THE RESTRUCTURING REVIEW

SIXTEENTH EDITION

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THE LAWREVIEWS

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PREFACE

I am very pleased to present this 16th edition of *The Restructuring Review*. This volume aims to help general counsel, private practice, governmental and academic lawyers, as well as other professionals, investors and market participants to understand the prevailing conditions in the global restructuring market in 2022 and the first half of 2023. This edition seeks to highlight some of the most significant legal and commercial developments and trends during this period.

Two common themes during this period pervade the contributions to this edition by leading practitioners from jurisdictions around the globe. First, a wide-spread economic slowdown, which started at the beginning of 2022 and has continued well into 2023 and appears likely to persist for some time. In the past year, most jurisdictions saw tightening in credit markets and increases in interest rates aimed at combating inflation that has taken hold while the covid-19 pandemic state-support measures were phased out. Those state support measures and a sustained period of access to cheap capital mitigated much of the damage wrought by the covid-19 pandemic on businesses and had resulted in positive economic growth and limited restructuring and insolvency activity throughout the pandemic and immediately after. Additionally, a number of geopolitical and other factors have materially slowed growth, with most jurisdictions seeing an increase in insolvency filings and restructuring activity during 2022. Second, this period has witnessed the continued development of restructuring tools to ameliorate and resolve insolvency and financial distress, with numerous jurisdictions introducing additional legislative reforms to facilitate restructurings or 'road-testing' and developing tools introduced in recent years.

Economies around the globe continue to face challenges to post-pandemic economic recovery including disruptions in global supply chains and historic levels of inflation and rising interest rates. An increased focus on environmental, social and governance concerns and metrics is also leading to changes in the corporate and investment landscape – changes to which businesses must adapt while juggling their operational demands. In addition, the war in Ukraine, which commenced with the Russian invasion in February 2022 and continues at the time of writing, has ushered in soaring energy costs, exacerbated supply chain issues, and been met with a punishing and ever-changing regime of economic sanctions from the European Union, United Kingdom and United States. Many companies have struggled to manage rising costs and interest rates, resulting in an increasing number of companies commencing insolvency proceedings, with some of the hardest hit industries in many jurisdictions being real estate, construction and hospitality. Although global inflation levels show signs of beginning to ease in the first half of 2023 as the impact of high interest rates begins to show, heightened costs of goods, services and energy persist, as does the war in Ukraine, and companies continue to face uncertainty on many fronts.

As a slight silver lining to the grey cloud of the current economic climate around the world, the increase in insolvency and restructuring activity allows further development and testing of the many jurisdictions that have in recent years put in place new or updated laws, rules and practices relating to business restructuring and insolvency. As you will see in the coming chapters, many of these new laws are being used on a regular basis, helping businesses to restructure in an exceptionally challenging time. This continued development means that corporate debtors and their advisers will have increasingly robust toolkits to deal with financial distress and insolvency arising in the turbulent post-pandemic environment.

I hope that this edition of *The Restructuring Review* will continue to serve as a useful guide at a crucial moment in the evolution of restructuring and insolvency 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 it would not have been possible.

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London
July 2023

Chapter 20

UNITED ARAB EMIRATES

Rahat Dar[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Although the continued increase in oil prices and the UAE government's various schemes to help businesses have, to some extent, helped the UAE economy rebound from the damage inflicted by the covid-19 pandemic, many businesses face a very real prospect of insolvency while they continue to face significant challenges in cash flow, revenue and bad debts. Indeed, some foreign companies with branches or subsidiaries in the UAE are actively reviewing the need to maintain this presence in the UAE, particularly where such branches or subsidiaries are not directly engaged in income-generating activities or require considerable administrative and financial resources. The introduction of corporation tax in the UAE may also result in some UAE subsidiaries being placed into bankruptcy, as their existence no longer serves a broader tax efficiency framework for overseas corporations. Creditors (particularly overseas creditors) are continuing to favour bankruptcy proceedings (notwithstanding the uncertainty associated with the largely untested Federal Law No. 9 of 2016 on Bankruptcy, as amended (the Bankruptcy Law)), particularly in emirates where creditors are effectively discouraged from pursuing alternative civil actions (e.g., debt recovery rather than bankruptcy) as a result of the high court fees for such actions. For example, in the emirate of Ras Al Khaimah, civil court fees are equal to 10 per cent of the value of the dispute – depending on the value of the debt – so initiating bankruptcy proceedings could be a significantly cheaper alternative. 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 face of the negative outlook for the global economy.

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. 32 of 2021 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 and individual traders. Civil companies were generally viewed as falling outside the previous insolvency regime because they engaged in civil as opposed to

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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 documents 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 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 available only 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 a stay of execution owing to its failure to perform its obligations under such a 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 parties' 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 into account 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 an 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 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 protection 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 a creditor has adequately notified the debtor of such a 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 for 30 consecutive business days after the creditor sends written notice of the overdue debt to the debtor and (2) the debt meets the minimum threshold of 100,000 dirhams. The 100,000 dirhams threshold might prove challenging for smaller trade creditors, who are unlikely to meet this threshold and might 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 that 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 cash flow and profit and loss projections for the 12 months following the date of its application. As with a 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 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 might still be rescued, it shall reject the bankruptcy application and make an order for restructuring. Although 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 (e.g., a creditor of the debtor, spouse or fourth-degree relative of the debtor, or a convicted felon, fraudster or perjurer).

Once a bankruptcy judgment is delivered, the trustee shall publish a notification of the judgment 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 their 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'. 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 a 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 when 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.

If 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 a division. Upon request by the trustee, the court can order the rescission

of any contract that the debtor is a party to, provided that such a rescission is necessary to enable the debtor to transact its 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 an 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 owed 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 they 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 an instance, each creditor once again has the right to take steps 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, when 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 a 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 the 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 their 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 their share, the liquidator shall deposit such a 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

On 10 January 2021, the UAE Cabinet declared the existence of an emergency financial crisis (EFC) as having effect (retrospectively) from 1 April 2020 to 31 July 2021 (the EFC period). During the EFC period:

a debtors were not required to file for bankruptcy if they failed to pay their debts within 30 days due to the EFC;

b creditors could not file bankruptcy applications against debtors, and the court could reject any such applications; and

c the debtor could still elect to file for bankruptcy, in which case:
- the court could elect not to appoint a trustee if the debtor could show that its financial or business disruption was caused by the EFC;
- no precautionary action was taken in connection with assets necessary for the continued operation of the debtor's business operations; and
- if the debtor filed for bankruptcy and the application was accepted by the court, the debtor could request 40 days to negotiate a settlement with its creditors, provided that any settlements were in writing, agreed by two-thirds of creditors and implemented within a period of 12 months.

Any bankruptcy proceedings filed before the EFC period shall continue, although the court may double the time periods for such proceedings, as outlined by the Bankruptcy Law, effectively halting such proceedings until the end of the EFC. The existence of an EFC does not preclude creditors from initiating civil proceedings (e.g., payment orders, precautionary attachments and money judgments).

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

As the law has been in practice for over five years, we have seen some general trends for the courts to favour restructuring over bankruptcy, with judges regularly appointing external financial experts to work alongside the trustee to examine the possibility for salvaging businesses in distress. We are also seeing a number of cases where the trustees and judges have actively looked for grounds to attribute liability on the managers (the definition of manager under the Bankruptcy Law extends beyond the immediate board of directors and could, theoretically , include anyone who is involved in the management (including directing the managers) of a bankrupt company, particularly where the assets of such company are insufficient to meet at least 20 per cent of its recognised debts, and there is evidence that the managers' conduct (this could include action or inaction alike) has resulted in losses to the bankrupt company). However, we note that such judgments are often the result of the mis-interpretation and mis-application of the Bankruptcy Law, and in most cases such judgments are overturned on appeal – although this is little comfort for the relevant managers as a considerable amount of time and money (most of which cannot be reclaimed, even if the appeal is successful) will be required to pursue the appeal.

There are limited means to gauge market trends in respect of restructuring procedures because, 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 there has been a marked increase in bankruptcy applications, 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 an 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

We continue to see inconsistencies in the quality of court decisions under the Bankruptcy Law, resulting largely from the lack of experience of the trustees and the court judges. However, this situation is slowly improving as the court and related advisers build their experience and familiarity with the new bankruptcy regime. Given the key role that a well-developed bankruptcy regime can play in minimising the adverse impact of the current financial challenges facing the UAE, there is greater urgency than ever before to invest in formal education and training on the application of the Bankruptcy Law at all levels of the insolvency framework, including the court judges, trustees and experts. This would represent a significant development of the insolvency regime in the UAE.