, Andres Martinez, Private Sector Development Specialist of The World Bank Group, and Abdul Aziz Al Yaqout, a Managing Partner of DLA Piper.

Whether any new insolvency regime is successful depends on many factors, some of which are outside

lawmakers' control. For example, there remains a cultural stigma to financial distress and insolvency in many countries. Unless the reality that businesses and markets need viable restructuring and insolvency alternatives (and the benefits created by effective insolvency regimes) overcomes this stigma, it may hamper a distressed business's ability to deal effectively with its stakeholders. Similarly, because formal restructuring and insolvency regimes may be underutilized in many countries, the institutional and professional cultures necessary to restructure business enterprises efficiently and effectively may be underdeveloped.

That some factors may not be within lawmakers' control, though, should not diminish the value of legislative reform. Indeed, reforms themselves can create countervailing cultural and professional trends that may, over time, overcome or diminish other factors' negative effects—as has happened in countries in other regions in recent years.

'Restructuring and Insolvency reforms in MENA countries face unique challenges'



AbdulAziz Yaqout (DLA Piper), Andres Martinez (The World Bank Group), James Sprayegen (INSOL)

(Consider, for example, the challenging questions posed by the use and restructuring of Shari'a-compliant financings.)

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Nonetheless, the region’s legislators and professionals are positioned to address these challenges. The views and expertise on display at the recent panel discussion that led to this article is evidence of that.

Recent developments indicate that MENA lawmakers are focused on key aspects of insolvency laws. One target has been the laws governing the creation and perfection of security interests, with the objective of providing greater certainty and efficiency for lenders and borrowers both.

Another focus is on ensuring that, in the right circumstances, a formal insolvency process can bind dissenting creditors. Without the ability to enforce a restructuring over a holdout’s dissent, no insolvency regime is likely to be an attractive alternative for a reorganizing business. Similarly, lawmakers are also considering options that would bar legal actions by creditors after an in-court restructuring begins (similar to the “automatic stay” imposed in U.S. bankruptcy proceedings).

These reform efforts mirror those recently undertaken in other jurisdictions. Reforms aim to

foster efficient restructuring and insolvency processes while also dealing with new issues, like multinational and cross-border insolvencies, that affect all jurisdictions and actors in the modern, global market.

‘Any reform should focus on making restructuring and insolvency laws more certain and more efficient’.

Achieving that objective may require rethinking some aspects of a jurisdiction’s insolvency laws—and even laws other than those specifically governing insolvency. While reform (like any important legislation) may be complex and multifaceted, continued analysis, professional dialogue, and legislative efforts indicate that this important work is well underway. Recent developments in the MENA region and around the world demonstrate that lawmakers are appropriately focused on restructuring and insolvency reform and that, with help from the professional community, more effective and efficient regimes will result. ↗



Session: “Trends in Insolvency Reforms”
AbdulAziz Yaqout (DLA Piper), Andres Martinez (The World Bank Group), James Sprayegen (INSOL) and Milo Stevanovich (IFC)



*Article by
James Farn,
Partner, Hadeef & Partners*

Financial re-structuring Government-related entities in the UAE

A Government-owned entity (GRE) is a legal entity created by government to undertake commercial activities on behalf of its own government. A GRE may be partially or totally controlled by government and is invariably set up to deliver key services to population. One of the unique features of a GRE is that it can be affected by extraordinary government intervention during a period of financial difficulty.

Although a GRE may also have public policy objectives, it can be differentiated from other forms of government agencies or state entities established to pursue purely non-financial objectives. Because a GRE is formed to carry out a commercial activity on behalf of its sponsor, it will be treated under UAE law as ‘trader’ for the purposes of the UAE Commercial Companies Law and may therefore be made bankrupt or subject to other insolvency-related procedures, unlike the State (federation), Emirates and other specific organs of the government.

GRE’s form an important part of the economies in the major Emirates of Abu Dhabi and Dubai, accounting for significant proportions of GDP jobs, economy activity and growth. A large proportion of Emirati debt remains tied up in GRE’s and many of these debts are due to mature this year (2014) and in forthcoming years.

What are some of the key issues and trends affecting financial restructuring of GRE’s in the UAE?

One of the key criticisms often aimed at GRE’s when they get into financial difficulties is that they are often seen as ‘too big to fail.’

This may lead to government intervention to prevent the failure – a GRE therefore gains an implicit guarantee at the taxpayers’ expense that it does not have to pay for. This funding advantage in turn creates incentives for GRE’s to become bigger and more complex, with little incentive to improve efficiency, financial transparency and corporate governance procedures. As the commercial activities of GRE’s become ever-more concentrated, this arguably increases the possibility of greater financial distress in the future.

Some particular trends are prevalent in the UAE. In Dubai (subject to few exceptions), there have been no significant asset sales to reduce existing debt burdens and therefore higher demands are being placed on the government’s already depleted funds. Since most of these funds are increasingly earmarked to help repay bonds, the government is also negotiating with banks in the restructuring of GRE debt.

Given the uncertainty as when and how a trader may be in a state of cessation of payments (and therefore the time at which the directors or managers of a GRE may be under an actual obligation to file for bankruptcy), financial restructurings in the UAE have to date invariably followed a consensual agreement or standstill arrangement rather than commencement of formal bankruptcy or protective composition proceedings.

Such arrangements are sometimes taken in order to minimise or even side-step the risk of criminal sanction for failure to file for bankruptcy within the requisite 30 days from date of cessation of payment (‘bankruptcy-by-negligence’).

Some GRE’s are now trying to push their borrowing

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away from holding companies and into their more profitable subsidiaries where the assets and cash flows are. This strategy may help shift debt away from entities that have struggled to repay it and may help in the short-term. However, if this strategy shifts the debt burden onto entities that were not responsible for assuming the debt in the first place, this could limit their ability to generate much needed growth and therefore actually dampen investment and growth in the medium to longer term.

Much of the increased liquidity in lending markets in the UAE since the financial crisis has also found its way into the pockets of GRE's on the basis that they are perceived to be a 'safe bet, based on a perceived alignment of a GRE's credit rating with that of its government sponsor. This growth in lending activity has encouraged recent regulatory developments, including a UAE Central Bank directive imposing caps on lending to GRE's. Although local banks should (in theory) now be in the process of writing down or selling of their loan books to fall within the required thresholds, there appears to be some reluctance to do this. Writing down large amounts of loans could cause banks to enter into another round of provisioning. A sale of debt in the secondary debt market (assuming the existence of buyers) could be interpreted as a 'distressed sale' and lead to another set of write-downs in credit ratings for both borrowers and lenders alike, so impasse is inevitably reached.

The UAE courts also have a discretion to defer a declaration of bankruptcy if it is in the 'best interests of the national economy.' Consequently, creditors have arguably been less willing to consider initiating bankruptcy proceedings against GRE's in financial difficulties (in particular those in strategic sectors of the UAE economy) in the knowledge that the courts have an overriding discretion to defer bankruptcy proceedings in any event.

What issues or factors are likely to support a more coherent and better restructuring environment for GRE's in the UAE?

“The process of financial restructuring assumes that a borrower’s problem is one of liquidity rather than solvency”

If asset prices begin to fall, there is a risk that GRE's may not be able to pay when the loans start to mature. The re-pricing of risk in the region could trigger a sudden reversal of the recent deposit inflows into the UAE banking sector. Part of the role of a central bank is to monitor individual bank liquidity conditions to ensure that banks have the required liquid assets to respond to any such reversal.

Federal and Emirati governments alike can take an active role by, for example, writing-off impaired assets and communicating the composition and maturity profile of the GREs' liabilities as well as their financing strategy.



Aaron Bielenberg, James Farn ,Alan Rodgers, and Essam Al Tamimi

UAE commercial banks are strongly interconnected with GRE's through government and ownership and financial linkages. Government control of banks and high exposure to GRE's point to potential governance issues. Some of these banks have also been heavily involved in lending to GRE's and GRE debt restructurings.

Key steps for further strengthening GRE corporate governance could include delineating clearly their commercial and non-commercial operations, strengthening the role and independence of

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company boards to allow for more effective decision making and improving risk management practices. For example, Abu Dhabi has made progress in monitoring and disseminating GRE debt and other financial data through its Public Debt Management Office. Data availability on financial conditions, debt stocks and maturity profiles of Dubai’s GRE’s is arguably some way behind.

“The federal government as well as the governments of Dubai and Abu Dhabi have all made progress in developing medium-term fiscal frameworks and help avoid boom-bust cycles in the UAE economy”.

As a main tool for macroeconomic management under a pegged exchange rate regime, fiscal policy should arguably be geared towards de-linking government and GRE spending from the volatility of oil prices.

The new federal bankruptcy law (if and when promulgated) will introduce a new ‘out-of-court’ insolvency procedure (Financial Reorganization Procedure) which is intended to offer an alternative to a consensual work-out or standstill. It remains to be seen whether this procedure will be successful and whether a single out-of-court procedure will be sufficient under the new draft law in order to encourage a more widespread ‘rescue’ culture within the UAE business community. ↗



Session: ‘Case study of a successful State Owned Enterprise Business Reorganisation’

In this Issue:

- ↗ ***The Impact of Modern Insolvency Laws – Maximizing Creditors’ Recoveries, Capacity Building and Controlling Risky Conduct – David Curry***
- ↗ ***“Restructuring Process in the DIFC Courts – An overview of evolving practice” – Natasha Bakirci***



*Article by
David S Curry
Attorney Adviser to
the Commercial Law
Development
Program, U.S. Dept.
of Commerce*

The Impact of Modern Insolvency Laws – Maximizing Creditors’ Recoveries, Capacity Building and Controlling Risky Conduct

Spurred by the financial crisis, rapidly-growing countries are increasingly focused on modernizing their insolvency laws. In the Middle East, these efforts intensified following Dubai World’s financial problems. The driving force behind these initiatives is that modern insolvency laws will promote investment and growth in good times, and better arm economies to deal with the bad effects of downturns, by establishing predictable, clear legal rules protecting creditors’ rights, preserving viable businesses and promptly redeploying assets of failed businesses.

UAE is at the forefront of these initiatives. A comprehensive law is now before parliament. It has many of the attributes of modern laws – including those in UNCITRAL’s “Legislative Guide” on insolvency law. These attributes include:

- A broad moratorium against uncontrolled seizure of asset by creditors;
- A system favoring reorganization rather than liquidation and administrator discretion to to continue business operations, if doing so would bring better results; and

- Authorizing reorganization based on majority vote of creditors, rather than requiring unanimous creditor approval.

Other GCC countries are also moving forward.

Recent experience throughout the world demonstrates the superior results that can be achieved under modern laws:

- Nortel Networks. In 2009, after years spent accumulating massive debt and making financial missteps, this global telecommunications business filed insolvency cases in Canada, U.S. and Europe. The insolvency laws in these countries shielded Nortel from chaotic dismemberment and permitted Nortel to maintain operations as it sold its business segments in an orderly process. A crowning achievement was a controlled auction of Nortel’s IP assets conducted by expert sale professionals in which a \$1 billion “stalking horse” bid turned into a \$4.5 billion sale. This sale process generated far more proceeds than would have occurred under antiquated laws.
- Japan Airlines. JAL was hopelessly insolvent when it collapsed into bankruptcy in 2010. Japan’s new insolvency law – which has many of the UNCITRAL attributes – empowered JAL’s administrators to fix its balance sheet, to get interim government financing, to shed onerous contracts and to emerge from bankruptcy as a healthy company. As a result, creditor recoveries were maximized and an important Japanese business was preserved.
- GM and Chrysler. U.S. reorganization laws facilitated a remarkably fast but orderly sale of the companies’ automotive businesses with minimal disruptions to suppliers, employees and customers. Creditor recoveries greatly exceeded the likely outcome that would have occurred had those companies liquidated through a “fire sale.”

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These examples and many others – achieved in the face of a global recession that put insolvency laws to their stiffest test in decades – demonstrate the efficiency and improved stakeholder recoveries that modern insolvency laws can produce. A good law, though, is not enough. Good outcomes also require good implementation. Even the best-crafted law will yield inferior outcomes if the persons charged with carrying it out do not have the necessary expertise. So, not surprisingly, the successes described above were achieved through the efforts of highly trained professionals, who knew how to use the available legal tools to achieve the best results. Without these experts, the results would have been far less impressive. The UAE is also moving to build capacity; a delegation of its judges recently received insolvency law training in the U.S.

“Modern insolvency law also plays a useful role in dealing with excessive risk taking, which can be a significant cause of business Insolvency”.

Among other things, modern laws arm administrators with weapons to undo some bad effects of reckless conduct. For example, these laws empower administrators

- to recover for the benefit of creditors assets that were transferred for grossly inadequate consideration or in other fraudulent ways; and
- to impose liability on unscrupulous owners who abuse the corporate form by using corporations as a subterfuge or sham to inflict harm on creditors.

As demonstrated by the extreme overleveraging of businesses that led to the Great Recession, however, neither insolvency laws nor company laws are currently curbing risky behavior adequately. These legal rules and business practices must find a better balance between the interest in promoting entrepreneurship, on the one hand, and prudent risk

taking that protects creditors from reckless business actions, on the other hand. For larger companies, the advice of Warren Buffet is a good place to begin:

“The CEO has to be the chief risk officer. And I think the boards of directors should have compensation policies that make sure that if the CEO fails in the risk job then that CEO goes away poor.”

[CNBC Interview, March 2, 2011] 



Session: “Collection of Insolvency Proceedings – A Moroccan Perspective”
El Hassan El Guassem (Court of Appeals in Casablanca) and James D. Filpi (Senior Counsel, CLDP, USA)

For feedback or to become a member of the FIRM, please contact info@hawkamah.org jahanara.ahmad@hawkamah.org or call +9714 362 2551. You can visit our website: www.hawkamah.org



Article by
Natasha Bakirci
Assistant Registrar
DIFC Courts

“Restructuring Process in the DIFC Courts – An overview of evolving practice”

Although there are no formal restructuring procedures in the DIFC¹, such as Chapter 11 in the United States or procedures whose primary objective is to rescue the company (such as administration in the UK),

“the DIFC jurisdiction has developed its own legislative and procedural framework in the context of Insolvency which is largely based on the insolvency regime in the UK”

Part 54 of the Rules of the DIFC Courts which came into force on 1 July 2011 provides for Insolvency Proceedings and should be read in conjunction with the DIFC Insolvency Law (DIFC Law No. 3 of 2009) which generally applies to companies incorporated under the DIFC Companies Law (DIFC Law No. 2 of 2009), together with the DIFC Insolvency Regulations, which are enacted pursuant to Article 140 of the DIFC Companies Law and Article 93 of the DIFC Insolvency Law.

The legislative framework provides for company voluntary arrangements (CVAs); receivership and winding-up of companies. In the context of CVAs, the

DIFC Insolvency Law enables the directors of a company to propose a voluntary arrangement with its creditors, which in limited circumstances may result in an application to the DIFC Courts for a moratorium/stay of the insolvency proceedings and the enforcement of any security.

In cases where an administrative receiver has been appointed, the DIFC Courts retain the power to remove them from office at any time. Moreover, an administrative receiver has the power under Part 3 of the Insolvency Law to sell property which is subject to prior security, provided DIFC Court consent is obtained.

A company may go into voluntary liquidation or be wound up by the DIFC Court (known as a compulsory winding-up). A company may be wound up voluntarily either as a members’ voluntary liquidation (“MVL”) or a creditors’ voluntary liquidation (“CVL”). A company may be wound up by the DIFC Court if: (a) the Company has resolved that the Company be wound up by the Court; (b) the Company is unable to pay its debts; (c) a DIFC Court ordered moratorium in relation to a CVA comes to an end and no voluntary arrangement has effect in relation to the Company; (d) the DIFC Court makes such an order pursuant to any provision of or under DIFC Law; or (e) the DIFC Court is of the opinion that it is just and equitable that the company should be wound up (see Article 50 of the DIFC Insolvency Law). An application (petition) may be commenced by the company, its directors or any creditor.

In accordance with RDC 54.61 and Practice Direction No. 3 of 2011 Insolvency – (Advertisement Requirements in Insolvency Proceedings), petitioners are required to advertise the petition in an English language and Arabic language newspaper for a period of not less than 7 business days before the day appointed for the hearing where the petitioner is the Company itself, or otherwise not less than 7 business days after service of the petition on the Company, nor less than 7 business days before the day so appointed (RDC 54.62).

¹ Save those in the context of the Dubai World Tribunal as provided for by Decree No. 57 of 2009, subsequently amended by Decree No. 11 of 2010

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Registrar’s Direction No. 3 of 2010 on Disclosure of Information in Insolvency Cases provides that the Courts will not divulge any information about insolvency proceedings unless and until a winding-up petition has been advertised. At that time, a copy of the petition may be obtained from the person who advertised it.

If a winding up order is made, the liquidation commences from that date and the Court will appoint a liquidator. DIFC Court decisions to date involving the granting of a winding up petition and the nomination and appointment of a liquidator

include DIFC Insolvency Law No. 3 of 2009 and Orion Holding Overseas Ltd (CFI 033/2009) [Sir John Chadwick J. Judgment issued 14 January 2010]; CFI 023/2009 Hussain Saleh-Farid Al Awlaqi, Andrew Tamplin Clout and Tabarak Partners LLP, Khuram Hussain, Ziad Naim Baya’a; and Siraj Capital (Dubai) Limited (CFI 007/2012), in which Sir John Chadwick ordered that the company be wound up (on the grounds that it was unable to pay its debts), appointed a liquidator and stayed all proceedings against Siraj Capital before the Courts. ↗



Session: 'Financial Restructuring: Dubai Dry Docks Case Study'

Ian Schneider (PWC), Ian McMillan (HSBC Holdings plc), Mark Hyde (Clifford Chance) and Mark Beer (Dubai World Tribunal)