Kuwait Considers New Insolvency Legislation

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The proposed Law on Bankruptcy (the "Draft Law") is currently being reviewed by the Department of Legal Opinions & Legislation of the State of Kuwait.

In certain jurisdictions, the bankruptcy process is one in which a debtor may have the option to obtain economic relief from the burden of debt so that it may continue its business, such as the case under the US legal system. On the other hand, certain other jurisdictions emphasize the protection of creditors and emphasize liquidation rather than the restructuring of the debtor entity. The current bankruptcy regime in Kuwait falls under the latter category.

The current bankruptcy regime in Kuwait is governed by Articles 555 to 800 of the Kuwait Law of Commerce (No. 68 of 1980) (the "Current Law"). Under the Current Law, bankruptcy proceedings begin when the debtor, a creditor, the court or the public prosecutor initiate proceedings in the Kuwaiti courts with a petition. When a debtor is adjudged bankrupt, it can no longer manage or dispose of its assets

With a push from the business community as well as legislators, Kuwait is now considering bankruptcy and insolvency legislation that will give debt stricken and failing businesses the opportunity to rehabilitate themselves under court protection, rather than be liquidated and shutdown. Similar to Chapter 11 of the Bankruptcy Code in the US, the Draft Law will allow Kuwaiti businesses the opportunity to continue their business activities and pay their debts to creditors through a court approved reorganization plan.

THE NEW DRAFT LAW

The Draft Law applies to both legal persons (companies) and individuals. It does not however apply to the following:

- Insurance Companies;
- Banks governed by the Central Bank of Kuwait;
- Institutions, departments or governmental bodies; and
- Companies partially or fully owned by the State of Kuwait that do not engage in commercial activities.

Under the Draft Law, a debtor may utilize the processes available for restructuring if it stops meeting its debt obligations or it is not able to cover its liabilities. The procedures will begin in the same manner as the Old Law, however, under the Draft Law, as mentioned above, a debtor may restructure its liabilities and the Bankruptcy Court will supervise a plan for the restructuring of the debtor's liabilities.

One of the key characteristics of the Draft Law is that it also allows the Court to appoint a foreign expert to supervise the restructuring process. This provision of the Draft Law allows the Court to involve foreign experts in matters that are too complex for the Court.

It should be noted that in order for a debtor to benefit from the restructuring promoted by the Draft Law, the debtor should, among other things, act in good faith, cooperate with the receiver and disclose all information in regards to its assets, liabilities and financial transactions. It is important to note however, that the Court has the discretion to order the liquidation of the debtor's assets. Any distribution of the debtor's assets will be subject to the Court's approval under a distribution plan.

CONCLUSION

The Draft Law will go a long way in reforming the current bankruptcy and insolvency regime in Kuwait. If passed, Kuwait may become the first GCC country to have a bankruptcy and insolvency regime that facilitates the rehabilitation of debt stricken businesses rather than their forced liquidation. The protection afforded by the Draft Law will also enable entrepreneurs and local businessmen to grow their businesses, as they will be less fearful of taking on debt.

Critical to the success of the Draft Law will be the inclusion of judges and experts who can facilitate complex restructuring and insolvencies of businesses. Allowing for the inclusion of foreign experts under the Draft Law will help this objective. In order for the Draft Law to be successful, the Kuwait Government must make it easier to do business in Kuwait and lessen the bureaucratic hurdles that businesses face. There is a strong need in Kuwait for a legal and regulatory environment that allows for the efficient and speedy collateralization of assets, including movable objects such as machinery.