



28 March 2011

Our ref: ICAEW 39/11 (ME Rep 03/11)

DIFC Courts
Dubai International Financial Centre
Ground Level, Building 4
The Gate District
PO Box 211724, Dubai, UAE

Dear Sir

Public Consultation for DIFC Proposed Insolvency Rules

ICAEW is pleased to respond to your request for comments on the proposed insolvency rules

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

DIFC PROPOSED INSOLVENCY RULES

Memorandum of comments submitted in March 2011 by ICAEW, in response to DIFC Courts consultation document published in February 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the DIFC proposed insolvency rules.

WHO WE ARE

2. ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
3. Our membership includes numerous audit committee chairs, finance directors and members involved in investment management activities as well as auditors. Members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued.
4. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and the Institute is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of Institute licence holders.
5. The ICAEW Middle East regional office opened in 2009 and is based in DIFC, Dubai, United Arab Emirates. The key focus of the office is to support ICAEW's wider international strategy to ensure the highest standards within the accountancy profession. Across the region, ICAEW Middle East provides support to over 1,200 members and students, and works closely with governments, regulators and key stakeholders. Examples include assisting the DFSA in audit quality monitoring, working with Hawkamah to increase awareness about the importance of developing and applying good corporate governance practices, and producing a series of thought leadership and technical events for both members and non-members, within the Middle East.

GENERAL COMMENTS

We commend the DIFC Courts for undertaking a consultation on the new proposed Insolvency Rules and for its openness to receiving feedback.

6. We agree with most of the new proposed amendments as we believe that they create greater clarity and certainty to the insolvency process.
7. We note that the DIFC proposed insolvency rules appear to be based on the new UK Insolvency Rules¹ introduced in April 2010. There are benefits in this approach as the development of those new rules involved public consultation and targeted stakeholder engagement. Also built into the rule approval process in the UK is the involvement of the Insolvency Rules Committee. The Insolvency Rules Committee is appointed under section 413 of the Insolvency Act 1986 for the purpose of being consulted by the Lord Chancellor before making any rules under section 411 (company insolvency rules) or section 412 (individual

¹ The Legislative Reform (Insolvency)(Miscellaneous Provisions) Order 2010 (2010 No.18);
The Insolvency (Amendment) Rules 2010 (2010 No.686);
The Insolvency (Amendment)(No 2) Rules 2010 (2010 No.734);
The Insolvency (Scotland) Amendment Rules 2010 (2010 No 688).

insolvency rules) of the Act. The committee consists of members of the legal and accountancy professions.

8. However, there are some practical difficulties that still need to be resolved, as recognised by the UK Insolvency Service (IS) and it would obviously be preferable if these were not replicated in DIFC proposed insolvency rules. We believe that there will shortly be an announcement on whether the IS intend to overhaul the UK system, in which case they would hope to publish draft replacement rules in May 2011. Alternatively, if the IS announce that they are not going ahead with the overhaul, we understand that they may provide information on the 'essential amendments' within a shorter timeframe. We believe that this information would be useful to DIFC in order that appropriate amendments to their proposed rules can be made before they are finalised thereby avoiding some of the problems that have been experienced in the UK.
9. An area that will need careful consideration is in relation to transitional provisions. For example, the new Dubai rules may provide that the changes only to apply to new cases after the changes come into force, but they will also need to be clear as to whether the current or new rules would continue to apply to a post-change follow on procedure after a pre-change appointment (eg, a post-change CVL after a pre-change administration).

SPECIFIC COMMENTS

Applications

10. X.12 - This rule requires an application to be served at least 14 days before the date fixed for the hearing and rule X.194 requires the respondent to appear before the court not less than 14 days from the date of the order. However, the time limits for advertisement of the petition are 7 business days before the day of the hearing and the filing of the certificate of compliance with the Rules regarding service and advertisement must be within 5 business days before the hearing. In the UK, we have now moved to a system whereby all time limits are defined as a number of 'business days' and we believe it would be better to have consistency throughout these rules.

Petition for a winding-up order

11. X.63 - This rule provides that the petition shall be advertised in the English language newspaper(s) and in Arabic language newspaper(s). We recommend that guidance is given as to (i) the title or number of newspapers in which the petition should be advertised so as to reach the appropriate audience, (ii) the size and form of the advert and (iii) the placement of the advert. (The UK insolvency rules provide for standard and consistent content for advertising and although there is a move away from advertising in traditional media there is provision that advertisements must be legible).
12. X.96 - This rule provides for an advertisement of the petition dismissal to be placed by the company after 21 days of the hearing if not placed by the petitioner as required by rule X.194. There is no provision for costs. It seems to us that the petitioner would always fail to place the advert if there are no consequences of not doing so.

Provisional Liquidators

13. X.104 - This rule is inconsistent with rule X.63 above. We believe consideration should be given to redrafting this rule in similar terms to rule X.63
14. X.109 - Consideration should be given for the appointer (the petitioning creditor) to provide the nominated provisional liquidator with an indemnity in respect of the 'costs of providing the security required under the Law'. It is unclear however from the draft rules how the provisional liquidator is to be reimbursed for these costs, if the appointer is unsuccessful in his application for a winding up order.

Inquiry into companies dealings

15. X.205 - The rules provide that where an examination has been conducted under a court order, the written records are not available for inspection except by the parties involved or by an order of the court. However there are exceptions, when they may be inspected by a person who has applied for an order or any person who 'could have applied' for an order. It is unclear who decides who 'could have applied' and, even if they have applied, why there is an assumption that the court would have made such an order. We believe that it would be preferable that no-one (other than the parties to the examination), can inspect the documents without court permission.

DIFC Court assistance to Liquidator

16. We would recommend that there should be a streamlined procedure for a DIFC appointed liquidator (whether voluntary or court appointed) to be recognised by the Dubai Courts (local courts outside of DIFC). Clarity and assistance should be given with respect to the steps to be taken to (i) recover assets outside the jurisdiction of the DIFC Court and (ii) bring claims against third parties outside the jurisdiction of the DIFC Court.

Education and training

17. While this may be out of the scope of the consultation process, we believe that a critical element of a successful insolvency framework is the need for high quality education and training in insolvency rules and processes. This training should be provided to those involved in the DIFC Court system, DIFC Registrar of Companies, administration departments and the employees of insolvency practitioners registered within the DIFC.

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