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Client Alert

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New Dubai Decree Relating to any Future Restructuring of Dubai World and its Subsidiaries

"Decree No. 57 is bold and ground-breaking insolvency legislation, drawing on best practices from around the world and is likely to become a model for the development of insolvency laws throughout the Middle East to enable restructuring of both operations and capital structures of businesses without consent of all parties in interest."

On December 13, 2009, His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Vice President and Prime Minister of UAE, Ruler of Dubai, 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 (Decree No. 57).[1] The text of Decree No. 57 is available at http://www.difccourts.ae.

Why Issue Decree No. 57?

Dubai World is a corporation established pursuant to a decree issued by the Ruler of Dubai, and consequently has a unique legal status. Due to its status as a decree corporation, Dubai World may not seek protection from its creditors under the existing provisions of Part 5 of Law No. 18 of 1993 (the UAE Commercial Transactions Law) which governs many other companies and traders throughout the UAE. To address this, the Government of Dubai developed Decree No. 57, which provides an integrated legal framework for any future restructuring of Dubai World, which is in English and draws heavily from the insolvency laws of England and the United States.

Decree No. 57 is intended to facilitate the restructuring of Dubai World and its subsidiaries (the Corporation) by creating a formal procedure known as a "Voluntary Arrangement," which would enable the Corporation to continue to manage its affairs under the supervision of a tribunal and, with the protection of a moratorium, pursue and, if approved, implement a restructuring.

The Corporation has not at the time of this writing entered a Voluntary Arrangement proceeding. However, it would be available to the Corporation if, for example, it believed that a restructuring of its affairs could not be achieved on a fully consensual basis, or if need arises for the Corporation to continue to negotiate a consensual restructuring with the protection of the moratorium provided by Decree No. 57.

The Tribunal and its Composition

Decree No. 57 establishes a three-judge tribunal (the Tribunal) which is empowered to supervise a Voluntary Arrangement or any liquidation proceedings relating to the Corporation initiated by the Tribunal. The Tribunal initially consists of the following judges of the Dubai International Financial Centre Courts (the DIFC Courts):

- Sir Anthony Evans, Chief Justice of the DIFC Courts and former High Court Judge of England and Wales;

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- Michael Hwang, SC, Deputy Chief Justice of the DIFC Courts, a former Judicial Commissioner of the Supreme Court of Singapore and partner at the law firm of Allen & Gledhill; and
- Justice Sir John Murray Chadwick, Judge of the DIFC Courts, a former Judge of the Court of Appeal of England and Wales and a renowned bankruptcy and insolvency specialist.[2]

In addition, Decree No. 57 permits the Chief Justice of the DIFC Courts to recommend to the Ruler of Dubai additional judges to be appointed to the Tribunal.[3]

Even though the Tribunal consists of judges from the DIFC Courts, the Tribunal is not a DIFC Court.

Key Features of the Tribunal

The key features of the Tribunal are:

- the Tribunal will have its seat and hold its hearings in the Dubai International Financial Centre (the DIFC),[4] most likely in the courtroom of the DIFC Courts;
- all proceedings before the Tribunal will be conducted in English[5] and will be 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;[6]
- the Tribunal will issue its decisions and orders by the majority votes of its members;[7]
- the decisions of the Tribunal will be final, irrevocable and not subject to appeal or review;[8]
- the registrar of the DIFC Courts will act as the registrar for the Tribunal;[9]and
- 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).[10]

The Law of the Tribunal

Decree No. 57 adopts the insolvency laws and regulations of the DIFC[11] (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 No. 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.[12]

The Voluntary Arrangement Procedure

In summary, the effect of the Schedule is to enable any member of the Corporation (the Notifying Corporation) to initiate a Voluntary Arrangement proceeding and implement a Voluntary Arrangement proposal if approved by certain majorities of its creditors and equity interest holders, and sanctioned by the Tribunal. The Notifying Corporation would have the exclusive right to propose a Voluntary Arrangement to creditors and equity interest holders of the Corporation for the first 120 days of the proceedings, which exclusivity period may be extended or terminated by the Tribunal.[13] The Schedule provides procedures for the Notifying Corporation to propose a Voluntary Arrangement to creditors and equity interest holders, and procedures for voting on the Voluntary Arrangement by creditors and equity interest holders.[14]

Notification of a Voluntary Arrangement and the Moratorium

The board of any Notifying Corporation may at any time notify the Tribunal in writing (such notice, a VAN) that it intends to make a proposal to the Notifying Corporation's creditors and equity interest holders for a Voluntary Arrangement.

Following a VAN, an automatic moratorium applies to all secured and unsecured creditors of the Notifying Corporation and its assets wherever located until proceedings with the Tribunal are concluded or such earlier time as ordered by the Tribunal.[15] The Tribunal may, on application by the Notifying Corporation, extend the moratorium to any other Corporation

or other entity upon finding that there is an imminent irreparable harm to the Corporation in the absence of a moratorium.[16]

Restructuring Financing

Following a VAN and a hearing before the Tribunal at which creditors and equity interest holders may be heard, a Notifying Corporation may obtain credit and incur debt, which debt has: (i) priority over existing unsecured debt; (ii) is secured by a lien on property of the Notifying Corporation that is not otherwise subject to a lien; or (iii) is secured by a junior lien on property of the Notifying Corporation that is subject to a lien.[17]

If the Notifying Corporation is unable to obtain credit on the terms set out above, it may seek authorization from the Tribunal to obtain credit or incur debt secured by a senior or equal lien on property of the Notifying Corporation that is subject to a lien only if there is adequate protection of the interest of the holder of the lien on the property of the Notifying Corporation on which such senior or equal lien is proposed to be granted or if with the consent of the holder of the lien on the property of the Corporation on which such senior or equal lien is proposed to be granted.[18]

Nominee

Immediately prior to a VAN, the Notifying Corporation must appoint a nominee (the Nominee) who must be found by the Tribunal to be a leading restructuring practitioner.[19] The main role of the Nominee is to file with the Tribunal a statement concerning whether in the Nominee's opinion: (i) the proposed Voluntary Arrangement has a reasonable prospect of being approved or implemented; (ii) the Notifying Corporation is likely to have sufficient funds available to it during the moratorium to enable it to carry on its business; and (iii) meetings of creditors and equity interest holders should be summoned to consider a proposed Voluntary Arrangement.[20] The Nominee would then become the supervisor of any Voluntary Arrangement approved under the procedure and sanctioned by the Tribunal.[21]

Creditors Committee

The Experts are required to facilitate the formation of a committee of unsecured creditors, the membership of which shall be voluntary and approved by the Tribunal to ensure adequate and fair representation of unsecured creditors.[22] The Experts may make recommendations to the Tribunal in relation to the formation of any other committees of creditors, and the Tribunal may approve such committees, the membership of which shall be voluntary. The Corporation shall bear the reasonable costs and expenses, including professional fees, of any such committees provided such costs and expenses relate to the proceedings in respect of the Corporation initiated under the Schedule.[23]

Exclusive Period to Propose a Voluntary Arrangement

Following a VAN:

- the Notifying Corporation has the exclusive right to propose a Voluntary Arrangement to its creditors within 120 days;[24]
- if the Notifying Corporation has proposed a Voluntary Arrangement for the approval of its creditors within 120 days, the Notifying Corporation has a further 180 days of exclusivity, which may be extended with the approval of the Tribunal following a hearing.[25] If the Notifying Corporation's exclusivity period described above expires or is terminated by the Tribunal,[26] the creditors may propose a Voluntary Arrangement in respect of the Notifying Corporation.[27]

Directions Hearing and Classes of Creditors

Before a Voluntary Arrangement proposal is distributed to creditors or equity interest holders, creditors and equity interest holders must be given no less than 20 days notice of a directions hearing to consider the Notifying Corporation's proposed procedures for voting by creditors and equity interest holders on a Voluntary Arrangement (the Directions Hearing) before the

Tribunal at which they have a right to be heard.[28]

The proposal for a Voluntary Arrangement put to the Directions Hearing must separately classify secured creditors, unsecured creditors and equity interest holders for the purposes of voting on the Voluntary Arrangement.[29] At the Directions Hearing, the Tribunal may order that the proposed notice and voting procedures be approved, rejected or approved subject to modifications.[30]

Creditors' Meeting and Voting Thresholds

If at least two-thirds in value (of claims agreed to by the Notifying Corporation or otherwise allowed by the Tribunal) of any 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 any Voluntary Arrangement, the Voluntary Arrangement, if sanctioned by the Tribunal, shall be binding upon all holders of claims against or equity interests in the Notifying Corporation and such other persons as ordered by the Tribunal.[31] A class of creditors or equity interest holders that is not impaired under any Voluntary Arrangement is deemed to have accepted the Voluntary Arrangement.[32]

Tribunal Approval of the Voluntary Arrangement and Cram-Down

Following the meetings 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 is required to sanction the Voluntary Arrangement. The Tribunal is required to sanction an approved Voluntary Arrangement upon a finding 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 Voluntary Arrangement or deemed to vote against the Voluntary Arrangement has received at least as much value as such class would have received in a winding up of the Corporation pursuant to the Schedule; and
- with respect to any class of unsecured claims, either (i) the 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 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 Voluntary Arrangement on account of such junior claim or interest any property or (iii) such class has voted to accept the Voluntary Arrangement.[33]

Consequences of Rejecting a Voluntary Arrangement Proposal

A Notifying Corporation may be wound up by the Tribunal if the Post Arrangement Hearing does not sanction the Voluntary Arrangement and the Tribunal finds that it is in the interests of the Notifying Corporation and its creditors for the Tribunal to do so.[34]

Ipso Facto, Executory Contracts and Unexpired Leases

Decree No. 57 precludes the termination of executory contracts or

unexpired leases solely because of a provision in such lease or contract which is conditioned on the financial condition or insolvency of the Notifying Corporation at any time before the close of proceedings before the Tribunal in respect of the Applicant.[35] In addition, a Notifying Corporation may assume or reject executory contracts or unexpired leases subject to the approval of the Tribunal.[36] The rejection of an executory contract or unexpired lease constitutes a breach of contract or lease immediately prior to the date of the VAN, leaving the counter-party with an unsecured pre-VAN claim for damages against the Notifying Corporation.[37]

Conclusion

The Government of Dubai has established a law and a tribunal which will enable any future restructuring of the Corporation to take place fairly and transparently. Decree No. 57 is bold and ground-breaking insolvency legislation, drawing on best practices from around the world and is likely to become a model for the development of insolvency laws throughout the Middle East to enable restructuring of both operations and capital structures of businesses without consent of all parties in interest.

Endnotes

1 Decree No. 57 is effective as of December 13, 2009.

2 Article (2) of Decree No. 57.

3 Article (2) of Decree No. 57.

4 Article (5)1 of Decree No. 57.

5 This is incorporated into the Decree via Section 60 of the DIFC Court Law.

6 Article (5)2 of Decree No. 57.

7 Article (5)3 of Decree No. 57.

8 Article (5)4 of Decree No. 57.

9 Article (5)5 of Decree No. 57.

10 Article (3) of the Decree.

11 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.

12 *See* Section 3 of the Schedule.

13 Articles (9), (10) and (11) of Section 2 to the Schedule.

14 Articles (12), (13), (14), (15) and (16) of Section 2 to the Schedule.

15 Article 8 of Section 1 to the Schedule and Articles 26 and 27 of Section 2 to the Schedule. The moratorium shall have effect as specified in the DIFC Insolvency Regulations and shall also preclude a right of set-off in respect of any obligation due from such corporation.

16 Article 9 of Section 1 to the Schedule and Article 28 of Section 2 to the Schedule.

17 Article 17 of Section 2 to the Schedule.

18 Article 18 of Section 2 to the Schedule. Note that "adequate protection" is defined in Article 18 of Section 2 to the Schedule as an interest reasonably sufficient to protect the holder of a valid security interest in property of the Corporation against a diminution in the value of such security interest to the extent such diminution is occasioned by the moratorium, any grant of a lien pursuant to this Article 18 or the Corporation's use, sale or lease of the property subject to such security interest following the VAN.

19 Articles 10 and 11 of Section 1 to the Schedule.

20 *See* Article 12 of Section 2 to the Schedule.

21 Regulation 2.7 of the DIFC Insolvency Regulations

22 Article 24 of Section 2 to the Schedule.

23 Article 24 of Section 2 to the Schedule. Note that additional rights and obligations of such committees are set out in Article 24 of Section 2 to the Schedule.

24 Article 9 of Section 2 to the Schedule.

25 Articles 9 and 10 of Section 2 to the Schedule.

26 Article 11 of Section 2 to the Schedule allows the Tribunal to terminate the Notifying Corporations exclusivity on request of a creditor of the Notifying Corporation upon notice and hearing for cause shown, including bad faith.

27 This is the effect of Article 12 of Section 2 to the Schedule.

28 Articles 12 and 13 of Section 2 to the Schedule.

29 Article 12 of Section 2 to the Schedule.

30 Article 12 of Section 2 to the Schedule.

31 Article 14 of Section 2 to the Schedule.

32 Article 14(b) of Section 2 to the Schedule. Note that this Article contains a detailed definition of "unimpaired."

33 Article 15 of Section 2 to the Schedule.

34 Article 13 of Section 1 to the Schedule and Article 33 of Section 2 to the Schedule.

35 *See* Article 19(e) of Section 2 to the Schedule.

36 *See* Article 19 of Schedule 2 to the Schedule which contains detailed provisions relating to executory contracts and unexpired leases.

37 Article 19(g) of Section 2 to the Schedule.

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