MENA Forum 2023: Insolvency, Business Restructuring & Investment Promotion

World Bank – INSOL International

19-20 June 2023, Cairo

Report

Nina Mocheva and Thomas Hewitt, The World Bank Group

Introduction

The First MENA Insolvency Forum: Insolvency, Business Restructuring & Investment Promotion was held in Cairo on 19-20 June 2023. More than 96 regional delegates and 38 international expert speakers participated, including judges, government officials and insolvency practitioners. The MENA Insolvency Forum initiative was the first of its kind in the region and brought together participants from across the region to share their insights and experiences. The event was a joint initiative between the World Bank, INSOL International and the Ministry of Justice of Egypt. The event was made possible with the kind support of SECO, UK Aid, and CLDP. The opening note featured a number of prominent speakers including Marina Wes (Director, MNA - Djibouti, Egypt, Yemen, World Bank), Cheick-Oumar Sylla (Director, North Africa & Horn of Africa, IFC), INSOL President Scott Atkins, Valérie Liechti from the Embassy of Switzerland, British Ambassador to Egypt Gareth Bayley and the Minister of Justice of Egypt Counselor Omar Marwan.

Day 1

Keynote Speaker

Following the opening introductions, a keynote speech was delivered by Dr. Ziad Bahaa-Eldin, the Managing Partner at Thebes Consultancy who previously held several public positions including the Deputy Prime Minister for Economic Development and Minister of International Cooperation. The purpose of his speech was to provide an outlook for the MENA region and an overview of recent economic developments.

GDP is expected to broadly decline across the MENA region in 2023. The situation is expected to improve in 2024 although some countries will continue to face declines. There has been a significant decline in the value of currencies of several MENA countries. Non-GCC countries such as Egypt and Tunisia have also seen their central bank foreign exchange reserves decline. Annual inflation has varied significantly within the MENA region.

Dr. Bahaa-Eldin discussed the benefits to the MENA region of insolvency reform. He highlighted the opportunity to create a business climate which would encourage investment. The stigma associated with insolvency was also discussed. In the MENA region, insolvency is linked closely with fraud and there is often a presumption of guilt. However, this has a chilling effect on investment and can dissuade entrepreneurs from starting and growing businesses in the region. It is important to change the mindset around insolvency and view it as an opportunity to start another business having learned from previous mistakes. This will allow for increased economic growth in the region.

Peer to Peer Discussion

The purpose of this session was to facilitate an exchange between peers regarding developments in insolvency law reform as well as ongoing challenges in the MENA region.

The panel began with a discussion of recent insolvency law reforms across the MENA region. In Egypt, the law was amended in 2018 and again in 2021. The reforms allow for either restructuring or preventive composition procedures. The restructuring procedure is only binding on the parties who agree to a plan. The preventive composition procedure allows for creditors to be divided into classes for approval with a majority of classes required to vote in favor of the composition.

Morocco has also recently reformed their insolvency laws. Their approach allows for a conciliation procedure, safeguard procedure and judicial rehabilitation procedure. The conciliation procedure allows for the debtor and creditors to reach an agreement outside of court. The safeguard procedure is designed to allow distressed enterprises to create a plan to address their financial challenges. This can include rescheduling or writing off debt. The judicial rehabilitation procedure involves a trustee reporting on the debtor's situation and then preparing a rehabilitation plan for how to ensure the viability of the business moving forward.

Bahrain reformed their insolvency laws in 2018 with the goal of encouraging corporate reorganizations. They utilize a debtor-in-possession approach which allows management to continue operations and a bankruptcy trustee to be appointed to oversee the process. A reorganization plan must be prepared by the trustee and approved by every class of creditor. If a creditor's rights are not impacted by the plan they cannot vote.

Jordan reformed their insolvency laws in 2018. The procedures available are a pre-packaged reorganization procedure and an ordinary reorganization procedure. The pre-packaged procedure is intended to allow for an expedited or out of court resolution. The ordinary reorganization procedure allows for a reorganization of the operations or debts of the debtor. The aim under both plans is to allow the debtor to remain in operation and avoid liquidation.

Saudi Arabia reformed their bankruptcy law in 2018. The main proceedings are the protective settlement procedure and the financial reorganization procedure. A protective settlement procedure can be initiated by a debtor if they believe the business is viable. They submit their request along with their settlement proposal for voting. A financial reorganization procedure can be used when the debtor believes the business is viable. A restructuring proposal must be prepared and approved. The court appoints an officeholder to assist with the reorganization process and supervise the management of the business. The debtor and officeholder work together to prepare the restructuring proposal.

The panelists then shared their thoughts on current and future trends and challenges in the region relating to insolvency law. This included monitoring the involvement of lawyers in various parts

of the insolvency process to ensure there is not a conflict of interest. Panelists discussed the importance of using technology to provide access to information about the insolvency reforms and their results. Access to e-insolvency such as digital filing is also beneficial but can be difficult to achieve in practice.

When discussing how education and training can be used to bring these reforms to fruition, the example of Jordan was highlighted. The government has placed an emphasis on training law students about these reforms to ensure that the next generation of legal practitioners have the skills necessary to further implement the reforms.

The panel also highlighted the difference between real fraud and when parties have good intentions but are unsuccessful. While fraud should be prosecuted and discouraged, there is a societal benefit to allowing entrepreneurs to attempt something even if they are unsuccessful.

Panel 1: Courts Specialization in Bankruptcy Issues

The first panel provided participants with an opportunity to explore the importance of courts specialization in handling bankruptcy issues and how it can improve the efficiency of the insolvency process.

The panel began with a brief overview of the terminology used when discussing "bankruptcy issues". This included an overview of bankruptcy in the context of corporate insolvency where a company is liquidated, and the assets are sold and the proceeds are distributed. This was contrasted with corporate restructuring and pre-insolvency measures which occur when a company is at risk of insolvency but an attempt is made to address the challenges and improve the situation.

The discussion proceeded to how these challenges are addressed in different jurisdictions. Panelists discussed the different approaches to designing regimes including whether they are debtor-led or creditor-led. One challenge is that if they are debtor-led, other guardrails are required to allow the debtor to remain in place, while protecting other parties. Singapore uses a moratorium and prefers a debtor-led regime subject to conditions set by the court as appropriate. The purpose is to maximize economic value. The UK prefers an independent officer being in control. They have a scheme of arrangement which allows a company to enter a compromise which is negotiated and then approved by the court.

The panelists then discussed what is different about insolvency proceedings compared to other proceedings. Insolvency proceedings are at the crux of courts and economic activity. Parties need to be able to reallocate assets in a way that is beneficial to the overall economy. This recycles assets back into the overall economy in a more productive manner. It is beneficial to allow entrepreneurs to be able to start again and encouraging entrepreneurship helps grow the global economy. In an Egyptian context, the main goal of the reforms was to save businesses wherever possible and to encourage co-operation between creditors and debtors to achieve better outcomes. Speed and predictability are critical to achieving this goal.

Panelists then discussed how these needs are met in their jurisdiction. In the UK, judges sit on commercial courts and insolvency matters come before the judges specialized in that area. Bahrain has established specialized courts where the insolvency court is not a commercial court, but judges have a specialization within insolvency and bankruptcy. Singapore has a list of insolvency judges and when a case arises, the co-leads are notified and then decide the assignment of the case. In Egypt, commercial court judges have an understanding of economic and investment matters which enables them to be more effective.

Parties discussed the differences between a commercial court system and a pure insolvency system. One benefit of the commercial court is it provides a broader background and additional context to judges. The contrast is that a pure insolvency system allows for judges to become highly specialized and knowledgeable. They can also develop stronger relationships with the lawyers and practitioners and the process is more predictable.

In terms of improvements, continuous training of judges is important to allow for continued knowledge and growth. This can be done through either formal training procedures or informal training procedures such as meeting with the Central Bank to discuss new financial instruments. Judicial training institutes allow for more formalized training. Providing a manual to judges allows them to navigate complicated procedures and standardize their approach. Uploading bankruptcy proceeding results to a website enables parties to review the material and helps allow for consistency across courts.

Panel 2: Early Restructuring of Viable Firms

This panel examined the cutting-edge restructuring strategies that are being employed worldwide as well as the use of modern technologies including Early Warning Tools and pre-insolvency regimes. The panel began with a discussion of the Demise Curve which shows that most options exist early-on in this process when profitability is the primary issue. Options are significantly reduced towards the later stages when balance sheet matters become more pertinent. Insolvency is the formal and final stage where the company runs out of cash.

The panel discussed the use of early warning systems in Europe which has a significant amount of public information which is widely accessible. There are many different approaches, but the challenge is that each jurisdiction has their own philosophy with different goals and desired outcomes. The UK does not have a robust early warning system. In Saudi Arabia, one can obtain a report showing all debts and inquiries by lenders. There is no such central source in the UK. Most early warning signals are symptoms of problems, but often come too late. A beneficial system would utilize effective technology, strong credit skills and involve a human element augmented by technology.

The French system is unique as it allows for entrepreneurs to be elected to serve as judges. As a result, they bring their unique experiences and corporate knowledge. Their goal is to ensure that whenever possible, the company and employment are protected. As part of this process, confidentiality is critical and they have found success using video calls to preserve anonymity. Spain has passed a law attempting to adopt the EU Directive around EWTs but is still struggling

with how to implement the law. Since Egypt's 2018 reforms, the system has improved. Insolvency is the last resort in Egypt so there is a focus on taking other measures to avoid insolvency.

In Spain, the approach to pre-insolvency utilizes a restructuring plan and has evolved significantly with the most recent changes resulting from implementing the EU directive. Spain now uses creditor classes and there are typically 4-8 classes. If all classes do not agree, there is an option for cross-class cramdown. In Egypt, restructuring plans can face added difficulty due to the economic climate of the country. The use of KPIs allows parties to identify when liquidation would be the more optimal route. However, liquidation is often rare in Egypt due to the social impact and alternative solutions are sought wherever possible.

In the absence of a pre-insolvency regime, being proactive is the best approach. It is always beneficial to obtain an independent perspective from a financial advisor. This will create options and could mitigate worse outcomes. It can be valuable to provide additional financing to help parties in financial distress, but this often requires significant concessions. There are organizations that provide volunteers, organizing tools and materials to assist entrepreneurs facing difficulty and looking for advice and mentorship. Some companies refuse to shut down even when it would be better to liquidate and then have a better chance to start again. Zombies are companies that remain active without adding any value to economy. It is more economically beneficial to reallocate capital to another more productive economic purpose.

Day 2

The second day began with brief opening remarks and a summary of the discussions during the previous day.

Panel 1: Capacity Building for Judges and Judicial e-Learning Tools

This session explored the importance of capacity building for judges and how judicial e-learning tools can be used to improve their knowledge and skills in handling insolvency cases.

The first topic covered was the impact of reforms on the ability of judges to deal with business insolvency cases philosophically. The example was provided of Jordan which significantly reformed its laws in 2018 to eliminate preventive composition and allow for reorganization. The new system required judges to view the case differently and interpret laws with the added task of making economic decisions. This requires judges to possess a different mindset and a more holistic view of the process. Another example was Morocco, where there was a recent overhaul of the relevant section of the Commercial Code aided by CLDP. CLDP helped develop judicial guidelines and held sessions to allow judges and officials from the public prosecution and trustees/administrators to come together to discuss the application of these reforms.

The next topic covered was initial judicial training. The example of the United States was provided where some judges have limited experience in bankruptcy issues. They are sent to initial training in order to develop the underlying knowledge needed to succeed in their role. These judges are

also able to attend annual seminars and training courses to further expand their knowledge. Often, private sector organizations such as INSOL can help supplement judicial training. This is particularly relevant in the United States where a few courts handle most major cases meaning the required skillset differs by jurisdiction. In Jordan, the judicial institute graduates several judges to be assigned to courts. They are provided continuous training in 3 phases. First, they develop introductory theoretical knowledge before proceeding to medium and advanced levels.

When designing judicial capacity building exercises, it is important to consider who is responsible for training the judges. One approach is to have experienced judges train less experienced judges within the same court where there is institutional knowledge. Another approach was adopted in Bahrain, where a program was created allowing Bahraini judges to pose questions about their challenges to American judges. Another example of a judicial training tool is the e-learning training being developed between the World Bank and INSOL International which uses practical cases and can be delivered virtually.

It is important to consider the implications of new technology on the instruction of judges moving forward. The increased use of technology to facilitate instruction and communication has been prioritized recently. However, some believe that remote learning and e-learning cannot replace the benefits of face-to-face interaction. Being together in-person allows people to learn and develop personal relationships. Putting together smaller in-person groups remains the optimal way to train judges. This is particularly true when using case studies. Furthermore, the training should only consist of judges and trainers as this allows for full honesty and engagement. E-learning can also be improved if is more interactive as opposed to a video. Projects need to be sustainable and designed with maintaining them in mind. An example is the Egyptian mediation project where those who were initially trained are now training others.

Panel 2: Use of ADR in Insolvency

This session focused on the use of Alternative Dispute Resolution (ADR) in insolvency cases and how it can help resolve disputes quickly and efficiently.

The first topic discussed was that court processes and alternative dispute resolution processes are complementary, particularly in economic and business restructuring cases. Courts and ADR aren't "either-or", but "both-and" concepts. This was discussed in the context of the example of pre-insolvency mediation in Egypt's Economic Courts. The 2018 amendment of the Bankruptcy law was meant to identify mediation as an efficient tool for restructuring businesses facing financial difficulties. Settling disputes through compromise is critical. The main tools in this process are confidentiality and trust building. Applying mediation procedures helps build confidence between the debtor, creditor and the court.

The discussion then progressed to the issue of out-of-court workouts also benefiting from engagement with mediation and other ADR tools. A sizeable amount of emerging market restructuring take place out of court. Mediators can play a key role in assisting with the negotiations and helping to develop compromises and facilitate discussions that allow all parties

to benefit. Mediators can also address inter-creditor disputes. They can be agents of reality in situations where parties have unrealistic expectations. Effective facilitating can be seen as giving people permission to compromise as dignity in the process is important. In addition, the mediator can help separate out major detail points from less relevant points and help parties focus on the bigger picture.

The next topic addressed how some jurisdictions have developed particularly innovative ways to engage courts in promoting conciliation and prevention of insolvency, including in confidential and pre-insolvency procedures. The example of the French Commercial Courts was used to highlight this concept. Stakeholders are required to attempt to conciliate in France. Parties who assist with helping make the company solvent have super-priority as they have contributed to the process. The goal is for there to be an eventual consensus and for parties to compromise and work together. Selling the company as part of the proceedings is a real possibility. There are examples of large businesses that were saved through conciliation including Pierre & Vacances Central Park. Mediation and arbitration in France is reserved for litigation.

The final segment of the panel discussed that successful implementation of ADR in business rescue is most likely when courts learn from the best practices and tools adopted outside their jurisdictions and adapt them to the particular needs and culture of their own courts and business environments. Highlighting the success of implementing reforms in other jurisdictions is critical. While some countries have modified their laws, the practical implementation has faced challenges. Parties must build the appropriate infrastructure to actually deliver reforms. Capacity building and training of mediators is critical to the success of introducing mediation in insolvency proceedings. Law reform often takes a top-down approach, but if something isn't working for the parties implementing the law in practice, there may be difficulties gaining momentum. An example of this occurred in Vietnam where there were challenges with implementing the law in practice. When this occurs, countries often elect to further reform their laws.

Panel 3: No assets insolvencies and insolvency of Micro and Small Enterprises

The panel explored alternative procedures and regulatory frameworks for managing insolvency cases with no available assets as well as the insolvency of Micro and Small Enterprises (MSEs).

The panel began by discussing insolvency of MSEs. In the United States, Chapter 11 is very onerous and too complicated for many small businesses. As a result, Subchapter V of Chapter 11 was brought into effect. The impact is to modify the process to lighten the administrative burden in order to streamline the procedure. In practice, Subchapter V has successfully lightened the burden for smaller creditors.

Given the importance of MSEs to the Egyptian economy, the reforms have aimed to move beyond the previous characterization of smaller debtors as criminals. While Egypt has historically struggled to define an SME or MSE, they passed a law in 2020 which introduced the threshold of 1 million Egyptian pounds. The government is continuing to work to destigmatize the process and reverse the impression that debtors consistently commit fraud.

The Jordanian reforms do not contain any specific provisions for MSEs. The new law has canceled the provisions of bankruptcy and preventive composition and introduced in its place an insolvency system applicable to any economic project. This is a flexible legal system that is based on helping troubled parties to continue to carry out their business and to develop solutions for how to move forward. There can be major challenges as MSEs usually do not have the financial ability to go through insolvency procedures.

In 2021, the Netherlands introduced the Dutch Scheme. This allows for restructuring all or some of the creditors' debts. The Dutch legislature focused on making the tool available for MSEs. There is little court involvement including no entry hearing. Parties can ask for interim measures, but they are not necessary. There is only a sanction hearing at the end of the process. In practice, the scheme has been used more by MSEs than large corporations which is contrary to expectations.

The panel then proceeded to discuss no asset cases. In Jordan, the Ministry of Industry, Trade and Supply administers a fund to cover the necessary expenses related to the insolvency procedures in no asset cases. In the Netherlands, trustees are renumerated on an hourly basis which creates challenges if there are no assets from which to pay them. One solution is to only appoint law firms for large insolvencies if they also accept smaller cases. There is a risk that if there are no funds to investigate fraud, then it creates an incentive to commit fraud as individuals are aware there are insufficient funds to investigate them. It is also important to note that it is extremely rare for there to be no assets. There is almost always something of economic value which can be either tangible or intangible. Insolvency judges should be aware of all kinds of assets.

Panel 4: Tracing and Recovery of Assets in the Context of Insolvency and Cross-Border Implications

This session covered asset tracing and recovery in insolvency. The panel also provided updates on cross-border insolvency case law in the MENA region and globally.

The panel began by discussing the different routes available to recover assets. If the goal is to punish the party, then the better option is the criminal recovery path. However, the civil recovery path allows for efficient commercial recovery. It is typically faster for claims to be recognized through civil. However, tools for criminal are typically stronger.

In Egypt, anti-money laundering and anti-terrorism work can include recovery of assets. Specified authorities are authorized to gather intelligence and data relating to assets and then that information is reviewed to determine which evidence can be used. Once true ownership of assets is proved, assets can be recovered using legislation, bilateral and international agreements.

The panel discussed the concept of litigation finance and how it can assist in asset recovery and insolvency scenarios. A third-party finances the tracing and recovery of assets. This is mainly focused on large businesses have chosen not to repay their obligations. This includes situations where debtors may try to avoid obligations by moving money abroad. A similar approach can be taken to funding the recovery of non-performing loans where assets are recovered using insolvency procedures.

There can be several practical problems when attempting to recover assets including putting assets in the names of other people and moving them to several locations abroad. Some banks avoid pursuing assets due to a fear of reputational loss. Criminal authorities often allow third parties to address the civil recovery of overseas assets which typically involves strategically using insolvency procedures. This requires a creative approach to recovering the assets including a detailed knowledge of the various international laws and agreements.

The Egyptian experience has been that co-operation is essential for cross-border asset recovery. The Egyptian government relies on a number of tools such as international conventions and bilateral and multilateral agreements. Cryptocurrencies such as Bitcoin has posed a unique challenge for recovery to the government.

Open Forum Discussion

The purpose of this session was to allow participants to come together to discuss various topics of shared interest.

The first topic addressed was developing a uniform process for effectively gathering and using data to conduct meaningful analysis. The audience discussed the lack of a uniform process for data collection and the opportunity for data sharing across agencies and countries. There is a need to protect the integrity of the data sets and prevent bias. AI can be used to assist with this process. The possibility was raised of a future panel on zombie companies which appear to be registered but are bankrupt and have not traded for years.

The second topic addressed was discussing the role of insolvency administrators in the insolvency process. The audience noted that insolvency administrators have different titles and roles depending on the country. In most countries, trustees are typically lawyers and/or accountants. Whether the person supervising and/or assisting is a lawyer, accountant or other role should vary depending on the needs of a situation. Data collection might be useful to determine the role of trustees in various jurisdictions.

The third topic addressed was techniques for addressing negative stigma around insolvency and gaining the confidence of investors. The audience discussed the importance of educating parties about the economic benefits of efficient and effective insolvency regimes. Providing examples of successful outcomes in other jurisdictions is an effective way to help address this stigma.

It was noted that there is significant interest in continuing to host the Forum on an annual basis with the location rotating.