

THE
RESTRUCTURING
REVIEW

THIRTEENTH EDITION

Editor
Dominic McCahill

THE LAWREVIEWS

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REVIEW

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This article was first published in July 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-499-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ABNR COUNSELLORS AT LAW

AFRIDI & ANGELL

ALLEN & GLEDHILL LLP

ARENDT & MEDERNACH

BAKER MCKENZIE

BEAUCHAMPS

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TATARA & PARTNERS

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PREFACE

I am very pleased to present this thirteenth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2020 and to highlight some of the more significant legal and commercial developments and trends during that period.

In particular, I would like to thank Chris Mallon for his editorship of all 12 of the previous editions. Having retired from a long and distinguished career as a restructuring lawyer in private practice, Chris is now a Senior Advisor in the Financial Advisory Group at Lazard, based in London.

2020 began with many market observers expecting a year of overall modest growth for the global economy. Of course, there were political and economic clouds on the horizon, as there usually are, such as the ongoing trade hostilities between the United States and China and the uncertain outcome of the Brexit negotiations between the United Kingdom and the Member States of the EU as the United Kingdom finally withdrew from the EU on 31 January.

However, the world is now in the midst of the covid-19 pandemic. Much of the world is in lockdown or taking tentative steps to emerge from lockdown. While the human cost is paramount, the economic impact has been enormous. This has prompted a huge response from governments and central banks around the world in an effort to support businesses and workers given the unprecedented drop in supply and demand. In some industries, the drop has been precipitous and virtually total. The full extent of the damage is yet to be assessed and the length and trajectory of the road to recovery are uncertain.

One prominent reaction to the crisis has been the emergence of new laws, rules and practices in restructuring, perhaps reflecting the maxim that one should never let a good crisis go to waste. These measures – as can be seen in the following chapters – include not only ones specific to covid-19, but also include broader reform of insolvency and restructuring law. Notwithstanding increasing nationalism in certain parts, the world's economies remain highly connected and interdependent. International, as well as national, efforts will be required to lead towards a full recovery. I hope that *The Restructuring Review* will be a useful guide at a time of evolution for restructuring law and practice internationally.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Dominic McCahill

Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2020

UNITED ARAB EMIRATES

*Bashir Ahmed and Rahat Dar*¹

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The ongoing economic slowdown affecting the UAE economy over the last few years, and Dubai in particular, was made even worse by the recent covid-19 pandemic, in part due to the resulting pressure on global oil prices, which is still a major source of revenue for many countries in the Middle East region. The UAE government has introduced schemes to shore up liquidity shortfalls, such as a US\$50 billion scheme to provide funding to banks, so as to enable them to continue providing funding to businesses (many of which are in dire straits), while maintaining their liquidity adequacy requirements. However, banks continue to show reluctance in dealing with the construction and real estate sectors, and more recently the hospitality sector, which has experienced a steep decline in recent years. Against this backdrop, we have seen a shift from the previous trend for creditors (particularly banks) to agree to restructuring of debts in favour of legal action (notwithstanding the uncertainty associated with the largely untested Federal Law No. 9 of 2016 on Bankruptcy (the Bankruptcy Law)). In particular, we are seeing a significant uptake in overseas creditors seeking to initiate bankruptcy proceedings against borrowers or commercial debtors based in the UAE. It is anticipated that there will be a significant increase in legal action under the Bankruptcy Law in the coming years, as debtors and creditors continue to struggle in the global downturn.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Overview

The most widely applied insolvency regime in the UAE is under the Bankruptcy Law, which applies to any company governed by the provisions of Federal Law No. 8 of 2015 on Commercial Companies (as amended) (the Commercial Companies Law), businesses formed in the free zones (except those in the financial free zones of the Dubai International Financial Centre and the Abu Dhabi Global Market, which have their own bankruptcy rules), licensed civil companies, public sector companies (i.e., those wholly or partially owned by the federal government or an Emirate government) and individual traders. Civil companies were generally viewed as falling outside the previous insolvency regime, since they engaged in civil as opposed to commercial activities. In contrast, the public sector is now almost completely exempt from the new Bankruptcy Law, unless and until a public sector company undertakes the amendment of its founding statute or constitutive and governing

¹ Bashir Ahmed is a partner and Rahat Dar is a senior associate at Afridi & Angell.

documents so as to make it subject to the new Bankruptcy Law. The Commercial Companies Law also contains provisions for the dissolution of a company. The Bankruptcy Law also repeals certain provisions of the Penal Code of the UAE (contained in Federal Law No. 3 of 1987) on non-fraudulent bankruptcy.

ii The Bankruptcy Law

The Bankruptcy Law provides for three options for companies in financial distress, namely preventive composition, restructuring and bankruptcy.

Preventive composition

Under the Bankruptcy Law, a debtor can apply for preventive composition rather than having to proceed directly to bankruptcy proceedings. During the preventive composition scheme, the debtor will be under court protection from individual creditor claims. This option is only available to a debtor that has not been in default for more than 30 consecutive business days and is not insolvent. Once the scheme is in place, the debtor cannot dispose of any property, stocks or shares, make any borrowings or (if it is a company) change its ownership or corporate form.

To initiate preventive composition the debtor must make an application to the court that must include, among other things, a description of its economic and financial position, details of its movable and immovable properties, employees and creditors, and its cash flow and profit and loss projections for the 12 months following the date of its application.

The debtor must continue to perform its obligations under its contracts, provided that the court has not issued a judgment of stay of execution owing to its failure to perform its obligations under such contract. A trustee will be appointed to facilitate the preventive composition process, and this trustee will have the right to request the court to rescind any contract if that is in the best interests of the debtor and its creditors and provided that it does not substantially harm the other contracting party's interests.

The trustee is obliged to publish in two daily local newspapers: (1) a summary of the decision approving the preventive composition, with a request that all creditors file appropriate claims; (2) a list of the debts and statement of accounts accepted from each of those debts; (3) an invitation to creditors to discuss and vote on the draft preventive composition scheme; and (4) once approved by the court, the decision and summary of the scheme. Ultimately, the court will approve the final list of approved creditors, having reviewed any objections received following the publication of the debts. The trustee will submit the draft scheme to the court, which will then have five business days to make its decision to approve or reject it (taking account of any creditor objections).

Thereafter, the trustee is responsible for supervision of the scheme throughout the implementation period, including submission of quarterly reports to the court detailing progress and any failures by the debtor to implement the scheme. The trustee can apply to the court for amendments to be made to the scheme if it considers it necessary at any point during the implementation period.

The scheme must be implemented within three years of the date of court approval. This term can be extended for a further three-year period if a two-thirds majority of the unpaid creditors consent to such extension.

Following a request by the trustee, and pending discharge of the debtor's obligations under the scheme, the court will issue its decision confirming that the scheme has been fulfilled. Such a decision will be published in two daily local newspapers.

Conversion from preventive composition into bankruptcy proceedings

At the request of an interested party, or in exercise of its own discretion, the court may initiate the termination of the scheme and convert it into a bankruptcy proceeding if: (1) it is proved that the debtor was in payment default for more than 30 consecutive business days or was insolvent on the date of commencement of the preventive composition proceedings, or if this became clear to the court during the court of preventive composition proceedings; or (2) it becomes impossible to apply the scheme, and ending the same would result in payment default for more than 30 consecutive business days or result in the debtor's insolvency. (The Bankruptcy Law does not provide any guidance as to what constitutes 'impossible'.)

Ability to raise new finance

While undergoing the preventive composition or restructuring process, a debtor (or the trustee) has the option to apply to the court for authority to obtain new funding. Any 'new' creditor will have precedence over any ordinary outstanding debt owed by the debtor (but providing protections for existing creditors).

Application for initiation of bankruptcy proceedings

There is a minimum threshold of 100,000 dirhams before a creditor, or group of creditors, can initiate bankruptcy proceedings against the debtor, provided that such creditor has adequately notified the debtor of such debt and the debtor has still failed to repay it within 30 consecutive business days of notification. (The Bankruptcy Law does not address how disputed amounts will be treated by the court.)

The debtor must apply to the court to initiate proceedings if it cannot repay its debts as they fall due for more than 30 consecutive business days.

Company bankruptcy

The Bankruptcy Law has expanded the number of parties that may apply for the bankruptcy of a company. It is now possible for a debtor company, its creditors, the competent controlling body of the debtor company and the public prosecutor to apply to the courts for a bankruptcy order. Bankruptcy applications from the above parties will be subject to different requirements. For a creditor, or group of creditors, to make a bankruptcy application against a debtor, it must show that: (1) the debtor remains in default 30 consecutive business days after the creditor sent a written notice of the overdue debt to the debtor; and (2) the debt meets the minimum threshold of 100,000 dirhams. This 100,000 dirhams threshold may prove challenging for smaller trade creditors, who are unlikely to meet this threshold and may not be able to identify other creditors to join in taking action, in particular as the annual accounts of most UAE companies are not publicly available. The creditor's bankruptcy application must be accompanied by: (1) the aforementioned notice to the debtor; (2) information on the debt and any related guarantees; and (3) a payment or bank guarantee for 20,000 dirhams, to meet the expenses and costs of the initial procedures for deciding the application. This provides a much more debtor-friendly position than under the old bankruptcy regime. In the case of a debtor-led bankruptcy, the debtor may make a bankruptcy application to the court, which must include, among other things, a description of its economic and financial position, and details of its movable and immovable properties, employees and creditors, and its cash flow and profit and loss projections for the 12 months following the date of its application. As

with the creditor-led application, the debtor's bankruptcy application must be accompanied by a payment or bank guarantee for 20,000 dirhams to meet the expenses and costs of the initial procedures for deciding the application.

Bankruptcy of a trader

A trader may be declared bankrupt in the same ways as a company (see above).

A creditor will have one year from (1) the date of death of the debtor; (2) the striking off of the trader from the commercial register; or (3) the date of judgment of incapacity, to apply for bankruptcy proceedings against a debtor. A bankruptcy application can be made for any company, even when the company is in the process of liquidation.

Bankruptcy proceedings and declaration of bankruptcy

Within 10 business days of receiving of a bankruptcy application the court will appoint an expert (ideally from its approved list of experts) to help the court evaluate the position of the debtor. The expert will prepare a report for the court outlining the debtor's financial position and provide an opinion on the possibility for restructuring the debtor. The court will make a determination on the bankruptcy application within five business days of the later of the receipt of the application or the expert report.

Upon receipt of the bankruptcy application, the court may take such measures (either at its own initiative or at the request of an interested party) as are deemed necessary to maintain or manage the properties of the debtor while it makes its decision (including sealing the place of business of the debtor). While the court evaluates the bankruptcy application, the secured creditors can still enforce their security as and when it becomes enforceable. The court may grant permission within 10 business days of the application from the secured creditor to the court. The court will decide the degree of priority if there are many secured creditors for the same asset.

If, based on a review of the bankruptcy application and the expert's report, the court believes that the debtor may still be rescued, it shall reject the bankruptcy application and make an order for restructuring. While a relevant party may apply to the court for bankruptcy, the decision on whether to proceed with bankruptcy or restructuring is at the court's absolute discretion. A detailed review of the restructuring regime under the Bankruptcy Law is beyond the scope of this chapter.

However, if the court accepts the bankruptcy application the court may appoint one or more trustees to administer the bankruptcy. A trustee has various responsibilities, including publishing a summary of the court's decision to initiate bankruptcy proceedings in two local newspapers, notifying known creditors, reviewing the claims and supporting documentation from creditors, providing updates to the court on the bankruptcy, maintaining a record of creditors and debtors of the bankrupt company and submitting a list of creditors to the court – the court will approve the final list of approved creditors, having reviewed any objections received following the publication of the debts. Certain persons cannot act as trustees, for example, a creditor of the debtor, spouse or fourth-degree relative of the debtor or a convicted felon, fraudster or perjurer.

Once a bankruptcy judgement is delivered the trustee shall publish a notification of the judgement in two newspapers and ask all creditors to file a final claim within 10 days of publication. All late filings of debt will be disregarded, unless the court decides otherwise.

If the trustee fails to notify any creditor to attend a creditors' meeting or fails to make a publication in accordance with the Bankruptcy Law, the relevant creditor may lodge a

grievance with the court within 10 business days of the relevant creditor becoming aware of the creditors' meeting. If the court approves the grievance, it may order the stay of any decision based on the results of the creditors' meeting, provided that the remaining creditors shall not be harmed.

Administration of the bankrupt's estate

The trustee may sell all assets of the debtor at auction, under the supervision of the court. The trustee shall update the court monthly and distribute the proceeds from the sale of the debtor's assets to the creditors.

Any interested party may also submit a grievance with the court if the trustee: (1) has acted or has proposed to act unfairly, to the detriment of the interested party; (2) fails to perform its tasks with due diligence; or (3) abuses or retains any monies or properties of the debtor or breaches any other obligations to the debtor.

The Bankruptcy Law retains the two-year rule regarding voidable or fraudulent preferences. Consequently, all transactions made by the debtor during the two-year period preceding the initiation of bankruptcy proceedings can be reviewed by the trustee to determine whether these should be set aside as having been an 'unfair preference' and the Bankruptcy Law lists the types of transaction that the court will consider as representing unfair preference, including donations or gifts, payment of debts when such payments were not yet due or the creation of any new guarantee on the debtor's properties. The court will consider whether such transaction was detrimental to the creditors and if the transacting party knew (or ought to have known) when entering into the transaction that the debtor was in financial difficulty and, thereafter, make its judgment on whether it should be set aside.

Effects on debtors

As soon as a bankruptcy judgment is pronounced, the bankrupt is, with certain exceptions, prevented from administering and disposing of its assets. At the request and under the supervision of the trustee, the court may give the debtor six months (extendable by two years) to sell all or part of its business, if this serves the creditors or public interest.

When a bankruptcy judgment is pronounced, all monetary debts owed by the bankrupt become payable, whether ordinary or guaranteed by lien. The court can deduct legal interest (9 per cent) for the period from the date of the judgment until the maturity date of the debt for deferred debt where no interest is stipulated. The court can grant approval to the following categories of person to purchase the debtor's properties if that would satisfy the creditors' interests: (1) spouse, relative by marriage or up to fourth-degree relative; (2) any person who was a partner, employee, accountant or agent of the debtor (within two years prior to the date of judgment); or (3) any person who works or worked as the auditor following the initiation of bankruptcy proceedings.

Where a debtor owns any common properties, the trustee (or any of the co-owners) may request division of such property, even if there is an agreement between the co-owners that does not allow such division. Upon request by the trustee, the court can order the rescission of any contract that the debtor is a party to, provided such rescission is necessary to enable the debtor to transact his or her business or if it would fulfil the interests of all of the creditors and not significantly prejudice the other contracting party's interests.

Effects on creditors

Following a bankruptcy judgment, a group of creditors is established. The group of creditors consists of persons having valid claims on the bankrupt dating from before the bankruptcy judgment. The pronouncement of the bankruptcy judgment results in the suspension of individual proceedings and actions brought against the bankrupt by ordinary creditors or preferred creditors. When a bankruptcy judgment is pronounced, all monetary debts owed by the bankrupt become payable, whether ordinary or secured by a general or particular charge.

Effects on creditors with debts secured by a chattel mortgage or lien, or by a mortgage over real property

The names of creditors of the bankrupt who have debts secured by a chattel mortgage or lien, or by a mortgage over real property, are entered in the group of creditors with reference to the mortgage or lien, and such secured creditors enjoy priority of repayment from the proceeds of sale of the secured assets. Secured creditors shall be paid from the proceeds of the sale of the secured assets. If the sale proceeds of secured assets do not fully satisfy the relevant secured debt, then any outstanding amount of such debt shall be treated as ordinary debt. If the sale of the secured asset produces a surplus (after settlement of the relevant secured debt), such amount shall be for the account of the unsecured creditors.

Preferential payments

In the course of preventive composition or restructuring proceedings, preference is given to the following classes of debts:

- a* any judicial fees or charges, or fees and costs of any appointed trustee;
- b* fees, expenses or costs incurred owing to supplying the debtor with services or to continue performance of any contract, to the extent that such fees, expenses or costs are to the benefit of the business or properties of the debtor; and
- c* any non-guaranteed new finance (including the principal debt, interest and unpaid related expenses).

In the course of bankruptcy proceedings, preference is given to the following classes of debts:

- a* any judicial fees or charges (e.g., fees of trustees and experts and expenses paid for the benefit of the common interest of the creditors to maintain or liquidate the debtor's properties);
- b* wages and salaries due to workers and staff for the period of 30 days prior to the declaration of bankruptcy;
- c* debts of maintenance paid by the debtor under a judgment delivered by a competent court;
- d* any amounts payable to governmental bodies; and
- e* any fees, costs or expenses incurred:
 - after the date of decision of initiating procedures to procure commodities or services to the debtor, or to continue the performance of any other contract that fulfils the benefit of business or property of the debtor; or
 - to continue the course of the business of the debtor after the date of initiating procedures.

The creditors in each class of debts listed above are ranked equally, unless the debtor has insufficient funds to satisfy each creditor ranking equally. In this case, the rank of debts is equally reduced. Following the payment of the preferential debts above, the holders of debts secured by pledges or liens shall be ranked higher than the ordinary creditors.

Any person is entitled to restitution from the bankrupt's estate in respect of specific items that the person can prove he or she owned at the time of the bankruptcy judgment.

Verification and schedule of debts

The Bankruptcy Law sets out the procedure and timetable for the verification of debts of creditors by the trustee in bankruptcy and the establishment of a final schedule of uncontested debts by the judge supervising the bankrupt's estate.

In the case of companies, debentures issued in accordance with the Commercial Companies Law are not subject to the procedures for the verification of debts. Such debentures are to be accepted at their nominal value after deduction of any amounts paid by the company.

Closure of the bankrupt's estate

If the bankruptcy proceedings are halted because of insufficiency of assets prior to ratification of a judicial composition or establishment of a state of union the court may, at its own discretion or in accordance with a report from the judge supervising the bankrupt's estate, order that the bankrupt's estate be closed. In such instance, each creditor once again has the right to take steps and to initiate individual actions against the bankrupt.

iii The Commercial Companies Law

The Commercial Companies Law provides for the dissolution of a company in certain prescribed circumstances. This includes, for instance, where the losses to a limited liability company amount to half of its capital, whereupon the company's manager shall ask the general assembly to consider the issue of voluntary dissolution. Similarly, if the losses of a limited liability company reach three-quarters of the capital, the shareholders holding one quarter of the capital of such company may demand to dissolve the company.

The authority of the manager or managers and the board of directors shall terminate immediately on the dissolution of the company and all debts of the company become due and owing upon an application for the company's dissolution. If the company's assets are not sufficient to meet all of the debts, then the liquidator is required to make proportional payment of such debts, without prejudice to the rights of preferred creditors. Every debt arising from acts of liquidation must be paid out of the company's assets in priority over other debts.

Following settlement of all debts, the remaining assets of a limited liability company resulting from liquidation shall be divided among all the shareholders. Each shareholder, upon division, shall obtain an amount equal to his or her share in the capital, and the rest shall be divided among the shareholders pro rata of their shares in the profits. If a shareholder fails to appear to collect his or her share, the liquidator shall deposit such share in the treasury of the competent court. If the net funds of the company are not sufficient to pay the shares of the shareholders in full, the loss shall be distributed among them in accordance with the prescribed rate for the distribution of losses.

III RECENT LEGAL DEVELOPMENTS

Originally, a personal insolvency framework was suggested and drafted at the same time as the Bankruptcy Law was formulated, but the draft personal insolvency law was not promulgated in 2016. However, a personal insolvency law was subsequently adopted as Insolvency Law No. 9 of 2019 (the Personal Insolvency Law) and came into effect on 29 November 2019. Like the Bankruptcy Law, the Personal Insolvency Law is seen as introducing a debtor-friendly regime. For example, a creditor-led liquidation application may be made by a creditor or a group of creditors where the total amount of their debts is not less than 200,000 dirhams provided that the debtor has been formally notified to pay the debt and has failed to do so within 50 business days from the date of notification. The Personal Insolvency Law remains largely untested, and it remains to be seen if, and to what extent, this law will be applied in the coming years.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

There are limited means to gauge market trends with respect to restructuring procedures, as generally little information is published or released regarding businesses facing financial difficulties. However, as noted above, we have seen a significant increase in legal action under the Bankruptcy Law, particularly by overseas creditors. Although we are seeing an increase in cases, the insolvency regime set out in the Bankruptcy Law is largely untested, particularly in connection with preventive composition, as it is very difficult for a debtor to satisfy all the eligibility requirements for such action. There continues to be a significant cultural aversion to the concept of bankruptcy, and the formal insolvency regime is avoided for that reason as well (in addition to potential criminal penalties for managers or directors of bankrupt businesses). As such, there is little in the way of information regarding significant transactions or active industries.

V INTERNATIONAL

The UAE has not entered into any international treaties specifically covering insolvency or restructuring. The Bankruptcy Law does not envisage how judicial assistance would be provided in the UAE to proceedings commenced in another jurisdiction.

VI FUTURE DEVELOPMENTS

There are no anticipated future developments in the law applicable to the insolvency regime in the UAE, as the Bankruptcy Law and Personal Insolvency Law represent a long-awaited and comprehensive overhaul. In light of some inconsistency in the quality of recent court decisions under the Bankruptcy Law, there is a need for formal education and training on the application of the Bankruptcy Law at all levels of the insolvency framework, including the court judges, trustee(s) and experts. This would represent a significant development of the insolvency regime in the UAE.

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Bashir Ahmed joined Afridi & Angell in 1988 and became a partner in 1993. A multi-specialist practitioner, Mr Ahmed advises on banking, corporate and contentious matters. He has extensive experience in domestic and cross-border acquisitions and advises clients on general corporate matters. He advises international and domestic banks on a wide range of matters including loan and credit facilities, syndications and regulatory matters, and has also advised on a number of mining, refinery and infrastructure projects.

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ISBN 978-1-83862-499-6