

Client Alert

Latham & Watkins
Global Restructuring Practice Group

First Test Case for Dubai's Innovative Decree 57 Restructuring Regime

On April 1, 2012 Drydocks World LLC (DDW) and its subsidiary Drydocks World — Dubai LLC (DDW Dubai), a Dubai- and Asia-based ship building and repair company that is wholly owned by Dubai World, became the first company to commence a reorganization proceeding in the Special Tribunal¹ (the Tribunal) created by Dubai Decree No. 57 for 2009 (Decree 57) and avail itself of Decree 57's integrated legal framework. Decree 57 is in English and draws heavily from the insolvency laws of England and the United States; it integrates selected substantive concepts taken from chapter 11 of the US Bankruptcy Code into the English law-based insolvency procedures enacted in the Dubai International Financial Centre (DIFC).

DDW stated that the purpose behind the filing is to enable it to implement rapidly its debt restructuring based on the consent of a majority, but not all, of its syndicated lenders under a US\$2.2 billion facility. Based on the current schedule approved by the Tribunal on June 5, 2012, meetings for the affected creditors and equity interest holders to vote on the proposed restructuring will be held on July 10, 2012, and the "Post Arrangement Hearing" at which the Tribunal will consider whether to sanction the proposed restructuring will be held on August 28, 2012. This *Client Alert* will provide a brief background to Decree 57 and an overview roadmap for the first proceeding.²

Decree 57 Background

Dubai World is a "decree corporation" established pursuant to a decree issued by the Ruler of Dubai and is wholly owned by the Government of Dubai. Due to its status as a decree corporation, Dubai World may not seek protection from its creditors under the UAE's existing insolvency regime, codified at Part 5 of Law No. 18 of 1993 (UAE Commercial Transactions Law), which governs many other companies and traders throughout the UAE. The current UAE insolvency regime and the UAE courts are not generally viewed by insolvency experts to provide a sufficiently clear or adequate legal framework for complex restructurings.

During the financial crisis and following the commencement of negotiations with Dubai World's creditors, on December 13, 2009, His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Vice President and Prime Minister of UAE, Ruler of Dubai,

"DDW's restructuring will set a precedent for whether voluntary arrangements approved under Decree 57 are enforceable, both within the UAE and globally against international creditors."

issued Decree No. 57 for 2009 Establishing a Tribunal to Decide Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries. The text of Decree 57 is available at [http://dubaiworldtribunal.ae/decrees/files/Decree No.57 for 2009.pdf](http://dubaiworldtribunal.ae/decrees/files/Decree%20No.57%20for%202009.pdf).

Decree 57 is intended to facilitate the restructuring of Dubai World and/or its subsidiaries (the Corporation) by creating a formal procedure known as a "Voluntary Arrangement." This procedure enables the Corporation to continue to manage its affairs under the supervision of the Tribunal and, with the protection of a moratorium, pursue and, if approved, implement a restructuring. The innovative restructuring regime implemented by Decree 57 is unique and the first of its kind in the Middle East.

The Tribunal and Its Composition

Decree 57 establishes the three judge Tribunal and empowers it with exclusive jurisdiction over claims against the Corporation and to supervise a Voluntary Arrangement or any liquidation proceedings relating to the Corporation.

Key Features of the Tribunal

The key features of the Tribunal are:

- The Tribunal has its seat and holds its hearings in the DIFC,³ in the courtrooms of the DIFC Courts.
- All proceedings before the Tribunal are conducted in English⁴ and are open to the public and to the press, unless the Tribunal decides otherwise for considerations relating to the conduct of justice or to protect the confidentiality of information.⁵
- The Tribunal issues its decisions and orders by the majority votes of its members.⁶
- The decisions of the Tribunal are final, irrevocable and not subject to appeal or review.⁷
- The registrar of the DIFC Courts acts as the registrar for the Tribunal.⁸
- The Tribunal may, as it considers appropriate, assign or appoint as experts persons having expertise and competence in the matters coming before it (the Experts).⁹

The Law of the Tribunal

Decree 57 adopts the insolvency laws and regulations of the DIFC¹⁰ (the DIFC Insolvency Laws) as the basic legal framework for its law, but makes a number of significant modifications to the DIFC Insolvency Laws. These modifications are set forth in the schedule to the Decree 57 (the Schedule).

Procedural Rules

The rules of practice and procedure applicable to the Tribunal are those applicable to the DIFC Courts, subject to a number of minor modifications.¹¹ The Tribunal has established a website with a public database of all proceedings under Decree 57, including DDW's insolvency proceedings and other claims asserted against Dubai World and its subsidiaries, at: <http://dubaiworldtribunal.ae/>.

Innovation Contained in Dubai Decree No. 57 for 2009

Broadly speaking, Decree 57 enacts a hybrid insolvency regime that takes the best aspects of English and American practices and merges them into one insolvency process. The procedural framework for the process is predominantly based on English practice, and the substantive provisions are driven by the core concepts of US chapter 11 reorganizations. Decree 57 contains a number of legal and procedural innovations that have not been integrated into other jurisdictions in the Middle East, including:

- Decree 57 authorizes the Corporation to incur new debt after an insolvency process has begun, a practice based on “Debtor in Possession,” “DIP” or “rescue” financing, which is available in chapter 11 proceedings in the US.
- Decree 57 permits a voluntary arrangement to be approved without the consent of all classes of creditors, which is a concept known as “cram up” (with respect to secured creditors) or “cram down” (with respect to unsecured creditors).
- Initiation of a Decree 57 process triggers an automatic moratorium prohibiting any action by any party, including secured creditors, against the Corporation or its assets anywhere in the world.
- Decree 57 prohibits parties to executory contracts and unexpired leases with the Corporation from terminating or modifying such contracts and leases based on so-called *ipso facto* provisions that trigger a default based solely on the insolvency or financial condition of the Corporation, commencement of an insolvency, restructuring, reorganization or bankruptcy proceeding or the appointment of a receiver or similar person.
- Decree 57 grants the Corporation discretion to assume or reject executory contracts and unexpired leases.
- Decree 57 authorizes the Tribunal to grant relief without notice or with limited notice where immediate and irreparable harm would result without such relief, and when necessary to obtain recognition of Decree 57 proceedings in other jurisdictions.

Roadmap for the Approval of the DDW Voluntary Arrangement

Approval of a Voluntary Arrangement in accordance with Decree 57 is a three-step process. Firstly, the Tribunal will consider and approve procedures for creditors and equity holders to vote on the proposed Voluntary Arrangement. Secondly, creditors and equity holders will vote on the proposed Voluntary Arrangement at a meeting held in accordance with the procedures approved by the Tribunal. Lastly, the Tribunal will hold a hearing to determine whether the Voluntary Arrangement satisfies the substantive standards of Decree 57 and should be sanctioned. Subject to the needs of the Corporation and availability of the Tribunal, Decree 57 allows this process to be completed in 60 days or less. In DDW’s case, the process will take approximately five months or more.

Directions Hearing

Before DDW’s Voluntary Arrangement proposal is distributed to its creditors and/or equity interest holders, its creditors and/or equity interest holders must be given no less than 20 days notice of a directions hearing before the Tribunal, at which they have a right to be heard, to consider DDW’s proposed procedures for voting by creditors and equity interest holders on DDW’s Voluntary Arrangement (the Directions Hearing). At the Directions Hearing, the Tribunal may order that DDW’s

proposed notice and voting procedures be approved, rejected or approved subject to modifications.¹²

By order dated April 2, 2012, the Tribunal ordered DDW to give notice to those creditors and equity holders impaired by DDW's proposed Voluntary Arrangement of DDW's application to the Tribunal for a hearing (a) to convene a meeting of certain creditors and equity holders to consider and vote on a proposed voluntary arrangement (the Meeting) and (b) to approve the voting procedures with respect to the Meeting. Since that order, on May 7, 2012, the Tribunal entered an order re-scheduling the Directions Hearing for June 5, 2012 in light of the possibility that an additional class of creditors may be impaired by the proposed Voluntary Arrangement. On June 5, 2012, the Tribunal entered an order granting directions for meetings of affected creditors and equity interest holders to be held on July 10, 2012, at which the creditors and equity interest holders may vote on the proposed arrangement. The Tribunal approved three classes, comprised of: (1) lenders under DDW's US\$ 2.2 billion syndicated term loan, (2) creditors under certain hedging agreements and (3) equity interest holders. In addition, the Tribunal's June 5, 2012 order set the Post Arrangement Hearing, at which the Tribunal will consider whether to sanction the proposed arrangement, for August 28, 2012.

The Meeting to Vote on the Proposed DDW Voluntary Arrangement

All creditors and equity holders will have an opportunity to vote at the Meeting. Decree 57 requires that at least two-thirds in value (of claims agreed to by DDW or otherwise allowed by the Tribunal) of at least one impaired class of creditors or equity interest holders, present and voting either in person, by proxy or through the procedures approved at the Direction Hearing, agree to the DDW Voluntary Arrangement.

Following the Meeting, the Tribunal will hold a hearing to consider whether to sanction the Voluntary Arrangement (the Post Arrangement Hearing) on no less than 20 days notice.

At the time it commenced its Decree 57 proceeding, DDW announced that it had secured support for its proposed Voluntary Arrangement from creditors holding approximately 87 percent of DDW's debt. Following the initial filing, DDW has continued to encourage the minority dissenting lenders to support the restructuring.

Post Arrangement Hearing

Following the Meeting of creditors and equity interest holders described above, a further hearing of the Tribunal (the Post Arrangement Hearing), at which creditors and equity interest holders may be heard, will be held to consider whether to sanction the DDW Voluntary Arrangement. The Tribunal is required to sanction the DDW Voluntary Arrangement upon findings by the Tribunal that:

- The Voluntary Arrangement proposal complies with the Schedule.
- The Voluntary Arrangement has been proposed in good faith.
- The Voluntary Arrangement is not unfairly prejudicial to each class of creditors and equity interest holders, and the Notifying Corporation's general body of creditors, taken as a whole.
- Either (i) all classes of creditors and equity interest holders have voted to accept or are deemed to accept the Voluntary Arrangement, or (ii) if a class of claims or interests is impaired under the Voluntary Arrangement, at least one impaired class of creditors has voted to accept the Voluntary Arrangement.

- There has been no material violation of the notice and voting procedures approved by the Tribunal at the Directions Hearing in relation to the relevant meeting.
- Any class of creditors or equity interest holders voting against the DDW Voluntary Arrangement or deemed to vote against the DDW Voluntary Arrangement has received at least as much value as such class would have received in a winding up of the Corporation pursuant to Decree 57 (which is essentially a liquidation of the Corporation in accordance with the DIFC Insolvency Law).
- With respect to any class of unsecured claims, either (i) the DDW Voluntary Arrangement provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the DDW Voluntary Arrangement, equal to the allowed amount of such claim, (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the DDW Voluntary Arrangement on account of such junior claim or interest any property or (iii) such class has voted to accept the DDW Voluntary Arrangement.¹³

If sanctioned by the Tribunal at the Post Arrangement Hearing, the DDW Voluntary Arrangement will be binding upon all holders of claims against or equity interests in DDW and such other persons as ordered by the Tribunal.¹⁴

DDW must provide at least 20 days notice of the Post Arrangement Hearing to all parties in interest. Prior to the Post Arrangement Hearing, creditors and equity interest holders may object to the Voluntary Arrangement up to 10 days prior to the Post Arrangement Hearing. The permitted bases for an objection are limited to: (a) the arrangement is unfairly prejudicial to the objecting party, (b) the Voluntary Arrangement was not proposed in good faith or (c) there has been a material violation of the notice and voting procedures approached by the Tribunal at the Directions Hearing. If any objection is filed, responses are due 5 days prior to the Post Arrangement Hearing.¹⁵

Key Issues in the First Implementation of Decree 57

Predictability and Enforceability in a Cross-Border Context

At the most fundamental level, the value of Decree 57 rests in the ability of companies, creditors and other parties in interest to predict whether a proposed restructuring will be approved and enforced over the objection of a dissenting minority. While Decree 57 is based closely on well-established English restructuring practice and the substantive standards of the US Bankruptcy Code, the manner of its application is inherently uncertain to some degree because it seeks to integrate these procedures and standards into a jurisdiction that does not have the historical body of judicial precedents upon which both English and American restructuring practice rely. Decree 57 provides that the Tribunal shall decide disputes based on the following sources of law, which do not include an express reference to English or American precedents:

- DIFC Law No (3) of 2009 Concerning the law of Insolvency, as amended by Decree 57.
- Insolvency regulations issued by DIFCA.
- DIFC Law No (10) of 2004 Concerning the Court of DIFC, as amended by Decree 57.
- Legislation in force in Dubai.
- Commercial custom.
- Principles of justice, and rules of righteousness and equity.¹⁶

If and when disputes arise in the Tribunal, parties will likely seek to rely on judicial opinions from England and the United States interpreting statutory language and applying standards upon which the language and standards of Decree 57 are based. The Tribunal's reasoning in the resolution of such disputes, and whether or not the Tribunal relies on English and American case law, will be a crucial precedent that will lend greater predictability to practice under Decree 57.

Furthermore, DDW's restructuring will set a precedent for whether voluntary arrangements approved under Decree 57 are enforceable, both within the UAE and globally against international creditors. Decree 57 by its terms provides the Tribunal with exclusive jurisdiction over claims Dubai World and its subsidiaries and authority to bind parties beyond the borders of the UAE. For example, the automatic moratorium (or stay) on actions against any Corporation that files under Decree 57 protects the assets of the Corporation globally for the benefit of all creditors and parties in interest. Nevertheless, a Corporation with assets, other interests or creditors outside of the UAE, such as DDW, may have to resort to the courts of other jurisdictions to enforce its restructuring against parties outside of the UAE.

The primary options for a Corporation to seek enforcement outside of the UAE are (a) recognition of the Decree 57 proceeding, which is available in some jurisdictions under the UNCITRAL Model Law on Cross-Border Insolvency or other procedures, or (b) a plenary restructuring proceeding under the laws of a foreign jurisdiction. In light of DDW's assets in Singapore and international creditors, and the absence of applicable recognition procedures in Singapore, DDW has filed for approval of a scheme of arrangement in Singapore to bind parties subject to Singapore jurisdiction and prevent action contrary to the restructuring against DDW's assets in Singapore.

Despite the clear global application of the automatic moratorium under Decree 57, and the ongoing Singapore scheme of arrangement process, the courts of Singapore permitted a customer of DDW to call on a refund guarantee issued by DDW's lenders with respect to one of DDW's rig projects. Payment of the refund guarantee crystallized significant claims against DDW by the lenders that extended the refund guarantee.¹⁷ News sources report that DDW is in negotiations with its lenders over a resolution to the dispute that would convey ownership of the relevant rig to the lenders that extended the refund guarantee. DDW has not sought relief in the Decree 57 Tribunal or other key jurisdictions outside of Singapore, such as the United States or England, to seek to enforce the automatic moratorium under Decree 57 to prevent call on the refund guarantee and/or enforcement action by the customer beneficiary of the refund guarantee or the lenders that extended the refund guarantee. This situation is a test of whether international creditors can be bound to a reorganization under Decree 57 and whether DDW is able to prevent "self-help" by its customers and creditors in violation of the moratorium imposed under Decree 57, when DDW does not appear to be availing itself of the argument in its Decree 57 proceeding that the moratorium under Decree 57 bars any action against DDW in Singapore or elsewhere.

If DDW is able to bind all relevant parties to its proposed restructuring based on the consent of a majority of its lenders that agreed to lock-up to the terms of the restructuring prior to commencement of judicial proceedings, it would represent a dramatic step for markets across the Middle East by demonstrating that a reorganization procedure in court can provide a viable and predictable means to resolve a capital structure without consent of all parties. Such a success will likely factor heavily in reforms of restructuring and insolvency laws that are ongoing in the UAE and across the Middle East.

Stability Through Process

Many debt restructurings and operational reorganizations in the Middle East are conducted with secrecy because of a regional stigma towards insolvent enterprises that can result in severe disruption to the business if the financial instability of the business becomes known. The success of DDW's restructuring will depend not only on the enforcement of its voluntary arrangement against all creditors but also on its ability to retain the confidence and good will of its customers, employees, vendors and suppliers and emerge from the process as a profitable enterprise. In this sense, DDW's restructuring process will set both legal and market precedents that will demonstrate whether a judicial restructuring process can succeed in Middle Eastern markets.

Endnotes

- ¹ Voluntary Arrangement Notifications of DDW and DDW Dubai, 1 April 2012 (Dubai World Tribunal Case No. DWT/VAN/0001/2012).
- ² For an overview of the Decree 57 please see Latham & Watkins Client Alert Number 972, January 8, 2010.
- ³ Article (5)1 of Decree 57.
- ⁴ This is incorporated into the Decree via Section 60 of the DIFC Court Law.
- ⁵ Article (5)2 of Decree 57.
- ⁶ Article (5)3 of Decree 57.
- ⁷ Article (5)4 of Decree 57.
- ⁸ Article (5)5 of Decree 57.
- ⁹ Article (3) of Decree 57.
- ¹⁰ Dubai International Financial Centre Law No. (3) of 2009 Concerning the Law of Insolvency and the regulations issued by the Board of the Directors of the DIFC Authority concerning DIFC Insolvency Regulation.
- ¹¹ See Section 3 of the Schedule.
- ¹² Article 13 of Section 2 to the Schedule.
- ¹³ Article 15 of Section 2 to the Schedule.
- ¹⁴ Article 14 of Section 2 to the Schedule.
- ¹⁵ Article 16 of Section 2 to the Schedule.
- ¹⁶ Article 4 of Decree 57.
- ¹⁷ See "Dispute holds up Drydocks World hearing", *The National* (May 8, 2012), available at <http://www.thenational.ae/business/economy/dispute-holds-up-drydocks-world-hearing>.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Christopher Hall
+44.20.7710.1152
christopher.hall@lw.com
London

Mitchell A. Seider
+1.212.906.1200
mitchell.seider@lw.com
New York

Caroline A. Reckler
+1.312.876.7663
caroline.reckler@lw.com
Chicago

Aaron C. Bielenberg
+971.4.704.6345
aaron.bielenberg@lw.com
Dubai

Adam J. Goldberg
+1.212.906.1828
adam.goldberg@lw.com
New York

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our website at www.lw.com.

If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to our global client mailings program.

Abu Dhabi
Barcelona
Beijing
Boston
Brussels
Chicago
Doha
Dubai
Frankfurt
Hamburg
Hong Kong

Houston
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Orange County

Paris
Riyadh*
Rome
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

* In association with the Law Office of Mohammed A. Al-Sheikh