سـوق أبـوظبـي العـالمـي
ABU DHABI GLOBAL MARKET

CONSULTATION PAPER NO 4 OF 2015

6 JANUARY 2015

INSOLVENCY REGULATIONS

WHY ARE WE ISSUING THIS PAPER?

1. The Board of Directors (the "**Board**") of Abu Dhabi Global Market ("**ADGM**") have issued this Paper to invite public comment on the Board's proposals to adopt new regulations for ADGM to be called the Insolvency Regulations (the "**Insolvency Regulations**"). A proposed draft of the Insolvency Regulations is set out at Annex A to this paper.

WHO SHOULD READ THIS PAPER?

2. The proposals in this Consultation Paper would be of interest to individuals, organisations and investors with an interest in establishing a presence in ADGM or otherwise doing business in ADGM, and their professional advisors.

HOW TO PROVIDE COMMENTS

3. All comments should be in writing and sent to the address or email specified below. If sending your comments by email, please use the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The Board reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. Comments supported by reasoning and evidence will be given more weight by the Board.

WHAT HAPPENS NEXT?

4. The deadline for providing comments on this proposal is 5 February 2015. Once we receive your comments, we will consider whether any modifications are required to this proposal. We will then proceed to enact the Insolvency Regulations. You should not act on these proposals until the relevant regulations are issued by the Board. We shall issue a notice on our website telling you when this happens.

COMMENTS TO BE ADDRESSED TO:

Consultation Paper No. 4 of 2015

Abu Dhabi Global Market
Sowwah Square
Al Maryah Island
PO Box 111999
Abu Dhabi, UAE
Email: consultation@adgm.com
Telephone: +971 02 4060888

BACKGROUND

5. ADGM was established pursuant to Abu Dhabi Law No. 4 of 2013 as a financial free zone in the Emirate of Abu Dhabi, with its own civil and commercial laws. ADGM will offer market participants a world-class legal system and regulatory regime.

APPROACH TO INSOLVENCY REGULATIONS

6. The decision has been taken by the Board, as with other legislation adopted by the Global Market, for the Insolvency Regulations to be based on the UK Insolvency Act 1986, the Insolvency Rules 1986 and other related UK insolvency legislation and regulations (together, the "**UK Legislation**").

7. A well-established, predictable and tested insolvency regime is crucial for establishing an environment that attracts and retains investors. We believe the UK Legislation, which has been adapted and updated in line with developments in business and restructuring practices and which has been the subject of much case law, fulfils these requirements and therefore provides a good basis for the Insolvency Regulations.

8. The UK Legislation currently consists of the Insolvency Act 1986, the Insolvency Rules 1986 and certain other supporting legislation (including the Companies Act 2006). While the Insolvency Act sets out the general framework of the insolvency regime, the Insolvency Rules and other legislation provide procedural guidance to companies, directors, insolvency practitioners and other concerned parties regarding the insolvency process.

9. We have examined other insolvency regimes, such as those in Australia, New Zealand, Singapore and the United States and considered whether certain aspects of those regimes might enhance the Insolvency Regulations.

10. In addition, we have also considered in detail the draft UK Insolvency Rules 2015 (the "**UK Insolvency Rules 2015**"), which have been the subject of a public consultation in the UK. The UK Insolvency Rules 2015 update the existing UK Insolvency Rules and certain other secondary legislation and consolidate these sources into one place. We have taken the opportunity to amalgamate the general insolvency framework of the UK Insolvency Act with the procedural guidance set out mainly in the UK Insolvency Rules (including, in certain cases, by adapting the draft UK Insolvency Rules 2015) to facilitate ease of reading and quick reference.

11. We have also followed the approach of the UK Insolvency Rules 2015 by consolidating certain sections that are common to different insolvency procedures, for example, those applicable to content and delivery of documents, creditors' meetings, creditors' committees, distributions and remuneration of insolvency practitioners. This has meant that those aspects of each insolvency proceeding have been shortened and streamlined.

12. The Insolvency Regulations do not provide a specific regime for the insolvency of regulated financial institutions and so the Insolvency Regulations will need to be updated at a future date to reflect the planned legislation dealing with financial services regulation.

ADMINISTRATION

13. Following UK Legislation, the Insolvency Regulations allow for an administrator to be appointed in respect of a Company by the Court, the holder of a qualifying charge, the Company itself or its directors.

14. Under the Insolvency Regulations, the purposes of administration are (in the following order of priority) to:

    (a) rescue a Company as a going concern,

    (b) achieve a better result for its creditors than a winding-up; or

    (c) realise property for its secured or preferential creditors.

15. An administrator will be required to have regard to the interests of the Company's creditors as a whole, so an administrator should not act in the interests of one particular creditor only, which we believe should encourage a fair treatment of all creditors and mirrors the approach in the UK Legislation and should encourage a rescue culture. The focus on a rescue culture is further supported by the inclusion of a process of creditor compromise as an exit mechanism specifically for administration, the Deed of Company Arrangement (see Question 4 below).

ISSUES FOR CONSIDERATION

Q1: THE BOARD WOULD LIKE YOUR VIEW ON WHETHER YOU AGREE WITH THE INCLUSION OF THE ADMINISTRATION PROCESS IN THE INSOLVENCY REGULATIONS, WHICH HAS AS ITS FIRST PRIORITY THE RESCUE OF A COMPANY AS A GOING CONCERN?

ADMINISTRATIVE RECEIVERSHIP

16. The Insolvency Regulations allow a creditor to appoint an administrative receiver in respect of all or substantially all of the assets of a Company; as a consequence an administrative receiver will generally be in a position to continue to operate the entire Company (as compared to a single asset receiver who will only have control of a defined part of the Company).

17. As a receiver will be appointed by a secured creditor with the aim of making sufficient recoveries for the appointor for the repayment of its secured debt, the receiver's primary duty will be to its appointor rather than to the creditors of the Company taken as a whole. There are therefore concerns that focus on a self-help procedure such as receivership (even administrative receivership) does not encourage a rescue culture which has been a significant focus of UK (and European) insolvency law reform in the last thirty years.

18. As a consequence the circumstances in which an administrative receiver can be appointed are strictly limited under the UK Legislation (so leaving administration as the required procedure) and other receivers have to vacate office if an administrator is appointed to a Company and requires them to do so.

19. The Insolvency Regulations follow the approach of the UK Legislation, limiting the appointment of an administrative receiver to capital markets arrangements and project financings.

ISSUES FOR CONSIDERATION

Q2: IN LIGHT OF THE STRONGLY CREDITOR-FOCUSED APPROACH AND SELF-HELP NATURE OF THAT PROCESS, DO YOU AGREE WITH THE INCLUSION OF ADMINISTRATIVE RECEIVERSHIP WITHIN THE INSOLVENCY REGULATIONS AND WITH RESTRICTING THE CIRCUMSTANCES IN WHICH CREDITORS MAY APPOINT AN ADMINISTRATIVE RECEIVER (I.E. TO CAPITAL MARKETS ARRANGEMENTS AND PROJECT FINANCINGS)?

FLOATING CHARGES

20. The UK Legislation focuses attention on the distinction between fixed and floating charges. Although, by adopting English common law in the Global Market, the concept of floating charges will be part of the law of the Global Market, we understand that such security is not a form generally recognised in Abu Dhabi or the United Arab Emirates. As a consequence, we have generally reduced the focus on the distinction between fixed and floating charges in the Insolvency Regulations.

21. Under the Insolvency Regulations, a person will be entitled to appoint an administrator if he holds a charge (or series of charges) or other security which relate to the 'whole or substantially the whole' of the Company's property. In a departure from the UK Legislation, the charges over the whole or substantially the whole of the Company's property do not necessarily need to be 'floating charges' and so may be constituted by some other form of security (e.g. fixed charges). We believe this protects creditors from losing their right to appoint an administrator in the event that floating charges may not be recognised.

22. As with the UK Legislation, the Insolvency Regulations provide that an administrative or other receiver dismissed upon an administration order taking effect may be paid out of the property that was within his control before he vacated office. Where that property is subject to a floating charge under the UK Legislation, the administrative or other receiver must pay preferential debts first in priority to the floating charge holder liabilities. We have removed this requirement in the Insolvency Regulations because of the aforementioned issues regarding the recognition and frequency of use of floating charges and because of the uncertainty as to whether assets subject to floating charges will be available to creditors. The priority of administration expenses to floating charge recoveries is also maintained, although this is likely to be of little effect if floating charges are not in practice used.

ISSUES FOR CONSIDERATION

Q3: DO YOU AGREE WITH THE APPROACH OF THE INSOLVENCY REGULATIONS OF REDUCING THE FOCUS ON FLOATING CHARGES COMPARED TO UK LEGISLATION?

CREDITOR COMPROMISE PROCEDURES

23. The UK Legislation includes the concept of a "company voluntary arrangement" which has not been included in the Insolvency Regulations. A company voluntary arrangement (a "**CVA**") is an insolvency process under which a Company and its unsecured creditors and members can achieve a compromise and/or restructuring of claims.

24. We did not consider that an additional separate insolvency process (additional to the compromise and arrangement that can be achieved through a scheme of arrangement under the Companies Regulations) was necessary. However, we have included a CVA-style arrangement, known as a Deed of Company Arrangement, within, and as an exit route from, the administration process.

25. Based on the process used under Australian companies legislation, upon execution of the Deed of Company Arrangement, the administration of the Company ends and the Company enters into a binding compromise arrangement with its creditors which will then be supervised by the Company's administrator.

26. The Deed of Company Arrangement, prepared by the Company's administrator is intended to follow a quick and efficient process, with the agreement being entered into within 15 business days of the creditors' meeting resolving to approve it.

27. While a Deed of Company Arrangement is in force, no person may take action to wind up a company or bring proceedings against the Company or its property, except with the leave of the Court.

28. A key advantage of this process from a Company's perspective is that the Deed of Company Arrangement will bind every creditor of the Company, which provides certainty for the path chosen by the administrator. However, secured creditors and owners or lessors of the Company's property will not be bound by such an arrangement unless they vote in favour of it. This provides some certainty to providers of secured financing that security arrangements cannot be overridden without their consent. The Court has the power to restrict the ability of a secured creditor and the owner or lessor of a Company's property to take action against a Company's property where to do so would have a material adverse effect on achieving the purpose of the Deed of Company Arrangement.

ISSUES FOR CONSIDERATION

Q4: WE WOULD LIKE YOUR VIEW ON WHETHER THE COMPROMISE PROCEDURES ENVISAGED BY THE INSOLVENCY REGULATIONS (NAMELY SCHEMES OF ARRANGEMENT AND THE DEED OF COMPANY ARRANGEMENT) PROVIDE COMPANIES AND CREDITORS WITH THE ABILITY TO ACHIEVE A SATISFACTORY OUTCOME FROM AN INSOLVENCY PROCESS?

NETTING AND FINANCIAL COLLATERAL ARRANGEMENTS

29. Part 8 of the Insolvency Regulations provides for two key protections for parties to financial transactions in the event of the insolvency of one counterparty.

30. First, the provisions allow for the continued enforceability of netting provisions, notwithstanding the insolvency of one party to a transaction. Such provisions are often found in the documentation governing financial market transactions (for example, ISDA documentation) and allow for payments due from each party to be set-off against one another, resulting in a single 'net' amount being due from one party to the other. The non-defaulting party will be able to claim in the insolvency of the defaulting party in respect of such 'net' amount. By allowing such provisions to continue in effect upon insolvency, this provides a greater level of certainty for market participants in respect of their financial markets transactions, which are key for liquidity and operational efficiency for businesses.

31. Second, the Insolvency Regulations allow for a person to be able to enforce against certain collateral arrangements entered into between parties (whether by way of transfer of collateral or security), notwithstanding that the collateral provider has entered insolvency proceedings. Subject to certain conditions, the collateral taker will be entitled to realise, liquidate or appropriate the collateral, in order to satisfy the obligations owed to him by the defaulting party, whereas ordinarily such action would be restricted by a moratorium or stay. In addition how appropriation is to operate is set out.

32. The concepts and terms found in Part 8 are based upon the ISDA Model Netting Act and are supplemented by provisions derived from the UK's Financial Collateral Regulations, which themselves implement a Directive of the European Union.

33. The ISDA Model Netting Act provides for situations where a counterparty has entered into contracts with a multi-branch bank under a multi-branch netting agreement. Multi-branch netting is intended to allow for a global netting of obligations between parties regardless of the particular branch or entity of the multi-branch bank that has entered into a particular transaction under the agreement. In the event of an insolvency of a particular branch, the provisions of the ISDA Model Netting Act are intended to override any local insolvency law protections that would otherwise restrict a counterparty's ability to recover against the assets of that particular branch and to provide a mechanism for determining the liability of a branch. We have not included the multi-branch netting provisions of the ISDA Model Netting Act in the Insolvency Regulations pending the preparation of the financial institution legislation of the Global Market and determination of whether such provisions are relevant.

ISSUES FOR CONSIDERATION

Q5: WE WOULD WELCOME VIEWS AS TO WHETHER THE NETTING REGULATIONS BASED ON THE ISDA MODEL NETTING ACT WOULD PROVIDE A SUFFICIENT BASIS FOR THE NETTING AND FINANCIAL COLLATERAL PROVISIONS IN CONJUNCTION WITH THESE INSOLVENCY REGULATIONS.

Q6: DO YOU AGREE WITH NOT INCLUDING THE MULTI-BRANCH NETTING PROVISIONS FROM THE ISDA MODEL NETTING ACT WITHIN THE INSOLVENCY REGULATIONS AT THIS STAGE?

ANNEX A: PROPOSED INSOLVENCY REGULATIONS