



# Dubai World restructuring decree

Dubai has issued a decree dealing with the restructuring of the Dubai World group of companies. This briefing outlines the decree's provisions and its implications for affected companies.

## Summary of the decree

On 14 December 2009, the ruler of Dubai issued a decree to facilitate the restructuring of the Dubai World group of companies (Decree No. 57 for 2009) (DW Decree). The government of Dubai also issued a basic question-and-answer guide to the Decree. The guide explains why the DW Decree was deemed to be necessary, who will sit on the tribunal established to supervise the re-organisation of Dubai World and its subsidiaries and how the tribunal will work.

The DW Decree is a customised version of the Insolvency Law and the Insolvency Regulations of the Dubai International Financial Centre (DIFC), which are based on English insolvency law principles. It disapplies many of the provisions of the DIFC Insolvency Law, with the apparent intention of ensuring that the restructuring of Dubai World will be carried out in a particular manner. For example:

- the process under which Dubai World will be able to obtain a moratorium in relation to its creditors is simplified. If Dubai World intends to make a proposal for a voluntary arrangement with its creditors, an automatic moratorium will apply from the time of the notification. In other cases (including with respect to Dubai World's subsidiaries), Dubai World will need to give 20 days' notice and there will be a hearing at which creditors and equity interest holders may participate, but it will be able to apply for a temporary moratorium in the meantime;
- there will be no possibility of a receiver being appointed over any of the assets of Dubai World or an administrative receiver being appointed over the company or its subsidiaries;
- the only circumstances in which Dubai World may be wound up will be on an order of the tribunal if a proposed voluntary arrangement is rejected by the creditors in accordance with the DW Decree;
- Dubai World and its directors are excluded from the DIFC Insolvency Law's provisions on wrongful trading;
- the tribunal has no equivalent to the ability of the DIFC registrar to impose a fine on persons who breach the DW Decree;
- the majority for approving a voluntary arrangement is lower than under the DIFC Insolvency Regulations (see below) and creditors whose position is deemed to be unimpaired in accordance with schedule 2, article 14 of the DW Decree will be deemed to have accepted the voluntary arrangement;
- the voluntary arrangement must be sanctioned by the tribunal under schedule 2, article 15 of the DW Decree, but the ability of the tribunal to reject it is limited;
- creditors may challenge a voluntary arrangement if they believe that it was wrongly entered into;
- the DW Decree also contains a number of provisions in schedule 2, article 19 on how Dubai World may treat contracts to which it is a party. These are relatively complicated and specific legal advice should be sought in respect of a particular contract, but it may be noted that:

- Dubai World has a general right to assume or reject contracts, subject to the approval of the tribunal; and
- counterparties to contracts may generally not amend or terminate such contracts on the basis of any provisions in such contracts in relation to insolvency proceedings, except where counterparties are excused from performance by the applicable law of that contract or where that contract is a loan.

## Comment

The DW Decree contains many recognisable features of well-known English and US restructuring tools such as company voluntary arrangements (CVAs), schemes of arrangement and Chapter 11 of the US Bankruptcy Code.

In particular:

- the cram-down mechanic to enable the tribunal to sanction the CVA if one impaired class votes in favour;
- priority funding with the concept of ‘adequate protection’;
- an acceptance/rejection mechanic for executory contracts; and
- the absolute priority concept

all borrow heavily from Chapter 11 of the US Bankruptcy Code.

The DW Decree also leaves a number of questions unanswered or contains a number of ambiguities.

- In the DIFC, UAE federal laws do not apply, except in criminal matters. In the case of the DW Decree, however, confusion may be caused by article 4, which provides that in addition to the specific provisions of DIFC law, as amended by the DW Decree, the tribunal shall decide claims submitted to it by virtue of ‘legislation in force in the Emirate’ of Dubai and ‘commercial custom’, as well as ‘principles of justice, and rules of righteousness and equity’. No order of priority is given to these requirements, which could cause confusion over how the DW Decree is to be interpreted.
- Article 9 excludes the jurisdiction of the Dubai courts and the DIFC court from any demand, claim or other matter that is within the jurisdiction of the tribunal by virtue of the new decree. Given the possibility that creditors may seek to obtain judgments against

members of the Dubai World group in courts outside Dubai, it is not clear whether:

- the enforcement of such judgments in Dubai would be subject to the DW Decree and any moratorium declared in respect of the debts of the Dubai World group in Dubai;
  - the tribunal has the power to enforce foreign judgments against Dubai World; and
  - the tribunal has the power to re-open foreign judgments.
- The most likely interpretation is that the DW Decree does not operate so as to oust the contractually agreed jurisdictional clauses in any contracts entered into by Dubai World and its subsidiaries except for those governed by Dubai law. Accordingly, parties will still be able to enforce their contractual rights in the English courts if the agreements were subject to English law. As regards execution of foreign judgments and attachment of assets in Dubai, the DW Decree does not expressly oust the jurisdiction of the Dubai execution judge, who is normally responsible for such matters.
  - The provisions of the DIFC Insolvency Law that would require the court to assist insolvency proceedings with respect to a foreign company have been excluded by the DW Decree. This may cause difficulties if an overseas subsidiary of Dubai World is subject to insolvency proceedings in another jurisdiction.
  - Unlike Dubai World, which is established under a Dubai law decree, its local subsidiaries are incorporated as companies under UAE federal law as limited liability companies and public joint-stock companies. It is therefore unclear how the DW Decree can operate so as to (i) apply DIFC law to those entities or (ii) exclude those entities from the application of federal insolvency laws.
  - Under schedule 2, article 10, the threshold for passing a voluntary arrangement has been reduced from three-quarters in value of creditors (under the DIFC Insolvency Regulations) to two-thirds in value (of claims agreed to by Dubai World or otherwise allowed by the tribunal) of any class of creditors or equity interest holders. A proposal passed is then binding on all persons within that class. It would appear that Dubai World could cause proposals to be adopted by a low proportion of creditors by simply not agreeing to claims of dissenting creditors.

- Schedule 2, article 17 provides that Dubai World may obtain credit (which has priority over unsecured debt only) after submitting its notification for a voluntary arrangement to the tribunal. Article 18 provides that if Dubai World is unable to obtain credit on such terms, then it may be authorised by the tribunal to incur debt secured by a senior or equal lien on property already secured by a lien, provided that the holder of the lien receives ‘adequate protection’ against a diminution in value of its security interest.

The DW Decree may well be seen by creditors of Dubai World as a welcome move towards providing an orderly approach to its possible restructuring, although it remains to be seen how the familiar characteristics of English and US insolvency law and a complex jurisdictional mix of other laws applicable to Dubai World and its subsidiaries will play out in practice.

For further information please contact

Adam Gallagher  
Restructuring partner  
T +44 20 7427 3685  
M+44 7976 355 741  
E adam.gallagher@freshfields.com

Patrick Ko  
Corporate partner  
T +971 4 5099 146  
M+971 50 240 3880  
E patrick.ko@freshfields.com

Reza Mohtashami  
Head of dispute resolution –  
Middle East and North Africa (MENA)  
T +971 4 5099 174  
M+971 50 458 7984  
E reza.mohtashami@freshfields.com

Charles July  
Head of finance – MENA  
T +971 2 6521 700  
M+971 50 656 0103  
E charles.july@freshfields.com

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