Cross-Border Insolvencies Within One Nation: The UAE Experience

In one of the first expositions by the DIFC Court of the effect of Schedule 4 of the DIFC Insolvency Law—which is an enactment of the UNCITRAL Model Law on Cross-Border Insolvency and its interaction with the UAE's Bankruptcy Law—the DIFC Court confirmed that the UNCITRAL Model Law applies in the DIFC only in relation to corporate insolvency. The authors appeared as counsel in the case.
The Court held that it will carefully consider its jurisdiction to offer recognition and assistance to non-DIFC proceedings (including those of sister Courts in the UAE). The mere fact that a foreign proceeding relates in a general sense to insolvency does not make recognition automatic. The Court emphasised that where issues of discretion arise, the Court is likely to look carefully at the conduct of the parties, and the practical benefit (or otherwise) to the parties in

Dans l'un des premiers exposés, par le tribunal du DIFC, de l'effet de l'annexe 4 de la loi sur l'insolvabilité du DIFC, qui est une application de la loi type de la CNUDCI sur l'insolvabilité transfrontalière, et de son interaction avec la loi sur la faillite des Émirats arabes unis, le tribunal du DIFC a confirmé que la loi type de la CNUDCI ne s'applique au DIFC qu'en ce qui concerne l'insolvabilité des entreprises. Les auteurs ont comparu en tant qu'avocats dans l'affaire.
Le tribunal a déclaré qu'il examinerait attentivement sa compétence pour offrir la reconnaissance et l'assistance aux procédures non DIFC (y compris celles des juridictions sœurs des Émirats arabes unis). Le simple fait qu'une procédure étrangère se rapporte de manière générale à l'insolvabilité ne rend pas la reconnaissance automatique. Le tribunal a souligné que lorsque des questions de pouvoir

David Russell AM RFD QC
Barrister
Outer Temple Chambers

David Holloway
Barrister
Outer Temple Chambers

exercising its discretion as to whether or not a stay of DIFC proceedings should be granted or continued.

discrétionnaire se posent, il est susceptible d'examiner attentivement la conduite des parties et l'avantage pratique (ou autre) pour les parties d'exercer son pouvoir discrétionnaire quant à savoir si une suspension des procédures DIFC doit être accordée ou maintenue.

1

Background

A. UAE INSOLVENCY REGIMES

As readers of this journal will be aware, the legal system of the United Arab Emirates is based on its federal system and the presence of two common law jurisdictions (the Dubai International Financial Centre –(**DIFC**)) and the Abu Dhabi Global Market (**ADGM**)) within the seven civil law emirates making up the federation.

Within the civil law jurisdictions, insolvency is dealt with under two laws: the Federal Bankruptcy Law[1] (which applies to companies and individuals classified as traders in relation to their commercial activities) and the Federal Insolvency Law[2] (which applies to individuals).

Being civil or commercial laws, the Federal Bankruptcy Law and the Federal Insolvency Law do not apply in the financial free zones comprising the DIFC and the ADGM. Each has its own law which applies to corporate insolvency only.

Being civil or commercial laws, the Federal Bankruptcy Law and the Federal Insolvency Law do not apply in the financial free zones comprising the DIFC and the ADGM. Each has its own law which applies to corporate insolvency only—in the DIFC, the DIFC Insolvency Law[3] and in the ADGM, the Insolvency Regulations.[4] Each of these prescribes the assistance which their Courts can give to foreign insolvency proceedings (including insolvency proceedings under the Federal Bankruptcy Law) by reference to its locally applicable version of the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**").[5] Neither the Federal Bankruptcy Law nor the Federal Insolvency Law contains corresponding provisions,[6] and the UAE has not otherwise enacted a local version of the Model Law on cross-border insolvency.

Given the significance of the financial free zones within the overall UAE economy[7] and the jurisdiction of the two common law courts, insolvencies of companies and individuals operating within the UAE will frequently create legal issues of some complexity within both the common law and civil law jurisdictions, including conflict of laws issues relating to recognition of foreign insolvency proceedings. In a recent[8] judgment,[9] Justice Sir Jeremy Cooke dealt with some of the issues which can arise in such cases.

Justice Sir Jeremy Cooke's judgment has an immediate impact on five significant cases which are proceeding in the DIFC Court, the total value of the Claims being in excess of USD 725 million.

The application was based on the proposition that the DIFC Court was bound to "recognise" or give effect to the Abu Dhabi bankruptcy proceedings and to stay or pause the DIFC proceedings until the Abu Dhabi bankruptcy procedures were concluded.

The case concerned an application made by persons appointed by the Abu Dhabi Court under Chapter 4 of the Federal Bankruptcy Law as the "*amin*" or "trusted person ("the Trustee", without the legal connotations attaching to that expression in English or DIFC law). The

1. Federal Decree-Law No. 9/2016 on Bankruptcy (hereinafter the "**Federal Bankruptcy Law**").

2. Federal Decree-Law No. 19/2019 on Insolvency (hereinafter the "**Federal Insolvency Law**").

3. DIFC Law No. 1/2019 on the Insolvency Law (hereinafter the "**DIFC Insolvency Law**").

4. The Abu Dhabi Global Market Insolvency Regulations 2015.

5. DIFC Insolvency Law Schedule 4, ADGM Insolvency Regulations Schedule 10.

6. The Federal Bankruptcy Law, by virtue of Article 2, applies only to UAE companies outside the financial free zones and traders.

7. *See*, e.g., DIFC 2021 Annual Report media release. Available at https://www.difc.ae/newsroom/news/difc-records-best-performance-17-year-history-driving-dubais-next-phase-growth/.

8. 4 March 2022.

9. *In the matter of an Application by Salem Mohamed Ballama Altamimi and Others*, CFI-085-2021, 4 March 2022 (DIFC Court of First Instance).

purpose of the application was to bring about a stay—or automatic suspension—of all claims in the DIFC Court involving all parties said to be involved in the Abu Dhabi bankruptcy proceedings. The application was based on the proposition that the DIFC Court was bound to "recognise" or give effect to the Abu Dhabi bankruptcy proceedings and to stay or pause the DIFC proceedings until the Abu Dhabi bankruptcy procedures were concluded. The legal basis of the application was the DIFC Insolvency Law (including the Model Law) as well as what were said to be principles of comity between courts.

Although a decision of the DIFC Courts, identical issues would have arisen had the DIFC proceedings taken place in the ADGM, with, it is suggested, a similar result.

B. DIFC PROCEEDINGS

The proceedings in the DIFC Court involved largely, but not solely, claims by a number of banking syndicates for repayment of loans. The claims were based on the underlying loan agreements and a number of personal and corporate guarantees. The application by the Trustees to stay these proceedings was the latest in a line of attempts on their part, and on the part of the Defendants in the DIFC proceedings, to have the DIFC proceedings stayed.

In each of the Banks' claims, there was a principal claim against a corporate borrower for repayment of loans, together with additional claims against a number of corporate Defendants as guarantors of those loans. The corporate Defendants are part of a larger company group ("**the KBBO Group**") which has been in extreme financial difficulty since, at the latest, mid-2020. The Banks's claims also included claims against two individual Defendants ("**HEAQ**" and "**Mr KBBO**"), who were the owners of the KBBO Group. The claims against HEAQ and Mr KBBO were made pursuant to personal guarantees of the underlying loans.

The individual Defendants challenged the jurisdiction of the DIFC Courts on the basis of allegations of forgery of signatures on the loan agreements and guarantees (which allegedly also invalidated the choice of jurisdiction in favour of the DIFC Courts). The individual Defendants further referred the issue of forgery to the Dubai Courts for adjudication, causing the DIFC proceedings to be stayed pending references to the Joint Judicial Committee, creating a jurisdictional conflict, and a significant delay of the DIFC proceedings.[10]

Two of the DIFC Courts proceedings had proceeded to the point of immediate judgment against many of the Defendants (with the jurisdictional challenge by the two individual Defendants having been dismissed). In those cases, the only outstanding issue was that of the validity of the signatures of one or both of the individual Defendants.

C. ABU BANKRUPTCY PROCEEDINGS

Since November 2020, several applications and letters had been sent to the DIFC Court requesting a stay of the various proceedings on the basis, *inter alia*, that the KBBO group had entered into a restructuring process under Chapter 2 of the Federal Bankruptcy Law. None of these attempts had been accepted by the DIFC Court.

On 27 July 2021 pursuant to an application made by Mr KBBO, the First Claimant in the instant litigation was appointed by the Abu Dhabi Court to carry out the functions prescribed in an order of that date (the "**Commencement Order**") under Chapter 4 of the Federal Bankruptcy Law. Prior to the application, Mr KBBO and HEAQ had concluded a written agreement in which they agreed that they would make an application to the Abu Dhabi Court on behalf of themselves and companies in which they each had an interest. The application was made by Mr KBBO as the "Debtor", with HEAQ and 28 corporate bodies in which they were interested named as "Joined Litigants". In it, Mr KBBO stated that the application was for "restructuring" on the ground of his insolvency. The basis of the application was that the initial financial statements filed with the Court showed that his assets were insufficient, if liquidated and sold, to pay the full value of his debts whether constituted by loans or by guarantees. It was said that extensive efforts had been made to reach agreement with creditors under the supervision and control of the Financial Reorganisation Committee under Chapter 2 of the Federal Bankruptcy Law but that these had failed. In consequence, a request was made to the Abu Dhabi Court to commence with the restructuring of his business and obligations under Chapter 4 of the Federal Bankruptcy Law by appointing the First Claimant to prepare a restructuring plan for approval by the creditors and the Court. An order was also requested for the suspension of all judicial procedures and judicial enforcement against him and his companies pending the approval of the restructuring plan. The final request was for approval by the Court of such a restructuring plan when it was forthcoming or, if it was not possible to reach an agreement with the necessary majority of creditors, for a declaration of bankruptcy and liquidation of his businesses.

In the accounts furnished to the Abu Dhabi Court, upon which Mr KBBO relied in his petition, reference was made to the debts owed by his companies to various banks and his guarantees loans to the corporate debtors

The Court observed that:

> *"any subsequent suggestion that Mr KBBO's signature of such guarantees was forged might thereafter be thought to ring hollow in the face of his reliance upon such guarantees in his petition to the Abu Dhabi Court, but that has not stopped him from saying so in witness statements filed in (one of the Bank's proceedings)."*

The Commencement Order issued by the Abu Dhabi Court on 27 July 2021 referred to 9 joinder applications made in the application to the Court for restructuring by Mr KBBO as the Debtor. This brought the 29 Joined Litigants into the proceedings. Reliance was placed on Article 80(2) of the Federal Bankruptcy Law. It provides that the Court may join any other person in the bankruptcy:

> *"if the assets of such person overlap with the debtor's assets in a way that is hard to disaggregate or in case the Court considers that it shall not be practical or feasible in terms of the cost, to open separate procedures concerning such persons."*

The Abu Dhabi Court found that:

> *"the commencement procedures in one application provides adequate and sufficient protection for the creditors. Accordingly, their inclusion in the proceedings shall be acceptable pursuant to Article 80(1) of the Federal Bankruptcy Law."*

The Court stated that it was acceptable to commence the restructuring immediately and to start preparing a restructuring plan and ruled that a trustee should be appointed to carry out the functions set out in the Federal Bankruptcy Law, which included making an inventory of the assets, and reporting back to the Court, advertising for creditors, preparing a list of creditors, preparing and developing a restructuring plan and advising the Court at least every 21 working days on progress made. It also ordered a stay of judicial proceedings against the Debtor and the Joined Litigants and a stay of execution proceedings against their assets.

The latter order was unnecessary as under the terms of Article 162(1) of the Federal Bankruptcy Law, the commencement of such procedures would automatically result in the stay of actions against the

10. In three of the claims the stay of proceedings has been lifted following the decision of the DIFC Court of Appeal in *Lakhan v. Lamia.* [2021] DIFC CA 001. The Dubai Courts themselves had rejected jurisdiction over the Defendants' claims in at least one of the disputes, but the Defendants were pursuing appeals against this decision in the Dubai Courts.

Debtor and stay of execution on his assets and for such stay to continue until approval of a restructuring plan or the expiry of a ten-month period, subject to any further extension by the Court. The Federal Bankruptcy Law provides for the ability of a creditor with security to request the Court to be excluded from the stay of execution, but such a request has to be notified within one working day of the commencement of the proceedings which rendered the making of such a request by the Banks in the present case impossible.

After appointment of the First Claimant, two further individuals were appointed as "Trustees" at the request of the creditors.

There had been a dispute in various of the Banks' DIFC Court proceedings as to whether the First Claimant alone had standing to act as a foreign representative within the meaning of the Model Law or more generally. This dispute was resolved when the Second and Third Trustees were joined as Claimants.

The past behaviour of the Defendants in those actions and the First Claimant had already been the subject of judicial comment in some of the DIFC Court proceedings. In the context of the instant application, complaint was made in respect of all three Trustees for their conduct since the panel of three was in place. As the Court noted, while such matters might be relevant to the exercise of any discretion by this Court, the foundational questions which the Court had to determine related to the jurisdiction and powers of the DIFC Court as set out in the DIFC Insolvency Law.

2

The Decision on Recognition

A. ISSUE 1: "FOREIGN PROCEEDINGS" AND "FOREIGN REPRESENTATIVE"

Under the Model Law, the terms *"Foreign Representative"* and *"Foreign Proceeding"* each have a defined meaning. Article 2 of the Model Law provides, inter alia:

> *"(a) 'Foreign Proceeding' means a collective judicial or administrative proceeding in a foreign State including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;*
>
> …
>
> *(d) 'Foreign Representative' means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;*
>
> *(e) 'Foreign court' means a judicial or other authority competent to control or supervisory foreign proceeding; and*
>
> *(f) 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."*

Article 15 of the Model Law provides that:

> *"a foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed."*

The question accordingly arose whether the Abu Dhabi proceedings were a Foreign Proceeding and the Claimants were Foreign Representatives within the meaning of the definitions set out above.

The question accordingly arose whether the Abu Dhabi proceedings were a Foreign Proceeding and the Claimants were Foreign Representatives within the meaning of the definitions set out above.

The Banks disputed that the assets of the Debtor or the Joined Litigants had vested in the Trustees or that they had control of such assets. Under Article 157 of the Federal Bankruptcy Law, the debtor, with effect from the date of the Commencement Order, could not manage his assets or pay any claims arising before the issuance of the decision (with limited exceptions) or dispose of his assets except in accordance with the Federal Bankruptcy Law. Under Article 160, the court may decide to suspend any of the debtor's business based on the urgent request of the trustee. That had not been done. Under Article 161, the trustee may, during his management of the procedures, request the debtor to carry out all that is necessary to preserve the interests of his business and may request the debtor to meet the valid contracts to which he is a party. In practice, it was common ground that following the Commencement Order, Mr KBBO continued to run his businesses with the permission of the Trustee or Trustees, while they sought to put together a plan for restructuring the affairs of the Debtor and the Joined Litigants to be proposed to the creditors for approval.

Under Article 68 of the Federal Bankruptcy Law, an application to open bankruptcy procedures can be made by the debtor where he ceases to pay his debts as they fall due for a period exceeding 30 consecutive working days in consequence of financial difficulties or insolvency. Other provisions permit creditors and the Public Prosecutor to request the court to open bankruptcy procedures where the debtor is insolvent and the public interest requires it. Where the application is made by the debtor, he is required to specify whether it is for the purpose of restructuring or adjudication of bankruptcy and liquidation and he must, in accordance with Article 73, explain the reasons for the application with supporting financial documents.

It followed, the Court found, that the Federal Bankruptcy Law is framed by reference to a "debtor", in this case Mr KBBO, whilst Article 80(2) provides for the joinder of persons whose assets overlap with the debtor's assets in a way that is hard to disaggregate. Such persons are not characterised as "debtors" and the effect of Article 2 of that Law, including Articles 157-162 is to create potential or actual restrictions on the use by the debtor of his assets and not those of the Joined Litigants. A clear distinction is drawn between the "Debtor" on the one hand and the "Joined Litigants" on the other. The Commencement Order did not refer to multiple debtors. Those Joined Litigants might become party to a restructuring or perhaps be put into liquidation in due course, but they were not "debtors" at the current stage of proceedings in Abu Dhabi.

The Court held that the definition of a "foreign proceeding" was apt to include an interim judicial or administrative proceeding, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to supervision by a foreign court for the purpose of reorganisation. Regardless of any question of vesting of assets or the actual management and control of the business affairs of Mr KBBO and his companies, which appear to lie with them, the assets and affairs of the Debtor and the Joined Litigants were subject to the supervision of the Abu Dhabi Court in an interim proceeding pursuant to a law relating to insolvency for the purpose of reorganisation.

In the circumstances, the Court held that the Trustees did not qualify as the Foreign Representative authorised in a Foreign Proceeding to administer the reorganisation of the Debtor's assets and affairs.

However, the definition of a "foreign representative" requires such a person, whether appointed on an interim basis or otherwise, to be

> *"authorised in a foreign proceeding to administer the reorganisation... of the debtor's assets or affairs or to act as a representative of the foreign proceeding."*

The Court accordingly held that although the order made was described as a Commencement Order, no order had been made for any reorganisation or liquidation by the Abu Dhabi Court, and the functions of the Trustees were only to put forward proposals for restructuring for the approval of the creditors and the Abu Dhabi Court on the basis of information gathered by them in relation to the assets and liabilities of the debtor, with a list of creditors where liability is accepted or disputed. In the circumstances, the Court held that the Trustees did not qualify as the Foreign Representative authorised in a Foreign Proceeding to administer the reorganisation of the Debtor's assets and affairs.

It followed that the application failed on the basis of the absence of standing on the part of the applicants in question to make it, as had occurred in the previous Banks' proceedings.

The Court went on to hold that there were other barriers which stood in the way of a successful application.

B. ISSUE 2: THE DIFC INSOLVENCY LAW AND RECOGNITION

As the Court noted, there is nowhere in the DIFC Insolvency Law any provision relating to the bankruptcy of an individual in the DIFC, as opposed to a corporate entity or those involved in a limited liability partnership. Provisions for Company Voluntary Arrangements, Rehabilitation, Administration, Receivership and Winding Up all apply only to corporate bodies. Under Article 88(2), when a winding up order has been made by the Court, no action or proceeding shall be commenced or continued against the Company or its property, except by leave of the Court and subject to such terms as the Court may impose.

Against that background, the Court held it was unsurprising that Part 7 of the DIFC Insolvency Law only applies to Recognised and Foreign Companies and that Article 117 related to Proceedings in respect of Foreign Companies. Article 117 provides, insofar as material, as follows:

> *"(1) Where a Foreign Company is the subject of insolvency proceedings in its jurisdiction of incorporation, the Court shall upon request from the court of that jurisdiction, assist that court in the gathering and remitting of assets maintained within the DIFC.*
>
> *(2) .....*
>
> *(3) The UNCITRAL Model Law (with certain modifications for application in the DIFC) as set out in Schedule 4 of this Law has force in the DIFC in respect of Foreign Companies. This law applies with such modification as the context requires for the purpose of giving effect to this Article 117(3)."*

The Court held that Articles 117(1) and 117(3) gave the DIFC Court separate jurisdiction and powers.

The Court held that Articles 117(1) and 117(3) gave the DIFC Court separate jurisdiction and powers, with questions of assistance falling outside Article 117(1) falling to be decided in the light of the overall scheme of the DIFC Insolvency Law and the Model Law.

It further held that Article 117(3) provided for the Model Law as set out in Schedule 4 to have force in the DIFC but only in respect of Foreign Companies. The first sentence of that subparagraph made it plain that the Model Law was modified for application in the DIFC and the second sentence made it plain that the DIFC Insolvency Law, which includes Schedule 4, applied with whatever modifications are necessary in order to give effect to Article 117(3). The effect of this was that the operation of the Model Law in the DIFC is restricted to Foreign Companies.

The consequence of this is that the provisions of Schedule 4, whether relating to recognition under Chapter III or to cooperation or assistance under Chapter IV of the Schedule, did not apply to individuals such as Mr KBBO or HEAQ. It was not open to them to seek recognition or a stay of proceedings under any provision of the Model Law or the DIFC Insolvency Law. Any application for a stay by either of those individuals would have to be based on other grounds, whether under some other statutory provision or case management powers. The application for a stay of DIFC proceedings against them on the basis that the Abu Dhabi proceedings should be recognised therefore could not succeed.

Article 17(2) of the Model Law provides:

> *"The foreign proceeding shall be recognised:*
>
> *(a) as a foreign main proceeding if it is taking place in the State where the debtor as the centre of its main interests; or*
>
> *(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State."*

Each of the provisions refers to the "debtor", with a need in the former case to show that the insolvency proceedings are taking place in the location of its centre of main interests, and in the latter case to show that it has an establishment in that location. As there was only one "Debtor" referred to in the Commencement Order and the Abu Dhabi proceedings, that being Mr KBBO, to whom the provisions of the Model Law did not apply, the Court held there was no relevant debtor for the purposes of recognition in the DIFC.

If the Joined Litigants were not classified as Debtors in the Abu Dhabi proceedings, they could not be so classified in the DIFC.

The Court further held that neither the DIFC Insolvency Law nor any other DIFC Law had any provision relating to Joined Litigants or recognition of proceedings which involve them, whether or not the requirements of Article 2(a) of the Model Law are otherwise met. If the Joined Litigants were not classified as Debtors in the Abu Dhabi proceedings, they could not be so classified in the DIFC.

The application for recognition therefore failed for this additional reason and the application for a stay based on that also failed. There simply was no jurisdiction to recognise the Abu Dhabi proceedings, even if they had been brought by a Foreign Representative.

C. ISSUE 3: JURISDICTION TO STAY PROCEEDINGS IN THE DIFC

The significance of the difference between the location of an entity's centre of main interests and the location of an establishment arises because of the distinction drawn between recognition of a foreign proceeding as a foreign main proceeding and recognition of it as a foreign non-main proceeding.

Under Article 20(1) of the Model Law, there is an "automatic"[11] stay of proceedings concerning the debtor's assets, rights and liabilities/obligations where the foreign proceedings are recognised as main proceedings. Where recognition is given of the foreign proceedings as non-main proceedings, under Article 21 "*the Court may*", at its discretion grant such a stay. In practice, the Court held that the distinction is limited in its effect because of the terms of Article 20(4), which gives power to the Court to terminate such a stay, and Article 20(2) which provides that the scope, or termination, of the stay referred to in Article 20(1) applies in the same way as a moratorium under Article 88(2) of the DIFC Insolvency Law and does not affect any rights to take steps to enforce security. Article 88(2) of that Law provides that the Court may give leave for actions to be continued against the company subject to such terms as the court may impose. The essential criterion to be adopted by the Court is that it must do what is right and fair according to all the circumstances of the case. The effect of the "automatic" stay under Article 20 is effectively to put the burden of proof upon the party resisting a stay, whereas the burden may rest upon the party seeking a stay under Article 21.

In any event, the evidence put before the Court as to the centre of main interests and location of establishment of the 28 corporate bodies who are Joined Litigants was held to be unsatisfactory.

The Court took the view that on the facts of this case, it did not matter whether the issue of stay—if it had arisen for decision—would fall for decision under Article 20 or Article 21, because the result would have been the same.

The Court took the view that on the facts of this case, it did not matter whether the issue of stay—if it had arisen for decision—would fall for decision under Article 20 or Article 21, because the result would have been the same.

11. The term is regularly (and arguably inaccurately) used in the literature in relation to the UNCITRAL Model Law which differs from the DIFC version in significant respects, including in relation to stays of proceedings.

In part, the Court's conclusion to that effect relied on aspects of the conduct of the Defendants in the DIFC proceedings and the Trustees which was specific to the case so will not be further considered here except in relation of matters of general principle beyond noting that such matters will have relevance in the Court's consideration of whether or not there should be a stay.

The Court noted that the Trustees had stated that:

> *"The process for review of claims is being carefully managed by the Abu Dhabi Court and will include submissions, meetings and detailed discussions with the Debtors and Banks surrounding such claims. The Trustee Panel also has the authority to appoint its own experts to review the claims, including independent forensic handwriting experts. In all respects, the restructuring process is being carefully and adeptly managed by both the Trustees and the Abu Dhabi Court"*

and that, notwithstanding any judgments of the DIFC Court, the Trustees will still have to review the underlying claim and cannot accept any orders of this Court made after the Commencement Date at face value. In consequence, the Trustees asserted that allowing the DIFC claims to run *"does more harm than good"*.

The Court noted that the Trustees were effectively contending that the determination of liability in the Court of the chosen jurisdiction between the Banks and the borrowers to be valueless because the Trustee Panel had arrogated to itself the power to second-guess or override any such determination, subject to any grievance raised against their decision which would be heard by the Abu Dhabi Court.

The Court continued:

> *"That appears to me to be an irresponsible position to take, regardless of the position adopted in the Abu Dhabi proceedings and the desire to bring about a restructuring, if enough creditors agree."*

Given that the principal issue remaining in contention in two of the cases was the validity of HEAQ's guarantee which was also in contention in the other two, the Court observed:

> *"It cannot be said to be in the interest of the creditors for the assets of HEAQ to be unavailable to satisfy the debts of the borrowers/Joined Litigants, if there is a valid guarantee. The Trustees, exercising their functions in a responsible manner would be expected to do all that they could to maximise the assets available for distribution to the creditors, whether there is ultimately to be a restructuring or a liquidation. The existence of the disputed claim against HEAQ which would, if established, result in the availability of greater funds for the creditors requires that matter to be properly investigated."*

There could be no doubt in the mind of any objective observer that the DIFC Court was better equipped to determine issues of forgery—with the benefit of disclosure, cross examination and expert evidence—than the Trustees with the limited right of a grievance procedure involving the Abu Dhabi Court.

The Court observed that while HEAQ maintained that he was not a party to this guarantee because he said that his signature was forged and he was not therefore bound by the jurisdiction clause in favour of the DIFC, there could be no doubt in the mind of any objective observer that the DIFC Court was better equipped to determine issues of forgery—with the benefit of disclosure, cross examination and expert evidence—than the Trustees with the limited right of a grievance procedure involving the Abu Dhabi Court in the event of a decision by the Trustees that there was or was not any liability on HEAQ under the alleged guarantees.

There was therefore every reason for the proceedings against HEAQ to continue in the DIFC Courts regardless of any other consideration.

D. ISSUE 4: ASSISTANCE AND CO-OPERATION

Reliance was placed by Counsel for the Trustees, if recognition were refused, on Articles 25-27 of the Model Law. Under Article 25:

> *"in matters referred to in Article 1* [assistance sought in the DIFC by a foreign court or a foreign representative in connection with a foreign proceeding], *the Court may cooperate with foreign courts or foreign representatives either directly or through a DIFC insolvency office-holder".*

The Court held that while it was open to the Court to stay the existing proceedings as a form of cooperation or assistance in connection with an insolvency proceeding taking place abroad, it was hard to think of any reason why the Court should do so if the proceedings in question were not capable of recognition as a "foreign proceeding" for any of the reasons set out above, even if there were a relevant corporate debtor in respect of which cooperation could be sought. As the DIFC Insolvency Law made provision for a stay to be granted in specified circumstances, it would need very good reason to grant a stay where the preconditions for a stay in accordance with that Law had not been not met.

> *As the DIFC Insolvency Law made provision for a stay to be granted in specified circumstances, it would need very good reason to grant a stay where the preconditions for a stay in accordance with that Law had not been not met.*

Where the law had provided for circumstances in which, in the case of the insolvency of a foreign company, a stay should be imposed, it would be odd to impose a stay in other circumstances which would result in achieving by the back door what was not permitted by the front. Where the proceedings were incapable of recognition because there was no foreign representative or where the only insolvent debtor, recognised as such in the foreign court, was an individual to whom the statute does not apply, there was no room for reliance on any part of Schedule 4, whether in relation to cooperation or otherwise. The DIFC Insolvency Law provisions were of no application to the bankruptcy of an individual in Abu Dhabi proceedings and there was no reason, as a matter of judicial policy, to find some other way of achieving the same result. What good reason could there be for granting a stay against him, or companies which he owns or in which he has a majority interest, or guarantors of the liability of such companies?

Any restructuring plan or liquidation process would in fact be facilitated by the DIFC Court's decisions on liability, subject only to the additional expense involved if the Trustees decided to contest claims made against the borrowers or on the construction contract or were made subject to orders for costs in favour of successful claimants. The incurring of cost in ascertaining the assets and liabilities of insolvent debtors, was however part of any insolvency process and is an inevitable feature of it. Lawyers' and accountants' fees regrettably consume assets which would otherwise be available to creditors but to some extent the quantum of such expenditure lay in the hands of the Trustees and the decisions they take as to admission of debts. Whatever applications were now made for immediate judgment in the DIFC proceedings, the Trustees would have time to consider whether they were well made and whether to incur any expenditure in opposing them and racking up costs on their side as well as increasing the costs of the Banks or the remaining DIFC Claimant.

E. ISSUE 5: DISCRETION TO STAY UNDER THE COURT'S CASE MANAGEMENT POWERS

The last powers of the DIFC Court to which the Claimants appealed were its case management powers, but the Court held that that involved consideration of the same factors set out above. If there was no basis for the exercise of any discretion in favour of the Claimants in the context of the DIFC Insolvency Law or other applicable statutory provision, there could be none in the exercise of case management powers.

Conclusion

The decision provides some very helpful guidance on an issue of practical importance arising in inter-emirate commercial litigation. It is a good example of the DIFC Court carefully defending its jurisdiction in circumstances where repeated attempts have been made to avoid having the underlying issues determined by the Court but respecting the position of the other Courts in the UAE.

As a matter of law, the judgment illustrates a careful and nuanced approach to the provisions in the UNCITRAL Model Law on Cross-Border Insolvency as enacted in the DIFC Insolvency Law. The DIFC Court has resisted an overly broad application of the principle of recognition in the Model Law. As such, parties may not rely on insolvency proceedings in another Court to delay or derail DIFC Court proceedings. Where such insolvency procedures are on foot (whether in another emirate or another jurisdiction), the DIFC Court will not simply impose an "automatic" stay of its proceedings, but rather will give careful attention to the provisions of the DIFC Insolvency Law, the nature of the "foreign proceedings", the conduct of the parties and whether a stay of proceedings will serve any useful commercial purpose.

Further, when Articles 20 and 21 of the Model Law (the provisions governing recognition of foreign proceedings) are not engaged, the Court is unlikely to grant relied based on broader notions of "comity" or wider case management powers. This significantly reduces the area of potential legal uncertainty. The approach to the Model Law reflected in this decision will clearly limit the scope for tactical satellite litigation. As such, the judgment is in keeping with the trend of recent cases such as the Court of Appeal decision in *Lakhan v. Lamia*.[12]

It should be noted that the defendants have requested leave to appeal at the DIFC Court of Appeal.

12. *Lakhan v. Lamia* [2021] DIFC CA 001 available at: https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/lakhan-v-lamia-2021-difc-ca-001.

أكدت محكمة مركز دبي المالي العالمي في أحد أول توضيحاتها لتأثير الجدول الرابع لقانون الإعسار والذي يعتبر تطبيقا لقانون الأونسترال النموذجي للإعسار عبر الحدود وتفاعله مع قانون الإفلاس في دولة الإمارات العربية المتحدة على أن قانون الأونيسترال النموذجي على مركز دبي المالي العالمي يطبق فقط على إعسار الشركات. وقد عمل المحررون مستشارين قانونيين في هذه القضية. ووافقت المحكمة على النظر بعناية في مسألة اختصاصها للاعتراف بالإجراءات القانونية غير المتعلقة بالمركز ودعمها (بما في ذلك المحاكم الشقيقة في الإمارات العربية المتحدة). إن مجرد كون إجراء أجنبي ما متعلق بصورة عامة بالإعسار لا يجعل الاعتراف به تلقائيا. وأكدت المحكمة، فيما يتعلق بالمسائل الخاضعة للسلطة التقديرية، أن المحكمة على الأغلب ستنظر بعناية بسلوك الأطراف والفوائد العملية (أو غيرها) التي تعود على الأطراف من ممارسة سلطتها التقديرية في إصدار قرار بمنح أو استمرار تعليق إجراءات مركز دبي المالي العالمي.

BIOGRAPHY

DAVID RUSSELL AM RFD QC is an Australian barrister specialising in international trust and tax law. He is admitted to practise in England and Wales, Australia, New York (as a legal consultant) Papua New Guinea, New Zealand and the Courts of the Dubai International Financial Centre. He was first appointed Queen's Counsel in 1986.
David Russell was President of the Taxation Institute of Australia from 1993 to 1995, and of the Asia Oceania Tax Consultants' Association (AOTCA) from 1996 to 2000. He has been appointed an AOTCA Honorary Adviser for life, an Honorary Member of the Taxation Institute of Hong Kong and an Advisor of the Global Tax Advisors Platform.
David Russell was Deputy Chairman of STEP WorldWide during 2018 and 2019 and was Chair of its Governance Committee, a co-chair of the UAE Chapter of the International Section of the New York State Bar Association, an Academician of The International Academy of Estate and Trust Law (and is currently a Council member) and since 2016 has been a member of Legal Week's Private Client Global Elite.
David holds an LL.M from the University of Queensland.
David Russell can be contacted at david.russellqc@outertemple.com.

DAVID HOLLOWAY is a barrister and arbitrator practising from Outer Temple Chambers, London, Dubai and Abu Dhabi. He has over 20 years' experience as counsel specialising in international trade law and international arbitration. He also sits as an arbitrator and is a panel arbitrator with several international institutions.
David is based in the Middle East. He is a licensed advocate with the ADGM Court and the DIFC Court and has been instructed as counsel in significant cases involving the laws of the Middle East. He has also worked as an academic in the region, formerly an associate professor at the University of Birmingham (based in Dubai) and responsible for establishing the Dubai based LL.M in International Commercial Law.
David publishes regularly in the field of international trade law and international arbitration. He has been General Editor of International Arbitration Law Review since 1999. He has also been co-author of Schmitthoff: the Law and Practice of International Trade since 2007.
David Holloway can be contacted at David.Holloway@outertemple.com.