

# Restructuring and Insolvency

We continue with our focus on the issues surrounding restructuring and insolvency by speaking exclusively to James Bowden, an associate in the Dubai office of Afridi & Angell. Here, he discusses market behaviour with *Lawyer Monthly* and some challenges that come hand in hand with cases within this practice area.

**Please introduce yourself, your role and your firm.**

Afridi & Angell is a full service law firm based in the UAE. As one of the longest established firms in the UAE, Afridi & Angell has become an integral part of the country's legal landscape, and one of the premier law firms in the region. The firm advises local, regional and international clients on a wide range of transactions and legal issues.

As an associate in the Dubai office of Afridi & Angell, I advise extensively on a broad range of corporate and commercial, M&A and technology outsourcing matters in the UAE. I also co-authored the UAE chapter of *The Restructuring Review 2012*.

**The restructuring and insolvency market has evolved radically over the last few years. How have you seen the market change recently in your jurisdiction?**

The legal framework governing insolvency in the UAE is primarily set out in UAE Federal Law No. 18 of 1993 promulgating the Code of Commercial Practice (the "Commercial Code"), and it has remained essentially unchanged since then. The insolvency regime set out in the Commercial Code is still largely untested in practice, because debtors and creditors tend to opt for commercially agreed solutions outside of the courts, as the court process is lengthy and cumbersome. Recent activity of note includes:

(a) The ongoing development of an entirely new insolvency law for the UAE which is expected to replace the existing legislation as and when it comes into force. The new legislation is expected to substantially overhaul the existing regime, including the establishment of a specialized tribunal to hear and oversee insolvency proceedings. A draft of the law has not been released publicly at the time of

writing, as it has only been circulated for comment to the UAE Ministry of Finance. Our expectation is that it will be at least another 1-2 years before it is finalized and comes into force, possibly longer.

(b) The establishment of a specialized tribunal in 2009 to deal with the Dubai World debt crisis in the aftermath of the real estate collapse in late 2008. Dubai World is a Dubai government owned holding company with a diverse portfolio of investments, which at the time included major government property developer Nakheel (developer of some of the Dubai's landmark developments such as the Palm Jumeirah and the World Islands). No claim was permitted to be brought against Dubai World or its subsidiaries other than before the specialized Dubai World tribunal. The tribunal was obligated to apply insolvency laws applicable in the Dubai International Financial Centre (one of Dubai's free zones, which is recognized under the laws of the UAE as its own legal jurisdiction, and is based on English common law), which are based on English common law and are very different from those set out in the Commercial Code. This specialized tribunal was established ostensibly for its expertise in sophisticated financial legal matters, and its independence from the Dubai government; a side effect is that the proceedings did not occur in the Dubai courts or apply the provisions of the Commercial Code, so this major restructuring effort has not shed any light on how the Dubai courts would handle such proceedings.

**What do you think are the advantages and disadvantages of a restructuring programme as opposed to insolvency?**

Whether restructuring or insolvency proceedings are preferred will depend upon the context of each situation, but the key question will be whether it is beneficial in each case for the company to continue carrying on

its business. A struggling debtor will generally be more inclined to voluntarily subject itself to a statutory restructuring regime, provided the regime is aimed at continuity of business (under protection from creditors). This can be seen as distinct advantage in that debtors may not wait "until it is too late" before seeking protection. In an insolvency-only regime, debtors will be unlikely to subject themselves to the court process when the only foreseeable outcome is liquidation.

**What legal challenges and complexities arise when dealing with insolvency and restructuring in your jurisdiction? How can you assist clients in navigating/solving these challenges and complexities?**

The primary challenge with this area in the UAE is the trepidation around how the UAE courts would apply and administer the provisions of the Commercial Code relating to insolvency in each case, and how long it would take for such proceedings to take their course. The regime in the Commercial Code is aimed at preventing individual proceedings against the debtor, verifying creditor claims, prioritizing them and then encouraging agreement on a settlement plan among creditors. It is a time consuming process, especially so if the creditors do not agree on the settlement plan (and in such case liquidation of the debtor is the only option prescribed, under the supervision of a court or creditor appointed trustee). As a consequence, creditors and debtors have historically preferred to keep the negotiation and settlement process outside of the courts to the extent possible.

Another challenge in the UAE is a fear of potential criminal consequences for managers or directors in an insolvency scenario, as the UAE Criminal Code provides that such individuals are subject to potential criminal liability punishable by fines and imprisonment when any of a broad spectrum of acts or oversights are committed preceding or during a bankruptcy proceeding. There is a general perception that it is better to avoid the risk of criminal liability by avoiding the bankruptcy judgment in the first place. In addition, there is a cultural aversion to submitting to insolvency proceedings or to declaring bankruptcy, as there is a stigma associating business failure with personal failure.

**Can you talk about any recent cases you have been involved in?**

We represented the majority shareholders of a company listed on a UAE exchange which became insolvent, and earlier this year sold a substantial stake in the company to repay creditors.

The share sale proceeds repaid part of the outstanding debts of the owners (and

companies owned by them) to their lenders. The borrowers have since restructured between 1 and 2 billion UAE Dirhams of debt with lenders (comprising of nine banks where there were bilateral loan agreements with each one). The lenders entered into standstill agreements declaring a moratorium on repayments for a period of two years in order to enable the borrowers to sell their mortgaged properties in an orderly manner to repay their obligations. The standstill arrangement was preferred as an alternative to filing for bankruptcy and/or insolvency of the borrowers. This is an example of the preference for commercial arrangements outside of the UAE court system.

**How do you see this practice area progressing over the next 3-5 years?**

In our view it is unlikely that there will be significant developments in this practice area in the UAE in the next 3-5 years. The possible exception to this that we are aware of is the new insolvency law noted above which is currently still in draft form undergoing reviews by the UAE Ministry of Finance. It is hoped that the new law will create a more accessible, predictable and transparent insolvency regime, including a component aimed at creditor-protected compositions or restructurings. Once the new law comes into force, there is no certainty that it will be well used, as parties in the UAE may continue to prefer to negotiate settlements out of court regardless of the prevailing legislation; however, at this stage the content and impact of the new law is purely speculation. **LM**

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