

## Purchasing an Insolvent Business

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## Overview

This Practice Note presents the steps and conditions required in order to purchase a business (or its assets) once it has been declared insolvent.

Once the liquidation process has commenced, the trustee in bankruptcy will be responsible for receiving all offers and thereafter notifying the court and other stakeholders. The trustee in bankruptcy will (subject to the oversight of the court administering the insolvency proceedings) be responsible for evaluating and (if deemed suitable) agreeing to any purchase offers.

## Definitions

- *Trustee*: An individual or a legal entity appointed to oversee and manage the liquidation process under the supervision of the court administering the liquidation.
- *Restructuring scheme*: A proposal submitted after the commencement of formal insolvency proceedings but prior to the issuance of a declaration of bankruptcy. Such a proposal contemplates ways in which the insolvent business can be restructured and revived (to the extent possible).

## Practical Guidance

### Liquidation

Pursuant to Federal Decree-Law No. 9/2016 on Bankruptcy before declaring a company insolvent, the trustee in bankruptcy may propose a restructuring scheme, which can (subject to the approval of the supervising court and the relevant creditors of the company) involve a proposition to sell some or all the assets of the company's business to a purchaser (see Practice Note: Company Voluntary Arrangements).

Once an insolvent company is declared bankrupt, the court's appointed trustee in bankruptcy is usually required to sell the company's assets. Such sale can take place by way of public auction, or in some other manner permitted by the court, in each case subject to and in accordance with conditions (if any) stipulated by the supervising court in the declaration of bankruptcy (see Practice Note: Compulsory Liquidation and Bankruptcy).

#### *Offer to purchase*

Once a declaration of bankruptcy has been issued, the trustee in bankruptcy is required to provide monthly reports to the court. If the trustee receives an offer to purchase all or some of the debtor's business, the trustee must immediately notify the supervising court and all stakeholders (including creditors, and any individuals appointed by the court in the context of the insolvency proceedings). The court will consider any objections from interested parties on the terms of the proposed sale. If the objections are denied, or if no objections are made, then the court will approve the sale.

The following persons cannot make an offer to buy an insolvent company's assets (unless the court consents):

- the shareholders of the insolvent company;
- the spouse or any relative up to the fourth degree of a shareholder of the insolvent company;
- any person who was a shareholder, employee, accountant or agent of the company in the last two years from the date of the court order for commencement of liquidation; and
- the court appointed inspector.

#### *Assets value*

The assets of the insolvent debtor should be disposed of at fair value. While Federal Decree-Law No. 9/2016 does not prescribe a method of determining "fair value", it does state that the value at which the assets of the debtor are sold should be the best value obtainable given the then current market conditions. The court may order any or all of the following persons to pay for the company's debts if it is proved that they were involved in disposing of the company's assets at an inadequate value:

- the company;
- the board of directors (or board of managers) of the company;
- the manager; or
- the trustee in bankruptcy.

## Access the assets of an insolvent business - Types of assets for sale

No party will have "access" to the assets of the insolvent company until those assets are transferred to the party whose offer is accepted.

Generally, movable property can transfer freely, although ownership registers (if applicable) must be amended. This is relevant primarily for motor vehicles, ships and aircrafts. Ownership to real property must be registered in the relevant land register.

Contractual arrangements cannot usually be assigned, but instead will require novation.

It cannot be assumed that contracts with third parties will be transferred automatically. Indeed, some cannot be transferred at all, such as powers of attorney. All property will be transferred subject to existing security interests unless those security interests are discharged.

## Impact on employees

The transfer of employees can be affected as long as the employees consent to working for the new owner(s). However, the transfer of employees is not an automatic part of an asset sale. There is no provision of law that would prevent the new employer from “cherry picking” select employees.

A transfer of employees will mean that the insolvent company's sponsorship of the relevant employees will end and that the new owner's sponsorship of the employees will begin.

The accrued entitlements of the employees must be addressed, or they will (usually) not agree to the transfer:

- either the bankrupt company must pay their dues (bearing in mind that the employees have a very high-ranking charge over the assets of their employer in respect of their employment entitlements); or
- the new owner will have to agree to assume those accrued obligations.

If the workforce is large, these assumed obligations could be significant, and this factor should be accounted for when assessing the bid of a party willing to take on this obligation.

## Restrictions on using the insolvent company's name

The company must use the words “under liquidation” after its commercial name on all correspondence once it enters bankruptcy.

An offer to purchase the company's assets could include the company's name among those assets.

If a buyer obtains the right to use the company's name or part of it, then the use of that name in the buyer's trade license will require the approval of the licensing authorities in the UAE. Likewise, if a trademark is transferred, then the particulars of the owner in the UAE Trademark Register (maintained by the UAE Ministry of Economy) must be amended.

## General considerations in purchasing an insolvent business

A careful consideration is required while purchasing an insolvent business in the UAE. Some of the general considerations are outlined below:

- The purchaser should acquaint itself with UAE's insolvency laws and regulations so as to understand the procedures for purchasing an insolvent business, including any restrictions or requirements set forth by the local authorities.
- It is recommended to conduct due diligence on such a business and this can include checking its accounting records, assets including intellectual property and liabilities, any pending/ongoing contracts, any pending/ongoing legal issues or cases in courts, etc.
- If there exists any potential to restructure the business and the related market opportunities which could potentially be exploited for such purpose which could overall lead to the profitability of the business.
- In the event that the company has liabilities then it becomes all the more important to assess its overall impact on the business. For this purpose, it is better to be clear beforehand whether these liabilities will transfer to the new owner or remain with the insolvent entity.
- It is also better to understand the labour laws regarding the transfer of employees, their contracts, and any redundancy or termination obligations.
- Have a clear plan on how to tackle the issue which led to the insolvency of the company is the first place.
- It is also very important to consider the goodwill and reputation of brand value of the insolvent business.
- It is better to have an exit strategy in place in case the business continues to struggle despite your efforts.

## Related Content

### Legislation

- Federal Decree-Law No. 9/2016 on Bankruptcy

## Authors



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***Areas of expertise***

Intellectual Property; Corporate.

***Education***

B.Sc (Hons), LL.B, Delhi University.

***Memberships***

- Bar Council of Delhi.
- Authorised Legal Consultant by Legal Affairs Department, Government of Dubai, UAE.

***Biography***

Rajiv is one of the leading expert lawyers with over 28 years of experience specialising in the field of Intellectual Property laws, Commercial and Transactional laws including contracts. He qualified as a lawyer in 1994 after obtaining degree in law and since then has practiced as an Advocate/Legal Consultant.

His expertise lies at handling both contentious and non-contentious issues both in India and UAE. Rajiv advice clients on strategies involving a wide range of intellectual property matters and has been involved in managing corporate portfolios across various industries.

He has also dealt extensively on commercial and transactional matters involving drafting and vetting varied forms of commercial agreements/contracts, technical knowhow agreements, licensing issues including third party/vendor contracts, non-disclosure agreements, manufacturing of goods agreement, business development and service agreement, brand acquisition agreement, assignment deed/s, drafting and execution of Wills in UAE etc.

He has been an author/co-author of articles relating to intellectual property issues for some of the leading legal publications. He has been a speaker at webinars/round table/s on issues relating to intellectual property rights and non-muslim personal law in UAE.

His name appears in UK's whoswholegal.com (WWL) 2008 for UAE, as a ranked prosecution lawyer in Managing Intellectual Property (MIP) 2019, in the list of World's Leading Trademarks professionals by World Trademarks Review (WTR) for the years 2020, 2021, 2022 & 2023 (UAE) and in the list of IP experts compiled by AsiaIP for the years 2021 and 2022.

Rajiv is fluent in Hindi and English.