INSOL INTERNATIONAL

THE INSOLVENCY REGIMES OF THE GULF COOPERATION COUNCIL:

KEY ISSUES AND TRENDS

SPECIAL PROJECT

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THE INSOLVENCY REGIMES OF THE GULF COOPERATION COUNCIL: KEY ISSUES AND TRENDS

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ACKNOWLEDGEMENT

INSOL International is pleased to present this Special Report, "The Insolvency Regimes of the Gulf Cooperation Council: Key Issues and Trends".

The Report provides an outline of the key features of the insolvency regimes in the six Gulf Cooperation Council (GCC) states of the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia and the United Arab Emirates (UAE), as well as the financial free zones within the UAE, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).

The GCC countries share common historical, cultural and religious ties, and also have a similar focus in seeking to enhance the strength of their insolvency regimes as a pillar of economic stability and growth and attracting foreign investment, in line with best practice international standards.

Recent years have seen various reforms introduced in GCC regions, and this publication provides a valuable analysis of these reforms, as well as the important practical considerations in progressing restructuring, bankruptcy and insolvency matters within the GCC, including in a cross-border context.

The publication highlights complex issues in jurisdictions that are rarely covered in global insolvency materials, and is intended to provide readers with a "one stop shop" they can draw on when conducting work in GCC regions.

The publication reflects INSOL's commitment to enhance its technical output and membership base in key strategic growth areas across the world.

Mamoon Khan (Partner) and Sarah El Serafy (Senior Associate) of Al Tamimi & Company served as the Project Leaders for the Report. A number of highly experienced senior practitioners within Al Tamimi & Company also authored individual chapters on Bahrain, Kuwait, Oman, Qatar and the UAE.

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INSOL expresses its appreciation to the Project Leaders and each of the chapter authors for their insights, expertise and time in contributing to this important publication for INSOL's members.

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THE INSOLVENCY REGIMES OF THE GULF COOPERATION COUNCIL: KEY ISSUES AND TRENDS

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INTRODUCTION

We are delighted to launch this exciting new publication from INSOL International, "The Insolvency Regimes of the Gulf Cooperation Council: Key Issues and Trends".

The Gulf Cooperation Council (GCC) is a regional political and economic alliance of six Arab states: the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the Kingdom of Saudi Arabia and the United Arab Emirates (UAE). The GCC countries share historical, cultural and religious ties, as well as a strategic interest in the stability and security of the region. They also face similar challenges and opportunities in diversifying their economies, enhancing their competitiveness and attracting foreign investment.

One key area of reform and development in GCC countries is the insolvency and bankruptcy regime, which governs the legal and institutional framework for dealing with distressed or insolvent businesses. A robust and efficient insolvency regime can facilitate the resolution of financial difficulties, protect the rights and interests of creditors and debtors and support the recovery and growth of the economy. Conversely, a weak or outdated insolvency regime can hamper the restructuring or liquidation of insolvent businesses, undermine the confidence and trust of investors and lenders, and impose social and economic costs on the society.

In recent years, GCC countries have introduced significant changes and improvements to their insolvency regimes, reflecting their commitment to aligning with international best practices and standards. These changes and improvements aim to provide more options and flexibility for debtors and creditors to resolve insolvency issues, streamline and expedite insolvency procedures, establish specialised courts and bodies to handle insolvency cases, and reduce the stigma and penalties often associated with bankruptcy.

The chapters in this publication provide an overview and analysis of the insolvency regimes in each of the GCC countries. For the UAE, separate chapters cover the two financial free zones: the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). In the Qatar chapter, the Qatar Financial Centre (QFC), a special economic zone in Qatar with its own legal and regulatory framework, is also addressed.

Each chapter highlights the main features, challenges and developments for the relevant jurisdiction. The chapters cover the following aspects of the insolvency regimes:

- the scope and applicability of the insolvency laws and regulations, as well as the entities and persons subject to them;
- the types and mechanisms of insolvency proceedings, such as preventive settlement, restructuring, administration and liquidation, and the conditions and procedures for initiating and conducting them;
- the roles and powers of the courts, regulators and other bodies that oversee and administer insolvency proceedings, and the appointment and duties of insolvency practitioners, such as trustees, experts and managers;
- the rights and obligations of the debtors and creditors involved in the insolvency process, and the priority and distribution of claims and payments among them;
- the effects and implications of insolvency on the debtor's assets, liabilities and business operations, including the moratorium and suspension of legal actions and enforcement measures against the debtor;
- the provisions and rules for dealing with secured creditors, set-off, new financing and voidable transactions in the insolvency proceedings, as well as criteria and consequences for invalidating or reversing certain transactions or actions of the debtor;
- the liability and accountability of the directors, managers and shareholders of the insolvent entity, and the sanctions and penalties for fraudulent or negligent conduct or breach of duties;
- the cross-border insolvency process; and
- the expected or recent developments and reforms in the insolvency regime, and the challenges and opportunities for further improvement and harmonisation.

The chapters draw on the relevant laws and regulations, as well as the available case law and practice, in each of the GCC countries. The chapters also provide examples and comparisons, which illustrate the similarities and differences among the GCC countries in their insolvency regimes.

Due to the limited coverage of GCC insolvency regimes in mainstream publications, we hope this report will be of interest and value to INSOL's members in their practice, particularly as the scope of insolvency and restructuring matters continues to expand across borders in emerging areas of trade and investment.

Mamoon Khan (Partner) and Sarah El Serafy (Senior Associate)
Al Tamimi & Company
Project Leaders

KINGDOM OF BAHRAIN

1. Introduction

The Insolvency Law (Law No. 22 of 2018) and the Central Bank of Bahrain (CBB) and Financial Institutions Law (Law No. 64 of 2006, as amended) (CBB Law) are the primary pieces of legislation under which insolvency or analogous proceedings to which a company incorporated under the Companies Law (Law No. 21 of 2001, as amended) can be subject in Bahrain.

The Insolvency Law applies to any company that is not licensed by the CBB. The CBB Law applies to any company that is licensed by the CBB. There are no laws that govern the insolvency proceedings of an individual in Bahrain.

For completeness, voluntary liquidation is available for solvent companies under the Companies Law.

2. The CBB Law

Part 10 (Insolvency of the Licensee and placing it under Administration and Compulsory Liquidation) of the CBB Law covers the insolvency of a CBB licensed entity (Licensee) such as banks (both conventional and Islamic), investment business firms and ancillary service providers such as payment service providers and insurance firms. Two options are available:

- administration; and
- compulsory liquidation.

Article 133 (*Insolvency of a Licensee*) of the CBB Law provides that a Licensee is deemed to be insolvent if its financial position becomes unstable and it stops paying its due debts other than administrative fines and any applicable tax. Once a Licensee is insolvent, it must immediately cease to undertake any regulated services in Bahrain, make any payments or carry on any business in relation to regulated services, unless otherwise agreed in writing by the CBB.[1]

"Regulated services" is defined as financial services provided by financial institutions, including those governed by Islamic Sharia principles under the CBB Law.[2]

2.1 Administration

Pursuant to Article 136 (*Reasons for Placing a Licensee under Administration*) of the CBB Law, the CBB may assume the administration of a Licensee or appoint an external administrator to conduct the administration of the Licensee on behalf of the CBB, if:

- the Licensee becomes insolvent or appears most likely to be insolvent;
- the Licensee's licence is amended or cancelled due to failing to satisfy any of its licence conditions or failing to start business within six months from the date of the licence; or
- the Licensee continues to provide regulated services, resulting in inflicting damage to the financial services industry in Bahrain.

2.2 Powers of the administrator

Pursuant to Article 137 (*Appointment of External Administrator*) and Article 140 (Powers of the Administrator) of the CBB Law, the CBB shall specify the terms and conditions under which an external administrator practices its duties and obligations and the administrator shall possess all the necessary powers to manage and run the business of the Licensee, including the power to:

- continue or temporarily suspend operations;
- suspend or limit the discharge of financial obligations;
- conclude agreements and sign documents on behalf of the Licensee;
- commence and defend any legal proceedings in the name of the Licensee; and / or
- take any other legal proceedings to which the Licensee is a party.

The administrator may also:

- declare a moratorium in respect of the debts of the Licensee;
- discharge obligations of the Licensee to certain creditors in preference to other creditors, if this is to the advantage of the Licensee;
- dismiss officers and employees, provided that reasons should be given for the dismissal;

1 Article 134 (The Effects of Insolvency) of the CBB Law.
2 Idem, Article 39 (Regulated Services).

- appoint officers and employees;
- nullify any agreement entered into by the Licensee (by way of a court order) before placing the Licensee under administration; and
- undertake any necessary action in the interest of the Licensee, its customers and its creditors.

Pursuant to Article 140(b)(5) of the CBB Law, the administrator may, after obtaining the approval of the courts of Bahrain, nullify any agreement (other than derivative contracts) entered into by the Licensee before placing the Licensee under administration if such action is in the interests of the Licensee or taken to protect the interests of its customers, or to avoid occurrence of irrevocable damage.

In practical terms, this power would be used where, for instance, retail depositors are unable to access deposits and the assets are required to be sold or to meet the operating expenses of the financial institution.

2.3 Duties of the administrator

Under Article 141 (*Duties of the Administrator*) of the CBB Law, within 30 days of commencing the administration, the administrator shall compile two copies of an inventory of the rights, assets and liabilities of the Licensee. One copy should be kept at the principal place of business (available for inspection by creditors and stakeholders) and the other at the CBB. In accordance with the powers of the administrator, the inventory should be updated from time to time and the administrator should take all the necessary measures to collect all the entitlements due to the Licensee.

2.4 Suspension of proceedings

Article 142 (*Suspension of Proceedings*) of the CBB Law provides that any action in relation to enforcing any security over the property of the Licensee, legal proceedings or any other measures may not be commenced or continued without the approval of the administrator.

2.5 Termination of administration

Under Article 143 (*Termination of Administration*) of the CBB Law, within a period of two years from the commencement of the administration, the administrator shall submit a petition to the Bahraini Court for either compulsory liquidation of the Licensee or termination of the administration and restoration of the management to the officials of the Licensee.

2.6 Compulsory liquidation

Pursuant to Article 144 (*Application for Compulsory Liquidation*) of the CBB Law, the administrator, the Licensee or any creditor may submit a petition to the Bahraini Court for compulsory liquidation of the Licensee and serve such petition at the Licensee's principal place of business. The petition should be made available to the shareholders and creditors of the Licensee and may be requested by any interested party. The entity or individual who submits the petition for compulsory liquidation should advertise the petition in the Official Gazette and in two Arabic and English newspapers at least 15 days before submitting to the Bahraini Court. The court shall then appoint a liquidator and determine their fees with the guidance of the CBB. All liquidator fees shall be borne by the Licensee.

2.7 Powers of the liquidator

Article 147 (*Powers of the Liquidator*) of the CBB Law provides that the appointed liquidator shall have all powers necessary to carry out the compulsory liquidation and has the right to take any necessary measures to complete the process.

In order to sell any assets or properties of the Licensee at a market value exceeding one hundred thousand Bahraini Dinars (BHD 100,000), transfer or allocate any of the assets or properties as a security for a debt owed by the Licensee, settle any claim or waive rights exceeding the value of fifty thousand Bahraini Dinars (BHD 50,000), the liquidator must obtain the prior written approval of the Bahraini Court.

Provided approval is obtained, the liquidator may (prior to placing the Licensee under liquidation) declare any agreement (other than derivative contracts) entered into by the Licensee null and void if it is deemed to be to the advantage of the Licensee or its customers, or to avoid irrevocable damage.

The Licensee under liquidation is prohibited from undertaking any of the following actions during the prohibition period (defined below):

- concluding any transaction at an undervalue with any person;
- entering into a transaction for the purpose of defrauding any of its creditors; or
- giving preference to any person.

The term "prohibition period" refers to:

- a period of two years prior to the date on which the Licensee was placed under administration or the date on which the liquidation ruling was issued if the date of the ruling does not precede the date of placing the Licensee under administration. This period applies to any transaction concluded, or priority given to any person related to the Licensee, in violation of the provisions stated above; or

- six months prior to the date of placing the Licensee under administration or the date of issuing the liquidation ruling if the Licensee was not placed under administration. This term applies to any transaction concluded, or priority given to any person who has no relation with the Licensee, in violation of the provision set out above. A person is considered to be related to the Licensee if he or she is a member of the board of directors, an official or a partner of the Licensee.[3]

Within 30 days of their appointment, the liquidator must notify all creditors of the Licensee under liquidation of the appointment. This notice should be served by recorded post in order to evidence receipt. Within 60 days of the decision to appoint the liquidator, the liquidator shall take necessary measures to terminate the activities of the Licensee pursuant to Article 150 (Notification of Creditors) of the CBB Law. The liquidator should send application forms to all the creditors of the Licensee, accompanied by the notice mentioned previously. The form should clearly indicate that if the creditor seeks to recover all or part of their debt, they should complete and return the form no later than 60 days from the date the form is dispatched, pursuant to Article 151 (Submission of Claims Related to Compulsory Liquidation) of the CBB Law.

2.8 Determination of claims

Under Article 152 (*Determination of Claims*) of the CBB Law, the liquidator should reach a decision on the claims submitted by the creditors within 60 days following the expiration of the application form deadline, by either accepting totally, partially or rejecting the claim. The creditor should be notified of the decision in the form of a recorded letter, and has the right to challenge the decision of the liquidator before the Bahraini Court within 15 days from the date of receiving the decision. Article 154 (Interim and Final Distributions) of the CBB Law clarifies that with the Bahraini Court's approval, the liquidator may make partial distributions to creditors whose claims have been accepted. The final distribution will be made after all claims have been determined.

2.9 Priority of claims

The CBB Law provides for a priority of claims under Article 156 (*Priority of Claims*) of the CBB Law, determining the rights of interested parties in the property of the Licensee in liquidation as follows:

- the administrator's fees and expenses incurred during the administration period of the Licensee, and the wages and salaries of officers and employees up to the date of the petition for compulsory liquidation filed at the competent court;
- the liquidator's fees and expenses incurred during the period of liquidation;
- fees and taxes due to the Government, its organisations, agencies and the CBB;
- deposits and loans taken with the approval of the CBB to protect the Licensee from insolvency;
- deposits of value not exceeding twenty thousand Bahraini Dinars (BHD 20,000) per depositor;
- other deposits that exceed twenty thousand Bahraini Dinars (BHD 20,000) per depositor, and all other unsecured debts; then
- any amounts due to the shareholders in proportion to their respective shares.

Under the CBB Law, the secured debts of the creditors of the Licensees shall be paid without reference to the order of priority set out in the CBB Law. Thus, in administration or compulsory liquidation, a secured asset of the Licensee can be disposed of. However, the secured party would get the benefit of the proceeds of the secured assets ahead of any other creditors.

3. The Insolvency Law

3.1 Applicability

Pursuant to Article 3 (*Scope of Application of the Law*) of the Insolvency Law, the provisions of the Insolvency Law apply to: (i) commercial companies established in Bahrain, including companies established by law or decree; and (ii) natural person traders who do business and have their head office in Bahrain.

The Insolvency Law does not apply to: (i) Licensees; nor (ii) companies that are established in accordance with a law that provides that they shall not be subject to the provisions of the Insolvency Law.

The provisions of the Law of Commerce (Law No. 7 of 1987, as amended) are applicable to commercial transactions carried out by "traders". The starting point is determining who is considered a "trader" and, accordingly, to whom the Law of Commerce applies.

Articles 3 to 8 of the *Law of Commerce* consider the following acts as commercial activities if they are carried out in a professional manner:

- purchase of moveables of any kind with the intention of selling or leasing them out in their original form or after conversion in any other state with the intention of making a profit including the sale and lease of any such moveable property;

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3 *Idem,* Articles 158 (Void Transactions) and 159 (A Person in Relation with the Licensee).

- taking moveables on lease with the intention of hiring them out or subleasing them to third parties;
- all transactions relating to bills of exchange, promissory notes and cheques regardless of the capacity of the persons involved and the nature of the transactions for which they are issued;
- construction, repair or maintenance of ships or aircrafts;
- purchase, sale, charter or taking on charter of ships and aircrafts with the intention of utilisation;
- sea or air transport;
- loading or unloading operations;
- contracts relating to the employment of ships, captains, pilots, engineers; navigators and such other employees;
- lending and borrowing;
- import, export and distribution of goods;
- industry;
- road transport;
- commercial agencies, business of commission agency and commercial representation;
- auction of whatever kind;
- insurance business of various kinds;
- banking operations, foreign exchange and stock exchanges;
- warehousing of goods, crops and other materials;
- printing, publication, photography, radio or television broadcasting, press, transmission of news, pictures or advertisement;
- extraction of natural resources such as mines, quarries and oil sources, stone cutting and such other activities;
- contracts of public works, construction, alterations, repair and demolishing, cleaning and maintenance contracts where the contractor undertakes to provide necessary material or workforce;
- purchase of properties and real estate rights with the intent to sell them and the sale of the properties after having purchased them with the aforesaid intent;
- customs clearing, manpower agencies and sale by public auction;
- tourist agencies, hotels, restaurants, cinema houses, playgrounds and recreational activities;
- leasing or letting of houses, apartments and rooms whether furnished or unfurnished with intent to sub-let them; and
- distribution of water, gas or electricity and communication services.

Please note that this is not an exclusive list as Article 6 of the Law of Commerce provides that any activity associated with the above list, as well as activities which have by analogy the same characteristics and objects as the activities referred to above, shall also be deemed to be commercial activities.

3.2 Types of insolvency proceedings and commencement of insolvency proceedings

Under the Insolvency Law, both debtors and creditors may initiate insolvency proceedings by filing an application with the Bahraini Courts.

The Insolvency Law sets out two methods of resolving a failing entity:

- restructuring; and
- liquidation.

In accordance with the Insolvency Law, irrespective of whether restructuring or insolvency procedures are ultimately followed, the initial process is the same and must be initiated by approaching the Bahraini Court.

The process for commencing such proceedings in Bahrain depends on whether the action is initiated by the debtor or the creditors. If the debtor initiates the action, it must meet the following conditions:

- the debtor must fail to pay its debts within 30 days of their maturity date or will be unable to pay them on their maturity dates, or the value of the debtor's financial obligations must exceed the value of its assets;

- the debtor must have legal authorisation to institute the action, such as a resolution of the board of directors or the general assembly of shareholders;
- the debtor must notify the regulatory authority, if any, of its intention to institute the action and attach evidence of serving such notice to the statement of claim; and
- the statement of claim must meet the requirements stipulated in the Insolvency Law, such as providing information on the debtor's identity, assets, liabilities, creditors, employees and proposed restructuring plan.

The Bahraini Court will verify these conditions and issue an interim decision accepting the debtor's action within five working days of instituting the action if the requirements are met. Creditors may object to the Bahraini Court's interim decision by filing a motion within 30 days of the notice of opening the insolvency proceedings. The Bahraini Court may also notify the debtor of deficiencies in the statement of claim and provide an opportunity to correct them, or it may render a judgment of nonsuit or approve the opening of the insolvency proceedings in the exact same condition as the action has been instituted.

If the creditors initiate the action, they must meet the following conditions:

- the debtor must fail to pay its debts on its maturity date after being given a written notice and has not paid within 30 days of the notice;
- the statement of claim must be filed by at least three creditors if their total claims are less than twenty thousand Bahraini Dinars (BHD 20,000); and
- the statement of claim must meet the requirements stipulated in the Insolvency Law.

The Bahraini Court will verify these conditions and the debtor's inability to pay its debts or the value of its financial obligations exceeding the value of its assets. The debtor may object to the creditor's action within 15 days of being notified of the action. If the Bahraini Court dismisses the statement of claim filed by the creditors, it may compel the creditors to pay all court fees and expenses incurred by the debtor and may compel the creditors to pay damages resulting from instituting the action if it has been instituted in bad faith or un-righteously.

3.3 The appointment of an insolvency trustee

The process for the appointment of an insolvency trustee depends on whether the insolvency proceedings are restructuring or liquidation proceedings. In restructuring proceedings, the Bahraini Court appoints the trustee immediately after approving the proceedings, based on the debtor's proposal or the Bahraini Court's own discretion. In liquidation proceedings, the Bahraini Court appoints the trustee after approving the proceedings, based on the debtor's proposal, the creditors' proposal, or the Bahraini Court's own discretion.

The Bahraini Court may appoint more than one trustee if necessary, depending on the size of the required duties or expertise, or to ensure the protection of different classes of creditors. If multiple trustees are appointed, they are expected to work jointly and are jointly liable for their administration unless the Bahraini Court decides to distribute tasks among them or assign specific tasks to one trustee.

The Insolvency trustee must meet certain conditions to be appointed, including not being an insider of the debtor, not being a creditor of the debtor and being registered in the roster of experts in the category of restructuring trustees for restructuring proceedings or liquidators for liquidation proceedings.

3.4 Restructuring

The Bahraini Court must first consider restructuring and order a restructuring of the debts of the debtor if this achieves a more favourable settlement for creditors than liquidation, or if it is economically justifiable for a company to continue its business.

Both debtors and creditors can file a case in the High Civil Court to initiate restructuring or liquidation of the company. A statement of claim will need to be filed with the High Civil Court including supporting documents, such as: (i) a report describing the financial position of the debtor and containing information on its properties and their nature, and data of its employees; (ii) a copy of the financial statements related to its business for the three years preceding the date of filing the application; (iii) a list of all the debtor's properties excluded from the insolvency assets; (iv) a list of names of the creditors and debtors, their addresses, the amount of their rights or debts and the securities and guarantees provided to them, if any; and (v) any other documents supporting the statement of claim, which the debtor deems necessary to be included. In addition, evidence that the person filing the claim has the authority to do so such as a power of attorney and/or resolution (as applicable).

Before accepting the debtor's request to initiate insolvency proceedings, the Bahraini Court will hold a hearing to assess the merits of the potential insolvency of the company.

The Bahraini Court shall, based on the case papers, within five working days as of the date of instituting the action, issue an interim decision accepting the debtor's action for opening the insolvency proceedings if it verifies that the requirements stipulated in the Insolvency Law are met.

If the Bahraini Court decides that the statement of claim has not met the requirements stipulated in the Insolvency Law, it shall notify the debtor of the deficiencies and give it a reasonable opportunity to correct or rectify the deficiencies. Otherwise, it may render a judgment of nonsuit, approve the opening of the insolvency proceedings in the exact same condition as the action has been instituted, or issue the decision it deems appropriate. The creditors may object to the Bahraini Court's interim decision approving the opening of the insolvency proceedings by filing a motion on the grounds that the debtor has not fulfilled any of the requirements of instituting the action. The motion shall be filed within 30 days as of the date of serving notice of opening the insolvency proceedings; otherwise, the interim decision shall be final.

Under the Insolvency Law, the insolvency trustee (i.e. the insolvency practitioner), with assistance from the corporate entity, is required to submit a proposal for restructuring to the Bahraini Court within three months from the date insolvency proceedings were initiated.

Subject to certain conditions, the Bahraini Court may permit creditors whose claims are at least one third of the total claims filed against the corporate entity to submit a proposal for restructuring. The proposal is put to a vote by the creditors whose rights are affected by the proposal. The Bahraini Court may ratify, reject or approve (subject to amendments) the proposal. The insolvency trustee responsible for making distributions to the creditors in accordance with the proposal.

3.5 Liquidation

Liquidation of a company entails the winding down of a company's business and sale of its assets.

The Bahraini Court may, at the request of the insolvency trustee, the creditors' committee or any stakeholder convert the restructuring into liquidation in accordance with the provisions of the Insolvency Law if the conversion is in the best interests of the insolvency assets.

When determining the best interests of the insolvency assets, the Bahraini Court shall take into account whether it is reasonably possible to approve the scheme of restructuring, or the continuation of the restructuring proceedings is likely to cause greater losses of the insolvency assets than those caused by the liquidation.

The Bahraini Court may convert the restructuring into liquidation in the following cases:

- if the scheme of restructuring is not submitted within the timeframes stipulated in the Insolvency Law;
- if the scheme of restructuring is not approved in accordance with the Insolvency Law;
- if the Bahraini Court refuses to ratify the scheme of restructuring;
- if the Bahraini Court decides to accept the objection for rejecting the scheme of restructuring;
- if the debtor is found, after the application for restructuring has been filed, to have acted in bad faith that is detrimental to the creditors; and
- if the debtor substantially breaches the terms of the scheme of restructuring or if the debtor's inability to implement it is proven.

Creditors may exercise their rights under the Insolvency Law, including filing a claim for liquidation of the debtor, if the Bahraini Court decides to terminate the restructuring proceedings in accordance with the Insolvency Law. The insolvency trustee shall continue to perform the tasks and duties necessary to liquidate the company in case of converting the restructuring into liquidation if he or she is enrolled under the category of liquidators in the roster of experts, unless otherwise decided by the Bahraini Court.

If the Bahraini Court decides to transfer the restructuring request to liquidation, the claims filed in the restructuring proceedings shall be automatically considered as if filed in the liquidation proceedings and any amount received by the creditor under an earlier proceeding shall be deducted from the liquidation distributions.

Upon opening the liquidation proceedings, the liquidator shall verify whether converting the liquidation into the restructuring proceedings is in the best interests of the insolvency assets.

The Bahraini Court may, at the request of the liquidation trustee, the creditors' committee or any stakeholder, convert the liquidation into restructuring in accordance with the provisions of the Insolvency Law if the conversion is in the best interests of the insolvency assets. When determining the best interests of the insolvency assets, the Bahraini Court shall take into account whether it is reasonably possible to approve the scheme of restructuring or the conversion into the restructuring proceedings is likely to maximise the value of the assets.

3.6 Tasks, duties and powers of the insolvency trustee

Pursuant to Article 40 (*Tasks and Duties of the Insolvency Trustee*) of the Insolvency Law, the Insolvency Trustee shall perform all the actions necessary to protect and administer the insolvency assets and preserve the interests of the creditors and shall, in particular:

- prepare a report, upon its appointment, on the debtor's assets and business, all the circumstances affecting the financial position of the debtor and the expected developments;
- prepare a record in which the insolvency trustee shall state all the details of the creditors and secured creditors, the claimed amounts, their maturity dates, nature of their securities over the insolvency assets and statement of the documents supporting such claims;

- prepare a list of the existing contracts;
- administer the insolvency assets on behalf of the debtor or supervise or control the administration thereof if the debtor does not continue the management thereof;
- apply for the invalidity of the dispositions performed by the debtor before the date of approval of the opening of the insolvency proceedings;
- collect any money or rights due to the debtor from third parties and request for proof of the debtor's ownership of the properties or rights;
- express an opinion on the proposed scheme of restructuring and provide assistance in the preparation thereof; and
- make an offset between what is owed by the debtor to its creditors and what is owed to the debtor by its creditors.

Article 44 (*Powers of the Insolvency Trustee*) of the Insolvency Law provides that the insolvency trustee shall have the following powers:

- the right to enter buildings related to the activity of the debtor and to access the debtor's commercial books, commercial correspondence and any other documents, information or data;
- the right to participate in the meetings of the administrative organs of the debtor's business;
- the power to appoint experts or technicians to assist in the performance of its tasks and duties without being restricted to the roster of experts kept by the Ministry of Justice after obtaining the approval of the Bahraini Court; and
- notwithstanding any provisions related to confidentiality contained in any law or agreement, the power to obtain information and data related to any financial transactions or agreements or any obligations or matters relevant to the debtor's financial position or business, including information on its bank accounts.

The Insolvency trustee may submit a request to the Bahraini Court for the stay of judicial proceedings and procedures, abatement of the legal or contractual interests, termination of the contracts concluded by the debtor, non-enforcement of any dispositions made by the debtor, or other requests necessary for the performance of its tasks.

The Bahraini Court shall notify the insolvency trustee of any procedures, measures or decisions before taking them and give it a sufficient opportunity to hear its opinion. However, the Bahraini Court may, in summary cases, take any procedure, measure or decision without notifying the insolvency trustee or giving him / her an opportunity to be heard if the time is not sufficient to serve notice or hear the opinion and the Bahraini Court has decided that it is necessary to adjudicate on the same in order to prevent any damage that may be caused to the insolvency assets or may impact the effectiveness of the insolvency proceedings, provided that the notice is served and the opportunity to hear the opinion is given as soon as possible.

3.7 Existing contracts

Article 59(a) (*Treatment of Existing Contracts*) of the Insolvency Law provides that the insolvency trustee may, after obtaining the approval of the Bahraini Court, assume an unperformed contract to which the debtor is a party or request its termination or assignment. Such right shall apply to all contracts with existing obligations, including but not limited to property lease contracts, sale contracts, service contracts, construction contracts and insurance contracts.

Article 64 (*Termination of Existing Contracts*) of the Insolvency Law provides that if the insolvency trustee determines that an unperformed contract does not achieve the best interests of the insolvency assets, the trustee shall submit an application to the Bahraini Court for its approval to terminate the contract and shall attach to such application the contract and the justifications on which the termination is based.

The Bahraini Court shall approve the application, after serving notice and giving an opportunity to hear the opinions, if the termination of the contract achieves the best interests of the insolvency assets. Termination of the unperformed contract may be approved under the scheme of restructuring. The other contracting party may file a claim, in accordance with the provisions of the Insolvency Law, for damage sustained by reason of termination if the termination is considered a breach of the contract. Such claim shall take the same priority of any claims arising prior to the opening of insolvency proceedings.

The administrative and management arm of the company remains in place and an independent insolvency trustee is appointed. The insolvency trustee owes a fiduciary duty to act in the best interests of the estate and performs a myriad of functions, including helping prepare the reorganisation plan and producing an inventory of the debtor's assets. The insolvency trustee (with assistance from the company) is required to submit a proposal for restructuring to the Bahraini Court within three months from the date insolvency proceedings were initiated.

The liquidator is responsible for selling the insolvency assets in accordance with a proposal for the sale of the assets and distributing proceeds to creditors in the order of priority set out in the Insolvency Law.

3.8 Moratorium

The Insolvency Law introduces the concept of a moratorium on claims against the insolvent's estate.[4] The moratorium:

- is triggered when the Bahraini Court commences the insolvency proceedings; and
- lasts for an initial period of 120 days.

The stay on enforcement proceedings provides leeway to manage the reorganisation of the estate and encourages continued trade. The moratorium can be extended at the insolvency trustee's request, provided consent is obtained from the secured creditors, or the Bahraini Court deems the extension to be essential in maximising the estate's value. There are certain exceptions to the moratorium's scope.

Financial derivative contracts are not subject to the stay. The Bahraini Court also maintains a discretion to terminate the moratorium. Along with certain other conditions, the stay can be lifted upon the motion of a secured creditor if the value of their secured funds decreases and they do not receive adequate protection against impairment or any other losses during the moratorium. Unsecured creditors may apply to terminate the stay if their claim has been previously litigated or is subject to a right of set-off, but only where the adjudication of the claim or exercise of the set-off would facilitate administration.

3.2 Set-off

Under Article 68 (*Rights of Set-Off*) of the Insolvency Law, set-off is permitted before insolvency proceedings are initiated. However, once insolvency proceedings are initiated under the Insolvency Law, set-off is only permitted pursuant to a court order, which can be made only if the debt is subject to a right of set-off and if set-off effectively enhances the administration of the insolvency assets. The Insolvency Law does not apply to financial derivative contracts. An application for nullity may be submitted in accordance with the CBB Law and the Netting Regulations (Resolution No. 44 of 2014).

3.3 Invalidation of fraudulent and detrimental transactions

Fraudulent transactions and transactions at undervalue, preferences and invalid security interests can be set aside. Article 72 (*Invalidation of Fraudulent and Detrimental Transactions*) provides that the insolvency trustee can apply to the Bahraini Court to invalidate any transaction undertaken by the company or any obligation incurred by the company retroactively in the following cases:

- if the company performs the transaction or incurs the obligation with intent to defraud its current or future creditors or with intent to cause damage to them; and
- if the company does not receive fair consideration for the transaction or assumes an obligation which is not in the interests of the company, and if the company is insolvent or becomes insolvent as a result of the transaction or obligation.

These provisions also apply to security interests.

Subject to certain exceptions, under Article 73 (*Invalidating Dispositions Giving Preference to Creditors*) of the Insolvency Law, the insolvency trustee can apply for any payment made or any transaction performed by the corporate entity, including the creation of a security interest over its properties for the benefit of any creditor if such disposition is made for the benefit of a debt owed by the corporate entity and the corporate entity is or will be unable to settle the debts when due.

Article 76 (*Time Required to Apply for Invalidating Transactions*) of the Insolvency Law provides that an application for invalidating a transaction must be submitted within six months from the date insolvency proceedings are commenced and one year if it involves one of the company's "insiders", namely a subsidiary institution, a member of the company's administration with significant control of company's institution, a person with access to non-public information about the debtor's decisions and financial situation, or the debtor's relatives until the fourth degree.

3.4 Treatment of unsecured and unsubordinated creditors of a counterparty

Article 93 (*Priority of Claims*) of the Insolvency Law sets out the priority of claims as follows:

- secured creditors;
- unsecured financing obtained after commencement of insolvency proceedings;
- administrative costs and claims of the insolvency proceedings;
- employee claims for due wages and financial benefits not exceeding three thousand Bahraini Dinars (BHD 3,000);
- customer claims for advance payment made to debtor for purchase of goods and services not exceeding one thousand Bahraini Dinars (BHD 1,000) per customer;

4 Insolvency Law, Article 51 (Stay of Procedures).

- claims of government agencies for taxes and or fees not exceeding one thousand Bahraini Dinars (BHD 10,000) per agency;
- unsecured claims arising prior to the commencement of insolvency proceedings;
- unsecured claims arising prior to the commencement of insolvency proceedings not filed within the stipulated timeframe but filed in a timely manner to determine right of distribution;
- claims of foreign government agencies (if any) for taxes and / or fees;
- unsecured claims as shareholders as compensation for late payment; and
- claims of shareholders for their ownership of shares.

Bahrain's insolvency regime represents Bahrain's business-friendly status as a country looking to facilitate the success of its investors and innovators.

4. Voluntary liquidation under the Companies Law

Voluntary liquidation is provided for under the Companies Law. The shareholders of the company would need to pass resolutions approving the voluntary liquidation of the company in accordance with the company's constitutional documents and the Companies Law.

An application for liquidation shall be filed with the Ministry of Industry and Commerce together with the supporting documents.

A notice of the liquidation is required to be published in a local newspaper and creditors have a period of 15 days from the date of the publication to submit any claims to the liquidator. If the entity is a CBB licensee, then an additional notice is also published by the CBB.

If any claims are received, the liquidator will be required to resolve this with the entity. Once all claims are resolved or alternatively, if no claims are received, then the liquidator shall submit a letter to the Ministry of Industry and Commerce and / or the CBB confirming that there are no claims from creditors.

A second notice is then published in the local newspaper notifying the public that the entity has been liquidated. The Ministry of Industry and Commerce application is then finalised, and the company is removed from the company register of the Ministry of Industry and Commerce.

The process of voluntary liquidation is supervised and controlled by the shareholders, who will be empowered to appoint the liquidator. The process will generally be supervised and monitored by the Ministry of Industry and Commerce.

5. Cross-border recognition

Part Five (Cross-Border Insolvency) of the Insolvency Law contains provisions pertaining to cross-border insolvency. As such, foreign insolvency proceedings can be recognised in Bahrain, and the Bahraini Courts may assist with foreign insolvency proceedings.

STATE OF KUWAIT

1. Introduction

Kuwait's Law No. (71) of 2020 (Bankruptcy Law), promulgated on 25 October 2020, is a comprehensive legal framework that regulates the bankruptcy procedures for natural persons who are traders, Kuwaiti companies, branches of foreign companies (except for joint venture companies) and collective investment systems that have legal personality. The Bankruptcy Law gives the Central Bank of Kuwait and the Kuwait Capital Markets Authority the right to set out rules governing preventive settlement procedures, restructuring and bankruptcy for stock exchanges, clearing agencies, central depository entities, central brokers, banks and insurance companies.

The Bankruptcy Law aims to balance the interests of debtors and creditors, facilitate the restructuring and settlement of debts, and protect the national economy from the negative effects of bankruptcy. The previous regime, which was set in place in 1980 and slightly reformed in 2009, offered minimal insolvency protections and debt restructuring mechanisms and deterred foreign investment. The Bankruptcy Law introduced a court-supervised corporate restructuring as an option for insolvent persons, in addition to bankruptcy and preventative settlement, to allow for early debt restructuring for distressed businesses. It also extended debt restructuring routes to companies beyond the financial sector. Among the most notable reforms, the Bankruptcy Law established specialist bankruptcy bodies, decriminalised bankruptcy and accelerated the procedures of bankruptcy and other insolvency measures. The Bankruptcy Law now allows for the reinstatement of a debtor's pre-bankruptcy rights upon the lapse of one year from the discharge of a bankruptcy. Further, subject to the ascertainment of a suspension date by the bankruptcy judge as detailed in section 7 below, preference periods are now generally fixed by legislation instead of being entirely subject to the court's jurisdiction.

2. Bankruptcy, restructuring and preventative settlement

The Bankruptcy Law sets out three court-supervised mechanisms under which a person may be subject to liquidation or administration as follows:

- a declaration of bankruptcy, whereby the assets of the bankrupt are liquidated by a court-appointed bankruptcy trustee;
- a restructuring, whereby the affected person retains full capacity to manage their assets but is placed under the supervision of the court-appointed bankruptcy trustee, who supervises the restructuring plan and may impose certain restrictions on a debtor's disposition powers; and
- a preventative settlement, whereby the affected person retains full capacity to manage their assets unless the Bankruptcy Court decides otherwise. Implementation of the preventive settlement proposal will be subject to the Bankruptcy Department's supervision.

Any creditor or a competent Kuwaiti regulatory authority may petition the Bankruptcy Department (a judicial subdivision) to make a declaration of bankruptcy or impose a restructuring plan on a debtor.

Moreover, under Article 13 of the Bankruptcy Law, a debtor may also petition the Bankruptcy Department to subject them to bankruptcy, restructuring or a preventative settlement, noting that restructurings and preventative settlements require the approval of certain majorities of the debtor's creditors. While we are not aware of any precedents under the current Bankruptcy Law with respect to consummated restructurings or preventative settlements, we know that multiple applications for restructuring and preventative settlement have recently been made to the Bankruptcy Department.

3. Financial restructuring committees

The Bankruptcy Law establishes the following specialised bodies:

- the Bankruptcy Court, which is a specialised court with sole jurisdiction over disputes arising under the Bankruptcy Law and with the authority to decide on the requests submitted to it in accordance with its provisions (Article 4);
- the Bankruptcy Department, a judicial division which reviews applications for bankruptcy and any relevant applications (Article 7); and
- the Bankruptcy Commission, formed by the Kuwait Ministry of Commerce and Industry and comprising members qualified to be bankruptcy trustees. The Commission serves a technical support function and may also include financial, legal or economic experts. Certain corporate debts are subject to the supervision of the Commission. These include debts of listed companies, collective investment schemes, Capital Markets Authority or Central Bank of Kuwait regulated entities and state-owned companies. The Commission reviews insolvency applications and related documentation submitted by any of the foregoing companies throughout the insolvency proceeding and opines on the same. Other functions include appointing bankruptcy trustees and determining their remuneration (Article 11).

However, an issue that may arise due to the framework established by the Bankruptcy Law is the overlap of competencies among the Bankruptcy Court, Bankruptcy Department, and Bankruptcy Commission. Since implementation, these bodies constantly defer jurisdiction to each other (and in certain cases, refuse to accept the same), which causes a bureaucratic "ping-pong" process and excessive delays for both debtors and creditors.

4. Secured creditors' rights

The Bankruptcy Law recognises the rights of secured creditors to enforce their security interests over the debtor's assets, subject to certain conditions and limitations. Secured creditors have priority over unsecured creditors in the distribution of the proceeds from the sale of the secured assets, after deducting the costs and fees of the sale. If the creditors have the same concession priority or mortgage rank, the asset of the debtor having a concession or mortgage right shall be divided among them on a pro-rata basis.

However, the Bankruptcy Law imposes certain restrictions on the enforcement of security interests by secured creditors in order to protect the debtor's interests and the collective interests of the creditors. For example, secured creditors cannot enforce their security interests unless they obtain the permission of the court (Article 225 of the Bankruptcy Law). Additionally, the trustee, the debtor and the Bankruptcy Commission – if the debt is subject to its supervision – may object to a request for enforcement in the following cases, as set out in Article 226 of the Bankruptcy Law:

- if the acceptance of the request impedes the debtor from exercising its activities in a feasible manner;
- if the acceptance of the request prevents the presentation of a preventive settlement proposal or a restructuring plan that may be accepted by the creditors or renders the preventive settlement or restructuring unfeasible; or
- if the harm that the acceptance of the request causes to the debtor and the collective creditors exceeds the harm that would be caused to the enforcing creditor in case the enforcement request is rejected.

5. Directors' liability

The Bankruptcy Law imposes certain duties and liabilities on the directors of a debtor company in order to prevent fraudulent or negligent conduct that may harm creditors or the public interest. Directors may face civil, criminal or administrative sanctions, depending on the nature and severity of the act. For example, under Article 278 of the Bankruptcy Law, following the issuance of a final decision to open bankruptcy procedures, the chairman and members of the company's board of directors, the auditors of its accounts, and those in charge of liquidating shall be exposed to penalties such as imprisonment for a period not exceeding five years and / or a fine not exceeding KWD 100,000, if they concealed the company's books or obtained a preventive settlement proposal, restructuring plan or reconciliation by fraud. Additionally, members of the board of directors, managers and liquidators of the bankrupt company shall be punished with a maximum of three years' imprisonment and / or a maximum fine of KWD 100,000, if they commit certain acts set out in Article 280 of the Bankruptcy Law, including awarding exorbitant bonuses to members of the board of directors, the chief executive officer or managers of the company during the three years prior to the company's failure to pay its debts, and that was one of the reasons leading to its bankruptcy.

6. New money

As per Articles 67 and 68 of the Bankruptcy Law, debtors subject to preventive settlement or restructuring proceedings may be allowed by the Bankruptcy Court, based on the request to open the proceedings, to obtain new financing, as long as this does not affect the joint interest of creditors or the preventive settlement or restructuring procedures. The new financing may be secured by entailing a mortgage in any mortgaged funds of the debtor, provided that the financing shall be equal to any existing mortgage on the required funds to be mortgaged or requested to be mortgaged. In this case, the approval of the creditors advanced in rank is necessary (Article 69 of the Bankruptcy Law).

In the case of bankruptcy proceedings, the Bankruptcy Court may, upon a request from the trustee or the debtor, permit continuing the operation of the business of the debtor if required by the public interest, or the interests of the debtor or creditors (Article 147 of the Bankruptcy Law). The Bankruptcy Court shall, upon a request from the trustee, appoint someone to manage the business of the debtor and the debtor shall be required to submit a monthly report to the Bankruptcy Court on details of its business.

7. Voidable transactions

Article 158 of the Bankruptcy Law now provides for a three-month preference or suspect period (or two years if the transactions were made with a related party), under which certain disposals can be set aside during bankruptcy proceedings. The following dispositions are listed:

- donations and gifts, excluding customary small gifts;
- any transactions where the obligations of the debtor are remarkably unbalanced with the obligations of the other party, whether the obligations are in-kind or cash;
- fulfilment of debts before they fall due, whatever the manner of this fulfilment, or in a manner other than that usually followed to fulfil debts of that kind;
- fulfilment of debts in a manner other than the agreed manner (fulfilment through commercial papers or bank transfer shall be deemed as fulfilment through funds unless there are commercial considerations justifying so); and
- provision of security for pre-existing debts.

The Bankruptcy Court may also order any disposition made by the debtor within the suspect period to be invalid if the transaction causes damage to the creditors and the lender is aware or is expected to be aware at the time it is made that the debtor is subject to a deficit in its financial position.

The date of suspension of payments is a matter of fact to be determined by the court.

8. Cross-border insolvency

Kuwait is not a party to the UNCITRAL Model Law on Cross-Border Insolvency. There is not much information or case law precedent available in Kuwait that would deal with cross-border or foreign insolvencies that relate to properties or assets located in Kuwait of an insolvent entity. No distinction is made in the Bankruptcy Law between Kuwaiti traders and foreign traders, so it would appear that creditors can commence bankruptcy proceedings against foreign national traders in the Kuwaiti courts.

From a practical perspective, whether a bankruptcy judgment that has been issued in a jurisdiction outside of Kuwait against a foreign entity that has assets in Kuwait would be recognised in Kuwait is likely to depend on whether it is enforceable in Kuwait in accordance with Article 199 of Kuwait Law 38 of 1980 regarding the code of civil and commercial procedure (Code of Civil and Commercial Procedure), which is set out below:

- the courts of the jurisdiction in which the judgment was issued must afford reciprocal treatment to judgments issued by the courts of Kuwait;
- the judgment was issued by a court of competent jurisdiction according to the law of the jurisdiction in which it was issued;
- the parties were duly summoned to appear and were duly represented at the proceedings;
- the judgment has the *res judicata* force according to the law of the jurisdiction of the courts in which it was issued;
- the judgment does not contradict any prior judgment or other rendered by the courts of Kuwait; and
- the judgment does not contain anything in conflict with the general morals or public order of Kuwait.

If a foreign judgment satisfies the conditions outlined in Article 199, an enforcement judgment could be issued by the Kuwaiti courts enforcing the foreign bankruptcy judgment without the need for a review of the merits of the foreign bankruptcy judgment, though this is extremely unlikely as Kuwait has very limited reciprocal arrangements with other countries.

Note, however, that Kuwait is a signatory to the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996 (Convention) and the courts of Kuwait will, subject to Article 199 of the Code of Civil and Commercial Procedure, recognise and enforce judgments rendered in jurisdictions which are also signatories to the Convention. Consequentially, a judgment issued by a court in any of the Gulf Cooperation Council member countries will, subject to Article 199, be enforceable in Kuwait.

While a foreign judgment (other than a judgment issued by a competent court in the countries forming part of the Gulf Corporation Council) is unlikely to be enforced in Kuwait if it does not satisfy the requirements of Article 199 mentioned above, there are also no provisions restricting the power of the bankruptcy trustee or the Bankruptcy Court to look beyond Kuwait to the bankrupt's assets abroad. Nothing in the Bankruptcy Law distinguishes between local and foreign assets. It therefore follows that the bankruptcy trustee or the Bankruptcy Court should be permitted to take action it deems necessary to seize the bankrupt's foreign assets to boost the bankrupt's estate for distribution to the creditors in the Kuwaiti proceedings in accordance with the Bankruptcy Law.

9. Conclusion

Given the recent legislation of the Bankruptcy Law and the establishment of its regulatory public bodies, application of the Bankruptcy Law remains nascent and many areas covered by the legislation have not been sufficiently tested in practice. Furthermore, the Bankruptcy Law left a number of relevant issues largely undefined or unregulated. For example, the Bankruptcy Law only applies to natural persons in their capacity as "traders" (Article 2 of the Bankruptcy Law).

The legislation does not precisely define what constitutes trading activity, which leaves the issue to be decided by the courts based on the general provisions of Decree-Law No. 68 of 1980 promulgating the Kuwaiti Commercial Code.

In a ruling by the Kuwait Court of Appeal in December 2023 (Appeal no. 3945 of 2023), doctors who own and run private medical clinics were excluded from the scope of the Bankruptcy Law. The ruling raises serious questions as to whether the Bankruptcy Law applies to other professional businesses of an individual nature (such as law firms, auditors, engineers and other consultants).

In addition to natural persons having a trader's capacity, the applicability of the Bankruptcy Law extends to Kuwaiti companies (including companies owned by the State) and collective investment schemes (such as funds). However, the legislation is silent with respect to public corporations and other entities established by Emiri decrees.

Another area of ambiguity under the Bankruptcy Law is the point at which the outset of insolvency begins. This is especially relevant to the court's determination of preference periods. The legislation equates the suspension of debt payments with the outset of insolvency for the purpose of setting preference periods. This may not be a definitive factor in assessing when a debtor's insolvency began, and it is not in line with best international standards.

Unless it is part of a restructuring plan or a preventive settlement, or pursuant to the judge's decision, the Bankruptcy Law restricts setting-off debts which arise after the declaration of bankruptcy (i.e. netting) between a debtor, subject to any proceedings under the Bankruptcy Law, and another creditor (Article 238 of the Bankruptcy Law), which may cause lengthier and less efficient liquidation processes than if netting was a permitted course of action.

SULTANATE OF OMAN

1. Introduction

The legal framework for bankruptcy in Oman is governed by Royal Decree 53 of 2019 (Bankruptcy Law).

The Bankruptcy Law came into effect on 1 July 2020, and applies to "entrepreneurs" or "merchants" as defined under the Law of Commerce (Royal Decree 55 of 1990) (Law of Commerce).[1] This includes both natural and legal persons.[2] The Bankruptcy Law does not apply to business entities licensed by the Central Bank of Oman in accordance with the provisions of the Banking Law (Royal Decree 113 of 2000) or insurance companies licensed under the provisions of the Insurance Companies Law (Royal Decree 12 of 1979).[3]

The Bankruptcy Law provides three court-governed procedures which companies must follow if they are facing financial difficulty: reorganisation, composition and bankruptcy. Provisions relating to optional liquidation and judicial liquidation are also set out in the Commercial Companies Law (Royal Decree 18 of 2019) and its accompanying executive regulations (Ministerial Resolution 146 of 2021) (together, the Commercial Companies Law).

2. Procedures under the Bankruptcy Law

2.1 Reorganisation[4]

Reorganisation is a procedure that allows a debtor company to restructure its debts under a plan approved by the court and the creditors, with the aim of overcoming its financial and administrative difficulties. The debtor must apply to the Department of Supervision and Control of Commercial Establishments (Competent Department) at the Ministry of Commerce, Industry and Investment Promotion (MOCIIP) within six months from the date of business hardship.[5] The debtor must not have committed fraud and must have been constantly engaged in business for two years preceding the application date.[6] A company may not, however, seek reorganisation while undergoing liquidation.

The Competent Department conducts mediation sessions to facilitate a settlement agreement between the parties.[7] If a settlement is reached, the Competent Department shall document the acceptance and refer the matter to the court for approval.[8] If a settlement is not reached, the application for reorganisation is considered rejected, with the chance for appeal within 15 days of the notice of rejection. If appealed, the court is required to decide the appeal in seven days, and that decision is final.[9] The Competent Department or the court can also form a reorganisation committee to develop and implement a reorganisation plan.[10] The reorganisation committee is comprised of experts listed on the roster of bankruptcy experts, and its function is to provide to the Competent Department or the court (depending on which called for the committee's formation) its opinion on the cause of the business hardship of the debtor, the feasibility of reorganisation and its proposed reorganisation plan.[11]

The reorganisation plan, once it receives the approval of the court, must be completed within five years. No legal proceedings may be instituted between the debtor and the signatories of the reorganisation plan in relation to the plan,[12] and the debtor remains liable for obligations or contracts arising or entered into before or after the approval date of the reorganisation plan, so long as these obligations or contracts do not conflict with the plan.[13] During the implementation of the reorganisation plan, the debtor cannot conduct any acts that may affect the interests of the creditors, including disposal of assets that have nothing to do with its normal business activities, making donations or gifts, borrowing or lending, or conducting any other act of donation, guarantee or pledge or any similar act, in violation of the reorganisation plan.

2.2 Composition[14]

Composition is a procedure that allows a debtor company which is experiencing financial hardship to propose a settlement with its creditors, subject to the approval of the court and a majority of the creditors, to avoid bankruptcy. The debtor must apply for a composition to the court and must demonstrate that its hardship is not caused by fraud or fault of a party other than the debtor, and that it has been engaged in business for two years preceding the application date.[15]

The court appoints a composition trustee from among the experts listed on the roster of bankruptcy experts to supervise the debtor's property, and a magistrate to oversee the composition procedures.[16]

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1 Bankruptcy Law, Article 2.
2 Law of Commerce, Article 16.
3 Bankruptcy Law, Article 2.
4 *Idem,* Chapter 1 of Part 1.
5 *Idem,* Article 8.
6 *Idem* Article 6.
7 *Idem,* Article 11.
8 *Idem* Article 12.
9 *Idem,* Article 13.
10 *Idem,* Article 14.
11 *Idem,* Article 15.
12 *Idem,* Article 22.
13 *Idem,* Article 18.
14 *Idem,* Chapter 2 of Part 1.
15 *Idem,* Article 24.
16 *Idem,* Articles 33 and 34.

The debtor can continue to manage its property under the supervision of the composition trustee, but will not be allowed to make donations, enter into settlements or mortgages or transfer ownership without the magistrate's permission.[17]

When the judgment commencing the composition procedures is announced, all legal proceedings and enforcement procedures against the debtor shall be suspended. Legal proceedings and enforcement procedures instituted by the debtor remain valid while the composition trustee is involved. Further, once the judgment commencing the composition procedures is announced, it is not permissible to adhere to the registration of mortgage and liens imposed on the property of the debtor.[18]

The composition trustee prepares a list of debts and calls a meeting of creditors to vote on the composition proposals.[19] The composition can grant the debtor time limits, debt relief or repayment based on solvency,[20] and takes effect for all unsecured creditors once endorsed by the court.[21] The composition will be finalised when its conditions are completed but can be invalidated if the debtor fails to implement them or commits fraud.[22]

2.3 Bankruptcy[23]

Bankruptcy is a procedure that declares a debtor to be insolvent and unable to pay its debts and liquidates its assets to distribute them among creditors. A failure to pay fines, taxes, fees or social insurance fund contributions is not sufficient for a bankruptcy petition.[24]

The bankruptcy petition can be filed by the debtor, the manager, the liquidator or a creditor of the company, and must meet certain conditions and time limits.[25] The court appoints a bankruptcy trustee from among the experts listed on the roster of bankruptcy experts to manage and safeguard the bankrupt estate, and a judge to monitor and order the bankruptcy proceedings.[26]

If a debtor pays all its debts before the adjudication of the bankruptcy, the court will invalidate the adjudication of bankruptcy and the debtor bears all the expenses of the lawsuit.[27] The court may also, at any time and at the request of an interested party, initiate mediation proceedings to reach a judicial composition.[28]

If a judgment for judicial composition is issued, all legal effects of the bankruptcy proceedings will be extinguished, the mandate of the bankruptcy trustee will terminate and all documents will be returned to the debtor.[29] After the adjudication of bankruptcy, the court forms a creditors' committee to represent their interests and claims.[30]

Secured debtors that hold registered mortgages or liens do not form part of the committee.[31] The bankruptcy affects the disposition of the debtor's property, the repayment of its debts, the suspension of individual lawsuits and the execution of judgments against it.

3. Optional and judicial liquidation under the Commercial Companies Law

The liquidation of companies in Oman is also governed by the provisions of the Royal Decree 18 of 2019 (Commercial Companies Law). Liquidation proceedings can be initiated for various reasons, including: (i) reasons stipulated in the company's constitutional documents; (ii) failure of the company to carry out its business from the date of incorporation or suspension of its business for more than two years; (iii) the transfer of stocks or shares to a number of partners or shareholders less than the minimum number set by law; (iv) if the capital is decreased below the minimum to be provided and it is not possible to increase it within the set time limit; (v) the expiration of the company's term; (vi) achievement or impossibility of achieving its purpose; (vii) bankruptcy or loss of all or most of its capital if such loss hinders the effective use of the remaining capital; or (viii) a decision by the partners or shareholders.[32] Upon dissolution, a company retains its legal personality to the extent necessary for liquidation, and the term "under liquidation" is added to its name.[33] The powers of those authorised to manage the company cease upon dissolution and any acts performed on behalf of the company post-dissolution are subject to personal liability of those who have performed them.[34] Liquidation can be either optional and initiated by the partners or shareholders, or judicial and initiated by a court order.

Liquidation proceedings are carried out in accordance with the steps provided for in the resolution or judgment, as the case may be.

17 *Idem*, Article 39.
18 *Idem*, Article 40.
19 *Idem*, Articles 44 and 49.
20 *Idem*, Article 60.
21 *Idem*, Article 62.
22 *Idem*, Article 66.
23 *Idem*, Part 2.
24 *Idem*, Article 73.
25 *Idem*, Articles 69, 72 and 189.
26 *Idem*, Article 78.
27 *Idem*, Article 85.
28 *Idem*, Article 166.
29 *Idem*, Article 171.
30 *Idem*, Article 120.
31 *Ibid.*
32 Commercial Companies Law, Article 40.
33 *Idem*, Article 41.
34 *Idem*, Article 42.

If the resolution or judgment does not contain any such stipulations, the following steps are to be adhered to:[35]

- the liquidator shall notify all creditors by registered letters with acknowledgment of receipt on their addresses recorded by the company of the initiation of the liquidation proceedings and shall invite them to file their claims against the company. If the creditors' addresses are unknown, they shall be notified and invited to file their claims via the Official Gazette. In all cases, creditors are granted a grace period of 180 days from the date of publishing to file their claims. The liquidator shall serve the notice within seven days from the date of depositing the liquidation resolution or judgment with the Companies Registrar (being MOCIIP);
- all valid claims filed against the company shall be settled, provided that the rankings of debts are accounted for, after liquidation expenses and the liquidator's fees are settled; and
- the remaining assets shall be distributed between the partners or shareholders in accordance with the incorporation documents. If the incorporation documents do not contain a provision to that effect, the remaining assets shall be distributed in proportion to the contribution of each of them to the capital of the company.

If the net assets are not sufficient to cover the full value of the stocks or shares, as stated in the incorporation documents, the deficit shall be divided among the partners or shareholders at the same ratio of loss incurrence.

3.1 Optional liquidation

Optional liquidation occurs when the partners or shareholders of a company voluntarily agree to dissolve and liquidate the company.[36] The process begins with an application submitted to the Companies Registrar through its electronic system, accompanied by necessary documents such as the minutes of the partners' meeting approving the dissolution and the liquidator's consent to manage the liquidation process. The Companies Registrar examines the application and, if approved, publishes an announcement in the Official Gazette.

The liquidator is responsible for notifying creditors, settling valid claims and distributing remaining assets among partners or shareholders according to their capital contributions. The liquidation process must be completed within a specified period and, upon completion, a final report is submitted by the liquidator to the partners or shareholders for approval. The Companies Registrar then publishes an announcement of the termination of liquidation in the Official Gazette.[37]

3.2 Judicial liquidation

Judicial liquidation is initiated by a court order at the request of concerned parties or MOCIIP. This process begins with an application submitted to the Companies Registrar through its electronic system, accompanied by a judicial decision or judgment initiating liquidation.

The Companies Registrar examines and approves the application if conditions are met. The liquidator appointed by the court is responsible for managing the liquidation process, which includes notifying creditors, settling claims and distributing assets. The termination of judicial liquidation follows similar procedures as optional liquidation, with a final report submitted to the court for approval.

The Companies Registrar publishes an announcement of the termination in the Official Gazette. Judicial liquidation ensures that all legal requirements are met and provides a structured process for resolving disputes and protecting creditors' rights.[38]

4. Financial restructuring committee

Under the Bankruptcy Law, when a debtor applies for reorganisation, the Competent Department (during the mediation phase for settlement) or the court (at any time during the proceedings) may form a reorganisation committee to develop and implement a reorganisation plan. The reorganisation committee is tasked with developing a plan for the reorganisation, management and appraisal of the assets of the debtor.[39]

The reorganisation committee then submits a report to the Competent Department or the court (as the case may be) giving its opinion on the cause of the business hardship, the feasibility of reorganisation and the proposed reorganisation plan. Once approved by the court, the reorganisation plan is binding on all parties and must implemented within five years.[40]

5. Secured creditors' rights and enforcement issues

Under the Bankruptcy Law, secured creditors (that is, creditors that have a security right in-rem which has been registered) have the right to take appropriate actions to sell the movables or real property over which their charge has been created, in accordance with the method specified in the security contracts, and to satisfy their rights that are secured by such assets or real property, not later than one year from the date of a bankruptcy declaration.[41] If the mortgaged property is sold at a price exceeding the debt value, the excess amount shall be collected for the account of the creditors' committee.[42]

In terms of enforcement, the creditor is required to prove that a debt was owed and would therefore first need to obtain a judgment against the debtor for the debt, and thereafter enforce the security. This can be time-consuming and costly.

35 *Idem,* Article 46.
36 Commercial Companies Regulations, Article 24.
37 *Idem,* Article 25.
38 *Ibid.*
39 Bankruptcy Law, Article 14.
40 *Idem,* Article 15.
41 *Idem,* Article 206.
42 *Ibid*.

6. Directors' liability

Under the Bankruptcy Law, the court may, either on its own volition or at the request of the Bankruptcy Judge, decide that the extinguishment of civil rights applicable to declared bankrupt debtor extends to the company's board members or directors who had committed serious mistakes, due to which the company suffered financial hardship and was unable to pay off its debts.[43]

The court may decide the bankruptcy of each person who, under the company's umbrella, conducted business for their own benefit and disposed of company property as if it were their own.

If the company's assets do not cover at least 20% of its debts, the court may order the board of directors, in whole or in part, jointly or severally, to pay off the company's debts, unless they prove that they had acted with diligence in managing the company's affairs.[44]

7. New money and super priority

While there is no strict concept of a super-priority status being awarded to new creditors, under the Bankruptcy Law, a debtor may, after obtaining the approval of the Bankruptcy Judge, engage in new business using funds other than the bankruptcy estate. The creditors whose debts arise on account of such business shall have priority to satisfy their rights from its property.[45]

8. Voidable transactions

Under the Bankruptcy Law, a judgment may nullify a mortgage or lien over the debtor's property if the mortgage or lien was registered after the payment default date, and after the lapse of 30 days from the creation of the mortgage or lien. The creditor with a mortgage or lien with the rank after the creditor whose mortgage or lien is set aside will take that creditor's place in the ranking. The creditor whose mortgage or lien is set aside would then receive only an amount up to the amount due for payment to them as an unsecured creditor.[46] Further, the bankruptcy trustee may request that a judgment be issued to set aside the debtor's dispositions if they have occurred prior to the adjudication of bankruptcy.

If a judgment is issued, the creditor shall return the amount received from the debtor or the value of the object at the time of receipt thereof. The creditor shall also pay the revenue or proceeds of the object received from the date of receipt thereof. The creditor, however, does have the right to get back the compensation initially given to the debtor if the compensation is available in the debtor's estate. If the compensation is not available from the debtor's estate, the creditor has the right to claim the benefit they derived from the disposition from the creditors' committee, and to intervene in the bankruptcy proceedings as an unsecured creditor to the value of the benefit.[47]

9. Cross-border insolvency

As of the date of this publication, Oman is not party to the UNCITRAL Model Law on Cross-Border Insolvency. However, under the Bankruptcy Law, and without prejudice to the effective international conventions to which Oman is a party, any foreign entrepreneur who has a branch or an agency in Oman can be declared bankrupt in Oman, even if they have not been declared bankrupt in a foreign jurisdiction.[48]

Foreign law judgments can be enforced in Oman. Pursuant to Articles 352 to 355 of the Law of Civil and Commercial Procedure (Royal Decree 29 of 2002), applications may be submitted to the courts of first instance in Oman for enforcement of judgments and orders passed by foreign courts. However, for the execution of a foreign judgment, the court in Oman needs to be satisfied that:

- no Omani Court has jurisdiction in the dispute and the foreign court did have jurisdiction;
- the parties in relation to which the judgement was issued has been given due notice of the proceeding and were represented;
- the foreign judgment is final;
- the judgment does not contradict any judgement issued in Oman, and contains nothing that would be in breach of public policy, order or morals; and
- the foreign country whose courts rendered the judgment sought to be enforced must itself provide for the enforcement of Oman judgments under like conditions.

In practice, however, the above criteria are likely to be applied restrictively and it is therefore unlikely that a judgment given by foreign courts would be enforced or recognised by the Omani Courts.

43 *Idem,* Articles 108 and 193.
44 *Idem,* Article 193.
45 *Idem,* Article 117.
46 *Idem,* Article 112.
47 *Idem,* Articles 123 and 124.
48 *Idem,* Article 4.

STATE OF QATAR

1. Primary insolvency regime in Qatar

The below outline considers the insolvency regime that applies in Qatar, as distinct from the Qatar Financial Centre (QFC), a financial and business hub located in Doha which has its own system of civil and commercial law and regulations, designed to attract foreign companies to do business within the QFC in the confidence that their transactions will be governed by regulations reflecting international common practice.

Separate analysis of the insolvency regime that applies in the QFC is provided in section 2 of this chapter.

1.1 The nature and scope of bankruptcy

Law No. 27 of 2006 on the Commercial Code sets out the general bankruptcy provisions that apply to traders[1] in distressed financial circumstances that are not able to pay, or have stopped payment of, commercial debts.

Bankruptcy is declared after the adjudication of bankruptcy by a court in Qatar. Under Article 606 of the Commercial Code, "any trader whose financial affairs are in difficulty and who ceases to pay its commercial debts at their maturity date may be declared bankrupt. The use by the trader of illegal or unusual means that evidence the dire state of its financial affairs in order to settle its debts shall be considered cessation of payment."

Thus, in order to be declared bankrupt, the following three criteria must be met:

- the debtor must be a trader;
- there must be cessation of the payment of commercial debts which reflects the collapse of the debtor's financial status; and
- a court ruling declaring bankruptcy must be issued.

Pursuant to Article 608 of the Commercial Code, a bankruptcy procedure may be initiated by:

- the debtor itself;
- court summons by one or more creditors that have unpaid debts;
- the public prosecutor; or
- the court, *ex proprio motu*.

If the criteria to declare bankruptcy are met, the court shall hand down a judgment declaring the debtor bankrupt and appointing a trustee / bankruptcy manager.

The judgment can also set the provisional date of cessation of payments to two years prior to the declaration of bankruptcy.

Following the bankruptcy judgment:

- all monetary debts due by the debtor shall become due;
- the period between the cessation of payments and the declaration of bankruptcy is known as the suspect period. This may give rise to the nullity of certain acts performed by the bankrupt party to safeguard the creditors' interests. Under Article 635 of the Commercial Code, these acts include:
  - (a) all contributions, except for customary small gifts;
  - (b) payments made in respect of debts that have not yet become due (i.e. prior to the maturity date);
  - (c) payments made in respect of due debts in a form other than the one agreed upon. Payment by commercial instruments or bank transfer shall be deemed the same as payment in cash; and
  - (d) any mortgage or any other securities contracted after the debt has arisen.

Further, any act undertaken by the bankrupt other than the foregoing during the suspect period may be ruled of no effect against the creditors if it is detrimental to them, and if it transpires that the third party having dealt with the bankrupt was aware at the time that the bankrupt had ceased payments;

1 According to Article 15 of the Commercial Code, branches of foreign public institutions and companies that perform commercial activities in Qatar will also be considered traders. Further, according to Article 5 of the Commercial Code, banking transactions, financial exchanges, investments and the provision of financing are considered commercial activities if they are carried out in a professional capacity.

- the trader loses all powers over its assets and the right to take legal action in matters regarding the latter, with these powers being transferred to the trustee in bankruptcy; and
- creditors may not:
  (a) individually sue the bankrupt party; or
  (b) enforce sentences, even if they precede the bankruptcy.

Exceptions are made for certain creditors who have special preferential claims, such as mortgagees and pledgees.

The creditors may file for the return of monies paid or for the release of the mortgage or security over the debtor's assets (or proceeds of any enforcement, if any) or for the return of the debtor's asset (subject to any payment made by the transferee of the relevant monies or asset).

There is no provision in the law relating to substitution of assets and we are not aware of any court decisions on this point, but we do note the following:

- provided the value of the assets being substituted was the same as those previously transferred, it could be argued that it does not fall within the provision as there is no detriment to the other creditors; and
- this situation is less likely to occur in Qatar than in other jurisdictions given the relatively short claw back period

1.2 Protective composition proceedings prior to a declaration of bankruptcy

Under the Commercial Code, there is provision for a judicial composition with creditors following the adjudication of bankruptcy. The judge in bankruptcy will issue an invitation to creditors to attend a meeting within seven days of the finalisation of the list of debts. A composition will only be effective if agreed by the majority of the unsecured creditors holding two-thirds of the debt. If no agreement is reached at the meeting, the deliberations may be extended by a further 10 days in accordance with Article 738 of the Commercial Code.

Additionally, a trader is entitled to request a preventative composition by filing an application with the court in Qatar.

An application must be filed within 20 days of the trader's business undergoing financial distress or the trader ceasing to make payments. The trader is required to provide a detailed analysis and reasons for its critical financial status and the proposal for the composition, and the settlement must not constitute less than 50% of the debt. The relevant provisions are set out in Articles 792 to 797 of the Commercial Code.

The court shall be entitled to undertake measures necessary to preserve the trader's assets until the court has issued its decision on the application. The court may also appoint an expert to present a report on the financial status of the trader. If the court decides to accept the request for composition, it shall appoint a judge to supervise the composition proceedings, appoint managers to initiate the proceedings and fix a date of the meeting of the creditors to list the debts and discuss the composition proposal.

According to Articles 810 and 811 of the Commercial Code, the trustee will, within five days from its appointment, register the arrangement procedures in the Commercial Register of the debtor and publish a summary of the arrangement in two daily newspapers, as well as send an invitation to the creditors to attend the creditors' meeting. The trustee then submits to the court a report on the financial status of the debtor and the creditors' names and debts, five days prior to the creditors' meeting.

The bankruptcy judge will then fix a date for the meeting of the creditors to discuss the debtor's proposed arrangement. The debtor may propose to amend the proposed arrangement during the discussions. The arrangement will be binding on all unsecured creditors if creditors comprising a majority of those who vote at the meeting and two thirds of the debt represented by the creditors voting at the meeting approve as per Article 817 of the Commercial Code. If no agreement is reached at the meeting, the deliberations may be extended by a further 10 days.

1.3 Claw back

Further to the above, in a bankruptcy, a transaction may be set aside if it is a relevant transaction as described below, and it is made after the "date of cessation of payment" preceding bankruptcy. This is the date set by the court, and it is essentially the date of insolvency. A transaction is a relevant transaction if it is:

- a donation;
- the payment of a debt before maturity or on different terms than agreed; or
- any other transaction that is prejudicial to creditors and, at the time of the transaction, the beneficiary of the transaction knew of the debtor's insolvency.

1.4 Set off post-insolvency

Article 632 of the Commercial Code states that "set-off between the bankrupt's assets and liabilities does not take place after the adjudication of bankruptcy, except if they are interconnected. Interconnection occurs (…) if the (…) assets and liabilities arise from the same subject matter, or they arise from the same current account."

Accordingly, following the adjudication of bankruptcy, set-off is not permitted unless there is a link between the insolvent party's rights and obligations.

Qatari law does not provide a clear definition of interconnection or "connexity" of obligations.

However, connexity could exist if the issues arise from the same subject matter – for example, where there is a set-off for an amount due for goods against a valid claim for a defect in the goods. In this case, the obligations giving rise to the set-off are economically linked and cannot be separated. Hence, it is not sufficient that connexity arises from the same agreement (which represents a formal element). It also has to arise in relation to the same issue or matter under the agreement (which is a substantive element). In Qatar, there is no body of case law that sets the boundaries of the concept of "connexity" of obligations, therefore each individual case will be determined on its own facts.

1.5 Interim administration and liquidation regime under the QCB Law

Law No. 13 of 2012 on the Qatar Central Bank Law and the supervision of Financial Institutions (QCB Law) is applicable to the financial institutions licensed by the Qatar Central Bank (QCB). A financial institution includes banks, finance companies, exchange houses, insurance companies and payment services providers.

Articles 176 to 189 of the QCB Law deal with interim administration and liquidation of a financial institution.

Article 176 of the QCB Law provides that the QCB may issue a decision to place the financial institution under interim administration if the institution is threatened with insolvency, or otherwise at the request of the financial institution.

The financial institution is deemed to be threatened with insolvency in any of the following circumstances:

- the financial institution has stopped paying its financial obligations at maturity;
- the financial institution has lost half of the balance of equity or violated the capital adequacy system determined by the QCB, unless there is a plan to cover the required amount of the deficit within the period specified by the QCB; or
- the financial institution in the state of the head office faced the risk of bankruptcy or insolvency, as determined at the discretion of the QCB.

A decision to place a financial institution under interim administration rests with the board of the QCB and is taken in light of the circumstances prevailing at the relevant time.

In accordance with Article 178 of the QCB Law, the QCB may either appoint itself, or an external third party, as the interim administrator to undertake the temporary management of the financial institution. The terms of appointment and the duties to be undertaken by the interim administrator are determined by the board of directors of the QCB in each case.

The scope of authorisation and entitlements of the interim administrator are set out in Article 180 of the QCB Law, and include:

- taking control of the properties and equity, exercising all the powers of shareholders, directors and other management, taking the debt and entitlement collection procedures, maintaining and reserving the properties and assets of the financial institution; and
- taking the procedures the QCB deems appropriate to achieve the best financial conditions to protect the funds and rights of depositors, investors and customers, including:
  (a) determining the position of the financial institution under liquidation;
  (b) supporting the financial institution and converting it to an acceptable financial position;
  (c) offering the property, assets, interest and revenue of the financial institution for sale;
  (d) selling or merging the financial institution with any other financial institution;
  (e) paying and repaying the debts of the financial institution according to a studied bailout; and
  (f) working on finding solutions and adjustments in the financial and other issues.

Article 182 of the QCB Law states that, during the interim administration period, the QCB shall have the power to manage and control the assets, branches, books and records of the financial institution. Further, no order can be issued (by a court or other authority other than the QCB) to seize any assets or monies of the financial institution.

Lastly, the QCB may dispose of assets and mortgaged property in accordance with the provisions of the relevant mortgaged contracts.

During the interim administration period, the interim administrator will manage the financial institution's affairs with the aim to revive its business and operations. If the operations of the financial institution cannot be revived by the end of the interim administration period, then in accordance with Article 185 of the QCB Law, the Governor of the QCB may decide to revoke the licence of the financial institution and the QCB shall develop a plan for liquidation of the assets and obligations of the financial institution. The liquidation plan must be implemented and executed under the QCB's supervision.

As regards valuation of the assets and properties of the financial institution, Article 187 of the QCB Law states that the QCB shall have the right to determine the net value of the properties and assets of the financial institution whose licence has been revoked pursuant to Article 185. The QCB will issue a decision with respect to the claims received by it as part of the liquidation process of the financial institution. The QCB will determine the legality of the claims received by it and shall have the right to exclude any claim which has not been established.

Article 189 of the QCB Law sets out the order for the settlement of claims, returns and interests upon liquidation of the deposit-taking financial institution placed under interim administration. The order for settlement will be:

1. fees of the administrator or liquidator;
2. entitlements due to the employees of the financial institution, except the employees found to be involved in any conduct or action that has affected the rights of shareholders, depositors and other clients of the financial institution;
3. deposit balances of all kinds inside and outside Qatar, provided that compulsory liquidation is not carried out on the branches of the financial institution outside Qatar, or does not conflict with the laws of liquidation in the home jurisdiction;
4. deposits of financial institutions inside and outside Qatar;
5. other credit balances. The QCB shall set the instructions and procedures for the settlement of other commitments within and outside the balance sheet;
6. support loans;
7. rights of the government related to taxes, duties and rights of the QCB; then
8. shareholders' equity.

Outstanding balances from funds received by the financial institution to invest them for the account of third parties shall be paid directly without being subject to the order referred to in the preceding paragraph after deducting the commissions due.

1.6 Expected developments

In 2017, the Qatar cabinet approved a draft law on corporate bankruptcy and prevention which was aimed at developing detailed regulations for corporate bankruptcy and prevention, taking into account international standards in this regard. However, the draft law has not yet been passed and it is unclear if and when this law might be proclaimed. Note the draft law has not been made available for public inspection, so we are unable to expand on it at this stage.

1.7 Cross-border insolvency

Qatar is not a party to the UNCITRAL Model Law on Cross-Border Insolvency. There is not much information nor case law precedent available in Qatar that would deal with cross-border or foreign insolvencies relating to properties or assets located in Qatar of an insolvent foreign entity. The Commercial Code does not have any provision that deals with such insolvencies.

Where an insolvency judgment has been issued in a jurisdiction outside of Qatar against a foreign entity that has assets in Qatar, we would expect that such foreign judgment would appoint liquidators or insolvency managers to deal with the insolvent company's assets. Based on the authority set out in the foreign court judgment (which should be legalised up to the Qatar Embassy in the relevant jurisdiction and attested at the Ministry of Foreign Affairs in Qatar), the liquidators or insolvency managers should be able to deal with the assets in Qatar – for example, to sell or access the relevant assets and repatriate the funds outside of Qatar. In the event that any counterparty (for example, banks, share brokers or other government entities) does not permit the liquidators or insolvency managers to have access to or sell the assets in Qatar, the foreign court judgment would need to be recognised by way of an order of the Qatar court and permitting an acceptable manner to deal with the relevant assets in Qatar.

It should be noted that, in practice, foreign court judgments are not directly enforceable in Qatar (other than the countries forming part of the Gulf Corporation Council) due to lack of reciprocity on enforcing foreign court judgments, and we are not aware of any case precedent in Qatar dealing with such an issue, particularly where the foreign insolvent entity has no presence in Qatar.

As regards a scenario where an insolvent or bankrupt entity in Qatar has assets in a foreign jurisdiction, there are no provisions in the Commercial Code that restrict the power of the bankruptcy administrator to look beyond Qatar to the bankrupt's assets abroad. Nothing in the Commercial Code distinguishes between local and foreign assets. It therefore follows that the bankruptcy administrator should be permitted to take action it deems necessary to seize the bankrupt's foreign assets to boost the bankrupt's estate for distribution to the creditors in the Qatari proceedings. The ease with which this action is taken is likely to depend upon the jurisdiction of the assets and the cooperation that such jurisdiction is willing to provide to the bankruptcy administrator in Qatar in respect of the Qatari proceedings.

In relation to the countries forming part of the Gulf Corporation Council, Decree No. (16) of 1996 in respect of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notification (Convention) authorises the execution of judgments issued by courts of Gulf Cooperation Council member countries. Article 3 of the Convention states:

(a) "A judgment issued by the courts of a member state may be executed in any of the states if such judgment may be executed in the state where the court that issued the judgment is located.

(b) The procedures of executing a judgment shall be governed by the law of the state where the judgment is required to be executed, unless this agreement provides otherwise."

Consequently, a judgment issued by a court in any of the Gulf Cooperation Council member countries will be enforceable in any of the other Gulf Cooperation Council member countries without referring to the subject matter of the judgment according to Article 7 of the Convention.

2. Insolvency regime in the QFC

2.1 Overview

The QFC is a business and financial centre located in Doha. It was established by virtue of the QFC Law (as amended), with the aims of enhancing growth and diversification of Qatar's economy, and providing an attractive platform for firms to establish and do business in Qatar and the region. The QFC provides a transparent environment and offers flexibility to conduct business, inside or outside Qatar. The QFC offers its own legal, regulatory, tax and business infrastructure. Since the QFC is not a separate geographical zone, all entities in the QFC operate on a fully onshore basis. This enables them to access the local market and operate from more than 50 locations all over Doha, with no restrictions on the currency in which they can trade.

The QFC predominantly comprises financial service firms, insurance companies, law firms, accountancy firms and asset management / investment firms.

There are two primary regulators in the QFC: (i) the QFC Authority; and (ii) the QFC Regulatory Authority (QFCRA). The QFC Authority is responsible for managing commercial and strategic aspects of QFC registration and business development. The QFCRA is an independent body established under the QFC Law, which authorises and supervises financial services firms that conduct regulated activities in or from the QFC.

Insolvency proceedings in the QFC are regulated under the QFC Insolvency Regulations No. 5 of 2005 (Ver 3, December 2021). A QFC entity may be subject to the following types of insolvency proceedings in the QFC:

(a) in relation to QFC companies:[2]

  (i) administration, company arrangements or winding up under the relevant provisions of the Insolvency Regulations;

  (ii) compulsory winding up (upon an application by the QFC Authority to the QFC courts) if it appears to the QFC court that it is just and equitable that the relevant QFC company should be wound up (Article 80 of the Insolvency Regulations); or

  (iii) voluntary winding up by the QFC company, including where the QFC company cannot continue its business due to its liabilities and believes it is advisable for the company to be wound up (Articles 58 and 60 of the Insolvency Regulations); and

(b) in relation to a branch of a foreign company established in the QFC, administration and / or winding up under the provisions of Article 181 of the Insolvency Regulations.

2.2 Claw back

The provisions relating to claw back discussed below are applicable in relation to transactions where at least one of the parties is a QFC entity, and that QFC entity is subject to insolvency.

Under Article 142 of the Insolvency Regulations, a transaction could be set aside:

- if it constitutes a transaction at an undervalue[3] with the insolvent party (in this case, the counterparty in the QFC) – that is, if the insolvent party made a gift to the other party to the transaction or otherwise entered into a transaction with that other party on terms that provide for the insolvent party to receive no consideration, or consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by such other party;

2 An entity which is formed and registered under the Companies Regulations No. 2 of 2005 or, in the case of a limited liability partnership, formed and registered under the QFC Partnership Regulations No. 13 of 2007.

3 Insolvency Regulations, Article 142(2).

- if the court is not satisfied that:

  (a) the insolvent party entered into the transaction in good faith and for the purpose of carrying out its business; and

  (b) at the time the insolvent party entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the insolvent party; and

- if the transaction was entered into during the period of:

  (a) two years ending with the commencement of liquidation or administration, with respect to a transaction entered into with a connected person (otherwise than by reason only of being an employee of the insolvent party); or

  (b) six months ending with the commencement of liquidation or administration, with respect to any other transaction at an undervalue.

Further, under Article 143 of the Insolvency Regulations, a transaction could be set aside:

- if:

  (a) it constitutes a preference given to a person – that is, (i) the person is one of the insolvent party's creditors or a surety or guarantor for any of the insolvent party's debts or other liabilities; and (ii) the insolvent party does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the insolvent party going into insolvent liquidation, will be better than the position the creditor / surety / guarantor would have been in if that thing had not been done; and

  (b) the insolvent party giving the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned above (we note that there is a presumption that the insolvent party which has given a preference to a person connected with it, other than by reason only of being its employee, at the time the preference was given has been influenced in deciding to give it by such a desire); and

- if the transaction was entered into during the period of:

  (a) two years ending with the commencement of liquidation or administration, with respect to a transaction entered into with a connected person (otherwise than by reason only of being an employee of the insolvent party); or

  (b) six months ending with the commencement of liquidation or administration, with respect to any other preference.

Lastly, Article 145 of the Insolvency Regulations states that where the insolvent party goes into administration or insolvent liquidation, a security interest over all or substantially all of that insolvent party's property is invalid where:

- the security interest is created in favour of a connected person[4] and was created after a date two years prior to the commencement of administration or liquidation; or

- the security interest is created after a date one year prior to the commencement of administration or liquidation and the insolvent party either was, at the date of the creation or became pursuant to the transaction in respect of which the security interest was created, unable to pay its debts as they fell due.

2.3 Priority of payments

Article 91 of the Insolvency Regulations sets out the priority of distribution of a QFC company's property in case of winding up, which shall be applied in satisfaction of the QFC company's liabilities that rank *pari passu* and shall (unless the Articles of association of the company otherwise provide) be distributed among the members according to their rights and interests in the QFC company, except where a creditor may agree to rank in priority after any other debts.

In a winding up, the priority of payments shall be as follows:

- secured creditors to the extent of their security interest and in the order of priority provided for in Part 5 of the Security Regulations[5] (which set out the general principles of priority between various security interests);

- costs and expenses, including the liquidator's remuneration, properly incurred by the liquidator in the exercise of its functions and, where the liquidation was immediately preceded by an administration, the administrator's remuneration, properly incurred by the administrator in the exercise of its functions;

- preferential creditors having preferential debts[6] as defined in Article 148; and

- unsecured creditors.

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4 Defined in the Insolvency Regulations as "a director or shadow director of a company or a person who, in the opinion of the QFC court, is otherwise connected with a company."

5 QFC Security Regulations No. 14 of 2011 (version 1 December 2011).

6 Article 148 of the Insolvency Regulations stipulates that the following debts of a QFC company shall be preferential debts and the reference to preferential creditors is construed accordingly: so much of any amount which is owed by the company to a person who is or has been an employee of the company by way of remuneration, which shall include any notice period not exceeding three months as does not exceed the sum of USD 50,000; so much of any amount which is owed by the company to a person who is or has been an employee of the company by way of reasonable accrued holiday remuneration and reasonable contributions to occupational pension schemes; and taxes, financial penalties and fees owed by the company to the State of Qatar, the QFC Authority, the Regulatory Authority and the CRO.

2.4 Set off post-insolvency

Article 107 of the Insolvency Regulations applies when, before a counterparty goes into liquidation, there have been "mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation", within the meaning of the Insolvency Regulations.

Under Article 107(2), an account shall be taken of "what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other". Only the balance (if any) of the account owed to the creditor is provable in the liquidation.

Article 107 of the Insolvency Regulations does not apply if the relevant set-off or netting arrangements would be considered transactions at an undervalue or preferences.

Also, under Article 107(3) of the Insolvency Regulations, sums due from the QFC company to another party are excluded if:

- the other party had notice at the time such sums became due that a meeting of creditors had been summoned or (as the case may be) an application for the winding up of the company was pending;
- the liquidation was immediately preceded by an administration and the sums became due during the administration; or
- the liquidation was immediately preceded by an administration and the other party had notice at the time that the sums became due that:

  (a) an application for an administration order was pending; or

  (b) any person had given notice of intention to appoint an administrator.

2.5 Cross-border insolvency

The QFC Insolvency Regulations allow for the recognition of foreign insolvency proceedings in the QFC, and the QFC court may assist with foreign insolvency proceedings. The QFC Insolvency Regulations may be applicable where:

- assistance is sought in the QFC by a court or a representative in connection with a non-QFC proceeding;
- assistance is sought outside the QFC in connection with a proceeding under the Insolvency Regulations; or
- a non-QFC proceeding and a proceeding under the Insolvency Regulations in respect of the same company are taking place concurrently.

Having stated the above, the QFC court may refuse to take an action governed by the Insolvency Regulations and to extend assistance for a non-QFC proceeding, if the action would manifestly be contrary to the public policy of the State and / or the QFC.

A non-QFC representative may apply to the QFC court, along with suitable evidence, for recognition of the non-QFC proceeding in which the non-QFC representative has been appointed.

Upon recognition of a non-QFC proceeding where necessary to protect the assets of the QFC company or the interests of the creditors, the QFC court may, at the request of the non-QFC representative, grant any appropriate relief, including, without limitation: (i) staying the commencement or continuation of individual actions or individual proceedings concerning the QFC company's assets, rights, obligations or liabilities; or (ii) staying execution against the company's assets, or suspending the right to transfer, encumber or otherwise dispose of any assets of the QFC company or entrust the distribution of all or part of the QFC company's assets located in the QFC to the non-QFC representative or another person designated by the QFC court, provided the QFC court is satisfied that the interests of creditors in the QFC are adequately protected.

In terms of seizing assets in different jurisdictions, the QFC Insolvency Regulations give the insolvency administrator, supervisor or liquidator wide authority to act outside of the QFC on behalf of a proceeding under the QFC Insolvency Regulations. Thus, the insolvency administrator is able to take any action deemed appropriate to recover assets in other jurisdictions to realise their value for the benefit of the creditors in the QFC proceedings.

The QFC insolvency regime is a more substantial piece of legislation than the Qatar regime. It offers more certainty to lenders and security holders in terms of the cross-border aspects of the bankruptcy procedure.

KINGDOM OF SAUDI ARABIA

1. Introduction

The New Saudi Bankruptcy Law (Law) was enacted on 4 September 2018 (Royal Decree M40 of 1439) as part of Saudi Arabia's Vision 2030 and to improve the position of the country in the World Bank's Ease of Doing Business rankings. The Law was followed by the implementation of supporting Regulations (Implementation Regulations).

The Law consists of 17 chapters and 231 Articles, and the Implementation Regulations consist of 18 chapters and 97 Articles.

The Law reflects the general direction and pace of international insolvency law reform measures (both in civil and common law jurisdictions), evidenced in reforms within the European Union (the EU Directive on Restructuring and Insolvency 2019 was then at an advanced stage of gestation), the various UNCITRAL Model Laws on insolvency recognition and the influence of institutions such as the World Bank and the European Bank for Reconstruction and Development. Along with a focus on transparency, certainty and efficiency for stakeholders, there is an emphasis where appropriate on preserving enterprise value, including the use of debtor in possession models, statutory enforcement moratoria, super priority finance and composition and cram down measures. The enactment of the Law must also be understood in the context of other legislation implemented in Saudi Arabia in the area of corporate and securities law as part of Vision 2030.

The new Law established a Bankruptcy Commission to keep the Law, Implementation Regulations and other regulations under review and to establish a regulatory regime for bankruptcy practitioners (or as they are referred to in the legislation, "trustees") as well as experts. The Bankruptcy Commission also acts as a liquidator of last resort in the context of the administrative liquidation procedure (as outlined further below).

Figures produced by Teneo at the end of the first quarter of 2024 disclosed 761 cases under the new legislation, the majority of which were administrative liquidations or liquidations (72.5%), but nevertheless there was a sizeable number of financial restructurings (27%).

In accordance with Article 3, the Law applies to natural persons engaging in commercial or professional or any other for-profit activities in the Kingdom, companies and professional companies and other for-profit entities registered in the Kingdom, and non-Saudi investors either holding assets or engaging in commercial, professional or-for profit activities in the Kingdom (but only with respect to assets located in the Kingdom).

Regulated entities, of which there is a substantial list (including banking, financing, insurance and exchange companies, utilities, minerals and energy, infrastructure and special purpose vehicles) cannot be the subject of a petition for any of the procedures without the approval of the relevant competent authority.

The Law and Implementation Regulations were enacted in Arabic. In preparing this chapter, the author relies on the official English translation published by the Bankruptcy Commission.

2. Overview of restructuring and insolvency processes

The Law provides for seven different procedures. The principal ones are the protective settlement procedure (PSP), the financial restructuring procedure (FRP) and liquidation.

These procedures are supplemented by dedicated processes for small debtors, which incorporate several important modifications of the main procedures. A small debtor is a debtor who meets the criteria set by the Bankruptcy Commission in coordination with the Small and Medium Enterprise General Authority (see the definition in Article 1 of the Law).

In addition, there is an administrative liquidation procedure. The latter is available where proceeds from the bankrupt's estate are insufficient to cover the liquidation procedure, and are usually managed by the Bankruptcy Commission in a similar way to the role of the Official Receiver under the United Kingdom's insolvency legislation.

2.1 The PSP and FRP (Chapters 3 and 4 of the Law)

The PSP and the FRP are both composition procedures designed to bind creditors of the debtor to a proposal to compromise the liabilities of the debtor. There are however some striking differences between the two.

The PSP, which is a more lightweight process that is shorter in duration than the FRP, provides for the debtor to remain in possession, whereas a trustee (regulated practitioner) is always appointed in a FRP. Only a debtor can initiate a PSP. However, the debtor only gets the benefit of a moratorium if the debtor's petition for a moratorium is supported by a report from a trustee giving its opinion that the necessary majority of creditors is likely to approve the proposal as well as the feasibility of its implementation.

In the case of a FRP, the debtor, a creditor or the competent authority can initiate the process. However, there are certain protections for the debtor, for example where the debt is disputed or the creditor seeks to abuse the process. A trustee is appointed to the debtor by the court upon initiation of the procedure and assumes certain oversight and management powers of the debtor (described further below).

In both cases, a petition can only be filed if the debtor is either likely to suffer financial difficulties that may lead to distress, or is otherwise actually distressed or bankrupt. A petition cannot be filed if another petition has been filed in the previous 12 months.

The debtor, directors and the auditor are exempt from the provisions of the Companies Law regarding company's serious loss of capital once the FRP is commenced.

Under the PSP, the initial moratorium is for a period of 90 days, extendable by the court for an additional period of 30 days and which can be repeated up to a total of 180 days. Under the FRP, the initial moratorium is for 180 days, extendable for a maximum period of 360 days.

The moratorium stays any bankruptcy procedures, action against assets, enforcement of security (other than with permission of the court) or action against a guarantor (again other than with permission of the court).

Under the provisions applicable to the PSP, creditors' claims are admitted to vote on the proposal where undisputed. Where disputed, the debtor is required to appoint a listed expert approved by the court to estimate the value of the claims included in the proposal to be voted on.

There are more extensive provisions regarding submission and agreement of claims under the FRP and a longer timeframe to do so. The trustee under the FRP must prepare a list of claims, which is submitted to the court. The list discloses the recommendations of the trustee as to which claims should be accepted, rejected or referred to an expert. Creditors whose claims are recommended not to be rejected or referred must be notified, and they can petition the court to have the claim accepted for voting purposes. The proposal itself must provide for the resolution of disputed claims.

Under the provisions applicable to the PSP, the proposal must have the support of the owners (a person or persons who own a stake or share in the debtor's capital). Under the terms of the FRP, the owners can be crammed down. Owners vote in accordance with their own constitutional documents.

In both the PSP and FRP, the proposals shall only be voted on by a creditor whose statutory or contractual rights are affected by the proposal. A class of creditors is only bound by a vote of a majority representing two thirds of the value of debts owed to voters in the same class and that such voters include creditors whose claims represent more than half of the debts of non-related parties, if any.

Under the provisions applicable to the PSP, each affected class must vote on the proposal and approve it. Under the terms of the FRP, a dissenting class can be crammed down. The proposal is confirmed if the court confirms (at the request of the trustee) that the proposal meets the standards of fairness, that either all the classes of creditors and owners accept the proposal or at least one class of creditors accepts the proposal and the creditors whose claims represent at least 50% of the total value of claims of creditors voting in all classes vote in its favour, and if the court determines that the confirmation is in the best interests of the majority of creditors.

The Implementation Regulations set out at some length the detail required for any proposal. The same rules apply to a PSP and a FRP. The proposal must cover the debtor's activities, financial position, assets, security, assets excluded from the proposal, third party assets, debts owed, lawsuits, proposed treatment of claims, new finance, conduct of business during the procedure, proposed classes of claims, voting procedures and timetable for plan implementation. The formation of classes must be based on similar rights and the extent to which the proposal affects those rights.

A trustee appointed to a debtor under the FRP has various powers and duties. He or she has an overall responsibility to verify the soundness of the debtor's management of its business and to monitor its financial operations. These powers and duties are supported by inquisitorial powers.

The trustee must make a decision regarding the debtor's executory contractual obligations based on whether a termination of a contractual obligation is necessary to implement the proposal of the debtor and to protect the interests of the majority of the creditors, taking into account the damage to the contractual counterparty. The trustee must also establish an inventory of the debtor's assets, third party assets and claims of creditors.

Under the PSP, there are more limited provisions concerning executory contractual obligations. There are also safe harbours for government tenders and finance contracts.

Under the provisions applicable to the FRP, the debtor, subject to the powers of the trustee, continues to manage its business and activities under the trustee's supervision. However, the trustee has wide powers of intervention, including replacement of management.

Furthermore, the trustee's approval is required in a very wide range of areas, including the preparation of the proposal itself and the voting procedures, finance, paying debts, vacating leased property, settlements with creditors, providing security, voting on the proposal, hiring professionals, filing and pursuing lawsuits, establishing subsidiaries and selling assets outside the normal course of business.

The trustee oversees the implementation of the plan from the confirmation of the proposal to its completion. The trustee can apply to court for termination of the procedure in a number of circumstances.

2.2 Liquidation (Chapter 5 of the Law)

A debtor, creditor or competent authority may file a petition for the initiation of a debtor's liquidation procedure.

There are rules for a creditor's petition similar to those in United Kingdom law. Notably, the debt must be above the prescribed threshold, the debt must be due pursuant to a writ of execution or a debt document (and not be subject to a dispute) and a request for payment must be outstanding for more than 28 days.

The debtor may object to a petition or may file a petition for the commencement of a PSP or FRP if the criteria are met. Conversely, a creditor may object to a debtor's petition or file a petition for a FRP if it can prove that this best serves the interests of a majority of the creditors. The registration of the petition results in the imposition of a moratorium.

The court will only initiate the process if the debtor is distressed or bankrupt, based on evidence the debtor is unlikely to remain in business and importantly the assets are sufficient to cover the expenses of the liquidation.

The management of the debtor is immediately replaced by the trustee, and any disposition of any of the debtor's assets post-appointment of the trustee is deemed null and void. Assets can be recovered from third parties, who can claim for compensation.

The trustee is authorised to liquidate and sell the assets of the debtor, save where the debtor is a natural person (in order to provide the debtor and its dependents with a decent standard of living based on the trustee's assessment).

As with the FRP, the trustee shall invite the submission of creditors' claims within 90 days of the publication of its invitation. Claims filed after that but before the final distribution may still be accepted.

Debts which are prospective are deemed due upon the initiation of the liquidation.

The trustee is required to convene a meeting of creditors to approve the following: where multiple offers are received to purchase any substantial asset; where the trustee proposes to sell an asset with a value in excess of one quarter of the value of the estate; the initiation of a lawsuit; deferral of the sale of bankruptcy assets; and settlement between the debtor and a third party. Only creditors with undisputed claims can vote in the meeting.

The court may, at the request of the trustee, consider the termination of the employment contracts of the debtor's business in accordance with the provisions of relevant laws.

Distributions are to be made in accordance with a creditor's ranking. Although a single distribution is preferred, allowance is made for multiple distributions and for a creditor who misses an earlier distribution to catch up from later ones. Provision is made for the trustee to retain proceeds for claims which are the subject of judicial dispute.

A natural person is deemed bankrupt for an additional 24 months from the date of the termination of the liquidation.

2.3 Other procedures (Chapters 6 to 9 of the Law)

As noted, the Law incorporates the concept of a small debtor. There are three small debtor procedures based on modified versions of the PSP, FRP and liquidation processes.

These are simplified procedures designed for small debtors which, while similar to the main procedures in concept and operation, are designed to meet the efficiencies that smaller estates require, with shorter timeframes and less court involvement to reduce cost. Chapter 6 sets out the modified PSP, Chapter 7 the FRP and Chapter 8 the liquidation process.

Chapter 9 provides for administrative liquidation, which aims to sell bankruptcy assets whose sale proceeds are unlikely covered by the expenses of the liquidation procedure. The procedure can only be initiated by a debtor or a competent authority. Unlike the other procedures, the Bankruptcy Commission acts as trustee.

Chapter 16 and the Implementing Regulations also provide for deceased debtors.

3. Financial Restructuring Committee (Chapter 4 of the Law)

Pursuant to the provisions applicable to both the FRP and liquidation (but not a PSP), a creditors' committee shall be formed. The detail is set out in the Implementation Regulations in Chapter 2, Articles 24 to 29.

The committee should consist of at least three creditors and in certain circumstances represent 50% of the total value of debts. A creditor's claim must be admitted and be at least partially unsecured. A member can be removed if it is the subject of a procedure, if it does not attend three consecutive meetings without an excuse acceptable to the chairman, if it is no longer a creditor, or where it requests termination of its membership. The court determines which of the members should be chairperson.

The committee's approval is necessary for the disposal of assets in excess of a quarter of the aggregate value of the estate. The committee is required to give its opinion on the proposals and any proposal modification plan, when a debtor seeks secured finance, on any violation of the Law or Implementation Regulations, on termination of contracts, and any other matters referred to it by either the court or under the proposals.

Any reasonable expenses incurred by a member of the committee in attending the meetings are covered out of the assets of the estate.

4. Secured creditors' rights and enforcement issues

Saudi Arabia recognises a wide range of security interests subject to the principles of Sharia law. The law in this area is the subject of two pieces of legislation: the Real Estate Mortgage Law 2012 (REML) – supported by guidance by the regulator of financial institutions the Saudi Arabian Monetary Authority (SAMA) – and the more recent Commercial Pledge Law 2018 (with accompanying regulations) (CPL) enacted as part of Vision 2030.

The REML creates a regime for registered mortgages of land, and the CPL regulates the taking of pledges over a broad class of movable assets. Certain movable assets remain subject to specific regimes, such as listed security and intellectual property, but are otherwise subject to the CPL.

The Law contains a number of provisions which impact on creditors with rights of security.

The first is the moratorium imposed on creditors upon the application by a debtor under a PSP and automatically in the case of a FRP or liquidation. This prohibits the taking or completing of any enforcement procedure against any bankruptcy assets provided as security, except upon the approval of the court. Specific provision is made in the case of a liquidation for the court to, upon the petition of the secured creditor, authorise enforcement against any of the bankruptcy assets securing the debtor's debt.

The second is the power in the context of the FRP and by implication liquidation for a trustee to sell and realise assets which are the subject of security. In the case of the FRP, the trustee can sell assets which are subject to security, but part of the plan set out in the proposals and if approved by the court. Any sale must be at market price on the date of the sale. Fees and expenses can be deducted, and the balance is to be paid into a separate account for the payment of the secured creditor's debt. Any excess is deposited in the debtor's account. In a liquidation, implicitly secured assets are subsumed within the sale of the debtor's estate. If the combination of expenses and secured claims means that there is nothing available for unsecured creditors, the trustee can cease the process of verification of claims given there will not be a distribution to them.

The order of priority of debts in a liquidation is set out in the law. Debts secured by in-kind securities rank first and then other security. After this, certain preferential claims relating to employees, family expenses, business expenses and further employee claims receive priority, and then unsecured debts. Government taxes are subordinate to unsecured creditors' claims.

The third area is that security may be subject to new security for super priority funding, discussed further below.

Finally, to maintain stability of the financial markets, certain contracts and transactions pertaining to arrangements of securities and set off relating to financial transactions are exempted from the Law. Under the Implementation Regulations, further detail is delegated to SAMA and the Capital Markets Authority.

5. Directors' liability (Chapter 13 of the Law)

A whole panoply of provisions, applying to any natural debtor, debtor's managers and promoters of the debtor, is set out in the Law regarding revocable transactions and penalties.

These provisions deal with misuse or misappropriation of the debtor's assets, conducting business for the purpose of defrauding creditors, continuing the business knowing liquidation is inevitable, concluding transactions for no or unfair consideration, and paying debts to the detriment of other creditors.

In addition, there are offences relating to embezzlement or concealing assets, concealing, destroying or altering records, providing incorrect information to the trustee, court or the Bankruptcy Commission, pledging or disposing of assets or paying debts in violation of the Law or a judicial ruling, and generally abusing powers for personal gain or to obtain an unlawful benefit.

Such offences can incur a sentence of imprisonment of up to five years and / or a fine of not more than five million riyals. In addition, there is the power to disqualify from management and ownership of a for profit establishment for up to five years.

The court has power to invalidate any disposition in breach of these provisions and order recovery and compensation.

6. New money and super priority (Chapter 10 of the Law)

A debtor is not entitled to obtain secured financing after the commencement of any procedure other than with the approval of the court. Similarly, in the case of unsecured finance, court approval is required in the case of liquidation.

Secured financing, which requires approval, is defined as providing priority over unsecured debts, providing security over an asset not encumbered by another pledge, encumbered by a pledge of higher priority, or secured by a pledge in priority or equal to another pledge where the court establishes that the existing pledge is not affected (or any other arrangement specified by the Implementation Regulations).

In the penultimate case, the debtor is under an obligation to protect the interests of the existing pledgee.

7. Voidable transactions (Chapter 13 of the Law)

Any person with an interest (i.e. not just a trustee but potentially creditors and other interested parties) is afforded civil causes of action in respect of certain transactions or dispositions, including transactions at an undervalue and preferences which take place within 12 months in the case of an unconnected party, or 24 months for a connected party preceding the initiation of any of the procedures. The court has power to invalidate any such transaction unless it can be established that at the time of the transaction it was in the best interests of the debtor and the debtor was not distressed or bankrupt. The court in addition can order recovery of the assets or funds and compel a guarantor to reinstate its security. There is protection for rights acquired bona fide by any third party.

8. Cross-border insolvency

Saudi Arabia adopted the UNCITRAL Model Law on Cross-Border Insolvency with effect from 16 December 2022. This provides for legal assistance to foreign courts and foreign officeholders and more specifically for recognition of foreign insolvency proceedings and officeholders, giving them the powers and facilities under the Law, subject to certain limitations and modifications.

The Model Law, as applied in Saudi Arabia, adopts the concept of main foreign insolvency proceedings and non-main insolvency proceedings, the former determined by whether the proceedings are initiated in the country where the headquarters of the debtor through which it conducts its business are located. The latter is based on proceedings initiated in a country where the debtor carries on a non-casual business through personnel and goods or services. The consequence of being a non-main foreign proceeding is that the recognition and assistance relates only to the assets which are the subject of the proceeding or information relating to it. Certain interim relief pending recognition is limited to main foreign proceedings and the assistance afforded to non-main proceedings is subject to the primacy of main foreign proceedings.

The foreign officeholder's application to the court does not result in the officeholder or the assets or business of the debtor becoming subject to the court's jurisdiction, save within the limits of the application.

The process of recognition is summary, requiring a copy of the appointment document, a certificate from the foreign court confirming the proceedings and a statement from the officeholder concerning any other proceedings.

Recognition of foreign insolvency proceedings allows the officeholder to apply for judicial assistance to protect the debtor's assets or to protect the interests of the debtor's creditors, including:

- suspension of any right to take or complete any action against the debtor or its assets, any execution against assets or right through a security to dispose of assets;
- collecting evidence and delivery of information relating to the debtor or its assets, rights or obligations;
- authority for the officeholder or other person appointed by the court to dispose of assets;
- distributing the proceeds of sale (which are located in the Kingdom); and
- generic judicial assistance.

No other insolvency proceeding may be initiated after the recognition of the main foreign proceeding, save where the debtor has assets in the Kingdom, in which case such proceedings will be limited to these assets and such other in accordance with the provision of the Law.

Further provision is provided for cooperation between the court and the foreign court, and there are also procedures with respect to multiplicity of foreign proceedings to ensure the primacy of the main foreign proceedings.

UNITED ARAB EMIRATES

1. Introduction

The UAE has recently implemented a significant transformation to its financial restructuring and bankruptcy framework through the enactment of Federal Decree-Law No. (51) of 2023 (New Law), replacing the previous Federal Decree-Law No. 9 of 2016 (Old Law) as of 1 May 2024.

The New Law largely maintains the scope of the Old Law by covering companies subject to Federal Decree Law No. 32 of 2021 on Commercial Companies, natural persons acting as traders and licensed civil professional companies (e.g. a partnership of lawyers or engineers). It excludes entities established in the financial free zones such as the Dubai International Financial Centre and the Abu Dhabi Global Market, which have their own regulations governing bankruptcy and insolvency. Additionally, it excludes from its purview banks, financial institutions and insurance companies that are subject to special legislation regulating recovery, rescue and insolvency.

Beyond the change in scope, the New Law introduces transformative changes aimed at enhancing the clarity and practicality of the UAE's insolvency regime.

Among the notable developments are the introduction of a new "preventative settlement" process (replacing the "preventative composition" process), a clear description of new terms, reinforced clawback provisions, the establishment of dedicated bankruptcy courts and a case management department, as well as heightened accountability for directors (with certain exceptions).[1]

2. Preventative settlement mechanism

One of the key changes in the bankruptcy regime is the replacement of the bankruptcy preventative composition mechanism under the Old Law with the preventative settlement mechanism under the New Law.

Preventive composition, as defined under the Old Law, is a debtor-initiated process overseen by the court, designed for debtors facing financial challenges without yet reaching insolvency or having been insolvent for less than 30 consecutive business days. The mechanism seeks to assist in the recovery of a business by assisting the debtor in reaching a settlement with its creditors. However, due to its strict conditions and intrusive supervision, the mechanism became redundant over time.

The introduction of the preventative settlement mechanism provides for a more user-friendly (less intrusive) court-supervised mechanism that enables the debtor to manage its business and assets normally while exploring settlement terms with its creditors. The business may also benefit from a moratorium period of three to six months from the date of the acceptance of the petition to initiate proceedings.

Essentially, by way of an approved settlement proposal with creditors, the new mechanism facilitates businesses to continue their commercial activities and meet debts, resulting in a more practical restructuring mechanism than was previously available.[2]

3. Moratorium

In addition to the moratorium with respect to preventive settlement proceedings, under the New Law, once restructuring proceedings are initiated, a moratorium is enforced on any judicial and execution actions initiated by creditors against the debtor regarding the debtor's assets and liabilities (pending the ratification of the restructuring plan or a decision to end proceedings).[3]

Unlike the previous legislation, there are no constraints on the moratorium period and its extension. This aligns with previous court practices, where moratorium periods have been extended beyond the limits set by the Old Law (i.e. 10 months) in several cases. However, it is important to note that labour and personal status claims, excluding succession-related claims, are exempt from this moratorium. This is a welcome development, as it protects the bankruptcy estate while allowing essential claims such as labour, divorce or child custody (in relation to an individual trader) to proceed.

Additionally, the New Law prohibits the filing of new claims against the debtor once bankruptcy proceedings are initiated, except for certain circumstances outlined in the legislation. This prohibition continues after the declaration of bankruptcy. However, creditors retain the right to pursue individual actions after the closure of the bankruptcy proceedings.

4. Introduction of a new bankruptcy court and enforceability

Another significant development in the UAE bankruptcy regime is the establishment of a new Bankruptcy Court. The court has authority over matters pertaining to bankruptcy, including all ongoing cases under the Old Law. This means that all ongoing cases as of 1 May 2024, within UAE courts, would be transferred to this new court.

The New Law allows for the appointment of experts and auditors skilled in handling bankruptcy matters to the

1 New Law, Articles 2 and 3
2 *Idem,* Articles 56 to 84.
3 *Idem,* Articles 92 and 93.

court to aid in its deliberations. The selection of experts and auditors and the determination of their fees shall be made by the competent judiciary. Another welcome change is that the fees for the experts and the auditors shall be paid from the budget of the competent judiciary, which suggests that they will be working alongside the court and the Bankruptcy Unit (a case management unit established to work alongside and in support of the court).

Importantly, Article 8 of the New Law states that court judgments serve as writs of execution, allowing for immediate enforcement. Furthermore, challenges or halts to enforcement are only feasible if the court halts or reverses its decision, either voluntarily or upon request from a debtor, creditor, trustee or other interested parties (or if challenged in the Court of Appeal).

This provision emphasises the immediate and binding nature of the court's decisions while allowing for judicial discretion and flexibility in their enforcement. It also highlights the potential for intervention by relevant stakeholders and the appellate process in the context of bankruptcy rulings.[4]

5. Enhancement of the Financial Restructuring Committee and the introduction of the Bankruptcy Unit

Under the New Law, a specialised division called the Bankruptcy Unit, overseen by a senior Court of Appeal judge, is introduced to manage and supervise bankruptcy and restructuring cases in support of the court. This initiative aims to enhance the efficiency and resolution of such proceedings by centralising management responsibilities that encompass the following:

- processing requests under the New Law;
- notifying parties of the court's decision and ensuring compliance with information and documentation required by the court prior to their presentation before the court;
- managing the debtor's business during proceedings;
- organising creditors' meetings; and
- summoning relevant parties for inquiries.

While the Financial Restructuring Committee (FRC) is a body established under the Old Law, it is retained under the New Law with an expanded role. It now oversees various aspects of the bankruptcy process, such as managing the online platform for the Bankruptcy Register, endorsing trustees and experts, overseeing judicial and expert training, and assisting the court in setting trustee fees.

However, its jurisdiction is revised to focus solely on providing support to the court in bankruptcy and restructuring proceedings involving regulated companies and financial institutions, as opposed to its earlier role. Previously, the FRC primarily focused on overseeing financial restructuring for establishments licensed by the Competent Regulatory Authorities, which originally included only regulated financial institutions. However, the reference to "financial" was later removed from the Old Law, broadening the FRC's scope.[5]

6. Accountability of board members (including *de facto* managers)

The New Law introduces significant revisions to the accountability of board members, managers (including *de facto* managers) and liquidators in bankruptcy scenarios.

Previously, under the Old Law, these individuals could be held financially accountable for certain actions occurring up to two years prior to the onset of bankruptcy proceedings. These actions included engaging in uncalculated business risks or business ventures, entering undervalued transactions or favouring certain creditors to others. However, those individuals could obtain an exemption from financial responsibility if they could demonstrate efforts to minimise losses or that they were not involved in culpable actions.

The New Law expands on these provisions, now encompassing *de facto* managers and individuals responsible for the actual company management. For instance, this may also include controlling shareholders of a company. This broader scope of liability is viewed positively within the legal community.

Furthermore, the New Law specifies that the quantum of liability amounts against directors or *de facto* managers should correspond to their level of fault. It retains the two-year timeframe for scrutinising actions leading to bankruptcy but introduces four scenarios to trigger their liability. For instance, directors and managers could be held accountable if it is proven that company assets cannot cover at least 20% of debts due to negligent management leading to the company's financial distress.

Additionally, the New Law provides a two-year limitation period from the bankruptcy declaration date to initiate liability proceedings. Exemptions from liability may be granted if individuals can prove adherence to standard measures or documented objections to questionable actions.

These changes in law signify a more refined approach to holding company leadership accountable during bankruptcy. The New Law now also considers degrees of fault and the impact of management decisions on the financial health of a company, thus promoting responsible business practices and safeguarding creditor interests.[6]

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4 *Idem*, Articles 5 to 9.
5 *Idem*, Articles 12 and 13.
6 *Idem*, Articles 246, 256, 269 and 271.

7. Claw-back

The New Law introduces a new approach with regard to the court's power to declare debtor transactions non-enforceable against creditors. The new approach focuses on a wider timeframe for examining debtor transactions in the context of bankruptcy.

The Old Law considered transactions within a two-year period before the initiation of the proceedings. In contrast, the New Law primarily targets a six-month window preceding the date of cessation of payment, which may in turn extend up to two years preceding the date of the decision initiating the proceedings.

Additionally, the New Law extends this examination to two years preceding the date of cessation of payment (i.e. for a period of up to four years preceding the date of the decision initiating the proceedings) for transactions involving insiders or related parties, reflecting a heightened vigilance against potentially prejudicial insider dealings.

Furthermore, the New Law introduces "commercial considerations" as a valid justification for certain transactions, indicating a more flexible and business-oriented perspective. This addition suggests that transactions made in the normal course of business, even if they fall within the examined period, may be defended under this new criterion. The New Law also continues to empower the courts with discretion, particularly in setting aside transactions if they are detrimental to the interest of creditors.[7]

8. Types of proceedings and enhanced security enforcement under the New Law

Contrary to the Old Law, the New Law provides secured creditors the authority to enforce against secured assets through the court and an appointed trustee during bankruptcy proceedings. This eliminates the need for separate enforcement actions.

Moreover, Articles 66 and 108 of the New Law (covering the preventive settlement and restructuring regimes) introduce the possibility of unifying, establishing, dissolving, selling or replacing any security if necessary to implement the preventive settlement or the restructuring plan, provided the secured creditor agrees. This flexibility is a notable improvement under the New Law by striking a balance between debtor flexibility and secured creditor protection.[8]

Additionally, the New Law streamlines constraints on debtor actions post-initiation of bankruptcy proceedings. Unlike the Old Law, which broadly restricted debt repayment and asset disposal, the New Law simplifies these restrictions. It initially prohibits debtors from settling any debts after bankruptcy proceedings commence. However, it introduces practical exceptions, allowing for the payment of debts related to workers' rights, suppliers of essential business materials and necessary living expenses for the debtor and their family, subject to the court's approval. This update represents a more balanced approach, recognising the need to maintain critical business operations and personal welfare during bankruptcy. This nuanced approach acknowledges the necessity of maintaining vital business functions and personal welfare amidst bankruptcy, providing crucial relief for clients in financial distress.

Furthermore, the New Law outlines detailed provisions for post-bankruptcy settlements that may be reached between debtors and creditors following bankruptcy declaration via a final judgment, enhancing clarity and structure in the resolution process.

9. Set-off

Similar to the Old Law, the New Law prohibits setting off debts that arise following the commencement of the proceedings, unless the set-off is based on the execution of the preventive settlement proposal, restructuring plan or the court's decision (based on the trustee's or creditor's request).

However, unlike the Old Law, the New Law refers to the provisions of Federal Decree Law No. 10 of 2018 on Netting (Netting Law).

To briefly summarise, the New Law stipulates that for any set-off arrangements (on a net off basis) following insolvency not covered by the New Law, the relevant set-off provisions under the Netting Law will apply. These set-off arrangements (on a net-off basis) may not be suspended, revoked, made conditional or unperformed due to any provisions under the New Law.[9]

10. New financing

Similar to the Old Law, the New Law maintains the provision regarding new financing, allowing the debtor to apply for new finance on either a secured or unsecured basis if deemed essential for the continuation of their business. If approved, this new financing is classified as preferential debt, taking precedence over all existing unsecured debts. The court may authorise the new financing to be secured by collateral ranking lower than existing security unless the holders of the existing security agree otherwise.[10]

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7 *Idem*, Articles 148 to 152.
8 *Idem,* Articles 213 to 218.
9 *Idem,* Article 224.
10 *Idem,* Articles 62, 94 and 257.

11. Cross-border insolvency in the UAE

The UAE is not a party to the UNCITRAL Model Law on Cross-Border Insolvency, nor has it adopted any legislation based on the Model Law. Therefore, there is no uniform framework for dealing with cross-border insolvency cases in the UAE. Instead, the recognition and enforcement of foreign insolvency proceedings and orders are subject to the general rules and principles of UAE law.

As a general rule, the UAE courts do not recognise concurrent insolvency proceedings occurring outside the UAE. The New Law, which applies to most commercial entities in the UAE, including free zone companies, does not provide for any cooperation or coordination mechanism with foreign courts or insolvency representatives. The Bankruptcy Law also does not contain any provisions on ancillary or secondary proceedings, or on the treatment of foreign creditors in domestic insolvency proceedings. Any non-UAE creditors would therefore be treated in the same way UAE creditors are treated under the New Law. This position is similar to the Old Law.

However, in practice, UAE courts may recognise and enforce certain foreign orders or judgments related to insolvency matters, such as the appointment of a trustee or liquidator, or the administration or disposal of assets located in the UAE, subject to certain conditions and limitations. Such foreign orders or judgments would be treated as foreign judgments and dealt with under the provisions of the UAE Civil Procedures Law, which sets out the criteria and procedures for their recognition and enforcement. These include the following typical requirements for enforcement of foreign judgments in the UAE:

- the UAE courts did not have exclusive jurisdiction over the dispute on which the foreign order or judgment was issued, and the foreign courts that issued it had jurisdiction according to their own laws;
- the order or judgment was issued in accordance with the law of the issuing jurisdiction and duly certified;
- the parties to the proceedings were duly notified and represented;
- the order or judgment has acquired the force of *res judicata* according to the law of the issuing jurisdiction; and
- the order or judgment does not conflict with a previous order or judgment issued by a UAE court or violate UAE public order or morality.

In addition, the principle of reciprocity applies, which means that the UAE courts will only recognise and enforce a foreign order or judgment if there is evidence that the courts of the issuing jurisdiction would do the same for a UAE order or judgment. This does not require a formal treaty or agreement between the UAE and the foreign jurisdiction, but rather a case-by-case assessment of the relevant laws and practices. There have been some recent examples of the UAE courts, particularly in Abu Dhabi, applying the principle of reciprocity and recognising foreign orders appointing trustees or liquidators in insolvency cases, based on the similarity of the requirements under the respective laws.

However, the recognition and enforcement of foreign orders or judgments in the UAE is not automatic or guaranteed and may face various challenges and obstacles. These include:

- the discretion and interpretation of the UAE courts, which may differ from one jurisdiction to another, and which may not be familiar or consistent with the concepts and principles of foreign insolvency laws;
- the procedural and evidentiary requirements, which may involve translation, authentication and certification of documents;
- the potential opposition or resistance from local creditors, debtors or authorities, who may have different interests or expectations from those involved in the foreign insolvency proceedings; and
- the potential conflict or inconsistency between the foreign order or judgment and the UAE laws or regulations governing specific matters, such as leases, employment, security or taxation.

Therefore, cross-border insolvency cases involving the UAE require careful analysis and planning, as well as coordination and cooperation with local counsel and stakeholders. Depending on the circumstances and objectives of each case, it may be advisable or necessary to initiate parallel or complementary insolvency proceedings in the UAE, or to seek alternative or additional measures to protect or recover assets or claims in the UAE.

12. Conclusion

In conclusion, the transformation of the UAE's financial restructuring and bankruptcy framework through the enactment of the New Law represents a significant milestone in the UAE's bankruptcy regime. With these significant changes under the New Law, the introduction of more user-friendly preventative settlement processes, the establishment of dedicated courts, and heightened accountability for company management (including *de facto* managers), the New Law aims to provide greater access to distress debtors to composition and bankruptcy process.

These changes are expected to facilitate smoother proceedings, protect creditor interests, and promote responsible business practices. Furthermore, enhancements in security enforcement, streamlined constraints on debtor actions, and provisions for post-bankruptcy settlements contribute to a more balanced and structured approach to bankruptcy resolution. Overall, the New Law signifies a comprehensive and forward-thinking approach to insolvency regulation in the UAE, fostering a more robust and resilient business environment.

ABU DHABI GLOBAL MARKET

1. Overview of restructuring and insolvency processes

1.1 Introduction

The Abu Dhabi Global Market (ADGM), together with the Dubai International Financial Centre (DIFC), constitute the two financial free zones in the United Arab Emirates (UAE). The ADGM Insolvency Regulations, introduced in 2015 and revised most recently in 2022 (Insolvency Regulations), supplemented by the Companies Regulations 2020 (Companies Regulations), together establish the insolvency regime for relevant companies in the ADGM. Onshore UAE laws relating to insolvency do not apply to companies incorporated within the ADGM.

The Insolvency Regulations are broadly based on English insolvency legislation, although they also take inspiration from the legislation of other jurisdictions (with the consultation paper for the original insolvency regulations in 2015 noting that the insolvency regimes of jurisdictions such as Australia, New Zealand, Singapore and the United States had been considered).

Similar to the insolvency regime of England and Wales, the Insolvency Regulations provide for administration, receivership / administrative receivership, schemes of arrangement and liquidation. Pursuant to the Application of English Law Regulations 2015 (as amended), English common law (including equitable rules and principles) has direct precedential value in the ADGM, subject to certain exceptions.

However, unlike the English regime, there is no provision for a company voluntary arrangement in the ADGM. Instead, and as considered further below, the Insolvency Regulations provide for a route out of administration by way of a Deed of Company Arrangement (DOCA), similar to that provided under Australia's insolvency regime.

The Insolvency Regulations embrace a "rescue culture", including through the emphasis on administration as the key default insolvency procedure and, in particular, the DOCA as an exit mechanism from administration.

This chapter does not consider provisions of the Bank Recovery and Resolution Regulations 2018, which are applicable to certain regulated financial institutions.

For completeness, it is also possible for ADGM companies to be dissolved without insolvency proceedings by way of an alternative company dissolution process pursuant to the Companies Regulations, termed voluntary strike off.[1] The ADGM Registrar also has the ability to strike companies off the register.[2]

1.2 Administration

Administration represents a rescue remedy for a company in financial distress. As considered further below, an administrator (who must be registered as an insolvency practitioner in the ADGM) can be appointed by the court, a holder of a qualifying charge, or by the company or its directors.[3] Appointment by way of the out of court routes does not require court approval, but a notice of intention to appoint an administrator must be filed with the court (and also provided to other interested parties) where there is a "qualifying charge" which purports to allow the charge holder to either appoint an administrator or administrative receiver.[4]

The Insolvency Regulations stipulate that an administrator must perform its functions with the objective of:[5]

- rescuing the company as a going concern (First Objective);
- achieving a better result (for the company's creditor population as a whole) than would be likely if the company were wound up without first going into administration (Second Objective); or
- realising property in order to make a distribution to a secured or preferential creditor or creditors (Third Objective).

The administrator must pursue the First Objective, unless he or she considers that it is not reasonably practicable or that the Second Objective would achieve a better result for creditors as a whole, in which case he or she must pursue the Second Objective. If that is not practicable, then the Third Objective must be pursued (if pursuing the Third Objective would not unnecessarily harm the interests of creditors as a whole).[6]

The administrator must act in the interests of creditors as a whole, irrespective of the appointing party.[7]

An administrator is granted broad powers, including any measures necessary or expedient for the management of the affairs, business and property of the company.[8]

1 Company Regulations, sections 867-875.
2 *Idem,* section 864.
3 Insolvency Regulations, sections 1(3) and 5(1); see further sections 6, 21 and 29 respectively.
4 *Idem,* sections 24 and 31.
5 *Idem,* section 2(1).
6 *Idem,* sections 2(3) and 2(4).
7 *Idem,* section 2(2).
8 *Idem,* section 95 and Schedule 2.

When an administrator is appointed, any administrative receiver must vacate office. A receiver must, if required by the administrator, also vacate office.[9]

When a company is in administration, there is a moratorium on insolvency proceedings and other legal processes (other than with the consent of the administrator or with court permission).[10] Prior to this, an interim moratorium may apply where the administration process has been commenced but appointment has not yet taken place.[11]

1.2.1 *Court-appointed administrator*

Upon an application by the company, directors or one or more creditors, the court may make an administration order if the company is or is likely to become unable to pay its debts and if the purpose of administration is likely to be achieved.[12] There is a prescribed list of people to whom the applicant must give notice of the application as soon as reasonably practicable after making the application, including any person who may be entitled to appoint an administrative receiver or an administrator.[13]

Although more involved procedurally than an out-of-court appointment, the court appointment route may be preferred if there is an international element to the company or its wider group and the administration may need to be recognised outside the ADGM (for which a court judgment may be required or beneficial).

1.2.2 *Appointment by a holder of a qualifying charge*

The holder of security relating to the whole or substantially the whole of the company's property may appoint an administrator in circumstances where the security has become enforceable and where the security instrument gives the creditor the ability to an appoint an administrator (or purports to confer the ability to appoint an administrative receiver).[14]

This route will likely only be utilised where there are no doubts about the enforceability or validity of the charge in question.

1.2.3 *Appointment by the company or its directors*

The company or its directors may appoint an administrator if the company is unable or unlikely to be able to pay its debts.

1.2.4 *DOCA*

As noted above, a DOCA is a process of creditor compromise as an exit mechanism from an administration procedure. It can only be deployed by a company in administration. Unless the creditors vote otherwise, the administrator of the company is also the administrator of the DOCA.[15]

If approved by the majority (by value) of creditors voting on it (as long as those voting against the DOCA do not represent more than half (by value) of total unsecured creditors eligible to vote which are not connected to the company), the DOCA will be binding on all unsecured creditors, including any who voted against it.[16] A secured creditor will be bound by the DOCA if they voted in favour of it or if the court has made an order to this effect following an application by the administrator.[17] The court can only make such an order if it is satisfied that allowing the secured creditor to deal with the security would have a material adverse effect on the DOCA (considering all circumstances), and that the creditor's interests would be adequately protected if such an order is made.[18]

While there are some points that must be included in the DOCA, the precise format and contents are not prescribed.[19] The DOCA must provide that preferential creditors (employee salaries or pension contributions for the period three months prior) are entitled to a priority least equal to the priority that such preferential creditors would benefit from in an insolvent liquidation.[20]

The DOCA procedure was deployed for the first time in the ADGM in the restructuring of the NMC group of companies (which also represented the first time the ADGM's administration process was utilised).

1.3 Receivership / administrative receivership

The Insolvency Regulations distinguish between the remedies of receivership and administrative receivership that may be available to secured creditors.

A receiver may be appointed by a secured creditor whose security document contemplates the appointment of a receiver. The receiver is tasked with collecting and selling any part of a secured property on behalf of the creditor benefiting from that security, and applying the proceeds in reduction of the debt due to that creditor. The receiver has the powers contained in the appointment instrument, subject to any contrary provisions of the Insolvency Regulations.[21]

9 *Idem*, sections 43(1) and 43(2).
10 *Idem*, sections 44 and 45.
11 *Idem*, section 46.
12 *Idem*, sections 7 and 8.
13 *Idem*, section 8(2).
14 *Idem*, sections 21 and 22.
15 *Idem*, section 73(2).
16 *Idem*, para 32 of Schedule 6.
17 *Idem*, section 76.
18 *Idem*, section 79.
19 *Idem*, sections 73(3) and 73(4).
20 *Idem*, section 77 and Schedule 8.
21 *Idem*, sections 152(1) and 152(2).

In contrast, an administrative receiver's role is broader in that an administrative receiver is deemed to be the company's agent and is authorised to take over the management of the business of the debtor company.[22] An administrative receiver has the powers contained within the appointment instrument and additionally those set out in the Insolvency Regulations.[23] An administrative receiver can only be appointed by a secured creditor benefiting from a qualifying charge in respect of the whole or substantially the whole of the company's assets, and where the appointment relates to one of the following:[24]

- a capital market arrangement involving a debt of at least USD 50 million;
- a project financing which provides for step-in rights in relation to the project in question; or
- any other additional circumstances specified by the ADGM Registration Bureau from time to time.

As a result, the circumstances in which an administrative receiver may be appointed are constrained.

Receivers and administrative receivers must act in the interests of the persons by whom or on whose behalf they were appointed, and must:[25]

- be registered as an insolvency practitioner in the ADGM;
- carry out their functions acting in good faith;
- manage any company property with due diligence (unless it would prejudice the interests of the persons by whom or on whose behalf he or she was appointed); and
- when exercising the power of sale of the company's property, use reasonable care to obtain the best price reasonably obtainable in the circumstances.

Money received by the receiver is to be applied in a specified order of priority.[26]

1.4 Schemes of arrangement

A Scheme of arrangement is a procedure set out in the Companies Regulations which implements a compromise between a company and its creditors (or, less commonly in a restructuring context, with a company's shareholders).[27] The ADGM provisions on schemes of arrangement will be recognisable to those familiar with the English law equivalent provisions.

Under a scheme, creditors are classified into classes and the scheme is voted upon by each creditor class. To be approved, 75% (in value) of each class of creditor must vote in favour of the scheme.[28] Unlike the position in some jurisdictions (including England and Wales), the ADGM scheme mechanism does not need to be approved by a numerical majority of each class of creditor. In the ADGM, low value creditors are therefore less likely to be able to block the approval of a scheme as compared to some other jurisdictions.

A scheme represents a cram-down process whereby, if approved by creditors as set out above and the court, the scheme will be binding on the company and all of its creditors which were entitled to vote (including dissenting creditors and dissenting secured creditors).[29]

A scheme does not, in isolation, confer the benefits of a moratorium.

1.5 Liquidation

Liquidation of a company entails the winding down of a company's business and sale of its assets. A liquidator is tasked with overseeing the process, ensuring that the company's property is collected or otherwise secured, realised and thereafter distributed to the company's creditors in accordance with the specified procedure, with any surplus being distributed to those entitled to it.[30]

A liquidator's powers are broad, as detailed in a schedule to the Insolvency Regulations.[31] Once the liquidation process is concluded, the company is dissolved and removed from the register.

Liquidation can be either voluntary (by shareholders or creditors) or by the court.[32] These are considered further below.

22 *Idem*, section 160.
23 *Idem*, section 152(3) and Schedule 3.
24 *Idem*, sections 152(3) and 152(8).
25 *Idem*, sections 152(6) and 156.
26 *Idem*, section 155.
27 Companies Regulations, section 801.
28 *Idem*, section 805.
29 *Idem*, section 805(3).
30 Insolvency Regulations, section 214; see also Schedule 5 in relation to distributions to creditors.
31 *Idem*, Schedule 4.
32 *Idem*, sections 172 and 176.

1.5.1 *Voluntary liquidation*

The Insolvency Regulations provide for voluntary liquidation by a company's members or creditors. In a members' voluntary liquidation (MVL), a solvent company (with sufficient assets to pay its debts within 12 months, confirmed in a declaration of solvency by directors) is wound up. In a creditors' voluntary liquidation (CVL), a company is wound up on the basis that it is insolvent. In an MVL, the liquidator is chosen and appointed by the shareholders whereas in a CVL the liquidator is chosen and appointed by the creditors (or the company where no nomination is made by the creditors).[33]

In either an MVL or CVL, a company can be wound up voluntarily as provided for in the company's Articles of association or if the company passes a special resolution for voluntary winding up.[34] Both an MVL and CVL commence upon the passing of the special resolution by the company, following which the company shall cease to carry on business other than required for its beneficial winding up.[35] A liquidator can apply to the court for a moratorium to prevent proceedings commencing or continuing against the company (except with leave of the court).[36]

If a liquidator during an MVL considers that the company will be unable to pay its debts within the stated period in the declaration of solvency, the liquidation converts to a CVL.[37]

1.5.2 *Compulsory winding up*

A compulsory liquidation entails winding up by the court. A winding up petition may be presented to the court including by the company, its directors or creditors.[38] The court may wind up a company if:[39]

(a) the company's shareholders have passed a special resolution (i.e. by a majority not less than 75%) resolving that the company is wound up by the court;[40]

(b) the company is unable to pay its debts, which is defined as follows:[41]

   (i) a statutory demand for a debt in excess of USD 2,000 served in accordance with the ADGM's Court Procedure Rules remains unpaid for a period of three weeks;

   (ii) an executed judgment, decree or court order is unsatisfied (whether in whole or in part);

   (iii) the court is satisfied that the company is unable to pay its debts as they fall due (i.e., it is cash flow insolvent); or

   (iv) the court is satisfied that the value of the company's current assets is less than its current liabilities (taking into account contingent and prospective liabilities) – i.e. the company is balance sheet insolvent.

(c) the court has made an order of winding up pursuant to any provision of ADGM legislation; or

(d) the court is of the opinion that it is just and equitable that the company is wound up.

A moratorium is automatically in place against commencement or continuation of proceedings (except with the leave of the court) once a winding up order is made or provisional liquidator appointed.[42]

2. Ranking of creditors and secured creditors' rights

Secured creditors rank ahead of unsecured creditors in the context of an insolvent liquidation.

In relation to administrations and winding up by the court, unsecured debts (including any part of a secured debt which is treated as unsecured) are paid after preferential debts (non-discretionary employee salary or pension contributions for a three month period) and rank equally among themselves.[43] A secured creditor that has realised their security may prove for the balance of any outstanding debt over and above the amount realised.[44]

There is no requirement for secured creditors to obtain court consent in order to enforce security but, as outlined above, a secured creditor may seek to appoint a receiver or administrative receiver in order to realise assets for that creditor. In respect of a company in administration, no steps can be taken to enforce security over company property without the consent of the administrator or the court's permission.[45]

The Insolvency Regulations afford certain legislative protections to secured creditors. For example, in an administration, an administrator's statement of proposals may not include any action which would affect the right of a secured creditor to enforce their security.[46] Further, in instances where a DOCA is in place, a secured creditor is not prevented from realising or dealing with their security unless that creditor voted in favour of the DOCA or if the court orders otherwise.[47]

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33 *Idem,* sections 178 and 187.
34 *Idem,* section 174.
35 *Idem,* sections 193 and 195(1).
36 *Idem,* section 197(1).
37 *Idem,* sections 183-184.
38 *Idem,* section 202(1).
39 *Idem,* section 199.
40 Companies Regulations, section 199.
41 Insolvency Regulations, section 200.
42 *Idem,* section 209(1).
43 *Idem,* sections 104 and 228; see also paragraph 13, Schedule 5. "Preferential debts" are defined in Schedule 8 of the Insolvency Regulations.
44 *Idem,* para 17, Schedule 5.
45 *Idem,* section 45(2).
46 *Idem,* section 103(1)(a).
47 *Idem,* section 76(2).

3. Directors' liability

As is a common feature of insolvency regimes, directors of ADGM entities are subject to particular duties and responsibilities when faced with cash flow issues, financial difficulties or other indications of potential insolvency. The ADGM regime includes a range of offences, incentivising directors to take prudent and responsible steps in the period running up to insolvency, and establishing punitive measures for those that do not. In particular, for the offences of fraudulent or wrongful trading, the Insolvency Regulations expressly provide the court with "wide powers" to give such further directions as it thinks proper.[48]

3.1 Fraudulent trading[49]

Any person, including but not limited to directors, may be liable for the offence of fraudulent trading. If it transpires that the business of a company in liquidation or administration has been carried on with intent to defraud creditors (whether the company's creditors or creditors of any other person), or for any fraudulent process, the court has the discretion (following an application by the liquidator or administrator) to declare that any persons "knowingly parties" to the conduct of business in this way must make a contribution to the company's assets. The court is granted a wide discretion to provide for the relief it thinks proper.

3.2 Wrongful trading[50]

A director that seeks to trade a company's way out of financial difficulty may be liable for the offence of wrongful trading. While described as "wrongful trading", there is no requirement for there to have been any trading in order for the director to be found liable.

A past or present director (including a shadow director) of a company in liquidation or administration may (on the application of the office holder) be held liable for the offence of wrongful trading and rendered liable to make any contribution to the company's assets that the court thinks fit. The requirements for a wrongful trading claim are that:

- the company is in insolvent liquidation or insolvent administration;
- prior to the commencement of the winding up or administration, the person knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation or insolvent administration; and
- the person was a director of the company at that time. This includes any person occupying the position of director, irrespective of their title.

It is a defence to a wrongful trading claim if, after a director knew or ought to have known that there was no reasonable prospect of avoiding insolvency, he or she took every step aimed to minimise the potential loss to creditors.

An assessment of the conclusions reached and steps that ought to have been taken are those applicable to a reasonably diligent person both with the general knowledge, skill and experience of a person carrying out the functions of that director, and also that individual director's specific general knowledge, skill and experience.

3.3 Fraud in anticipation of winding up or insolvent administration[51]

The Insolvency Regulations provide for past or present officer liability (and imposition of a USD 50,000 fine) in circumstances where, in the 12 months prior to commencement of the winding up or insolvent administration, that officer has (with the intention of defrauding the company's creditors, or concealing the state of affairs of the company or to defeat the law):

- concealed or fraudulently removed company property with a value of USD 200 or more;
- concealed any debt due to or from the company;
- concealed, destroyed or falsified documentation, or made a false entry in the same, relating to the company's property or affairs;
- fraudulently parted with, altered or made an omission in any document relating to the company's property or affairs; or
- pawned, pledged or disposed of company property that was obtained on credit and has not been paid for (if this was outside the scope of the company's ordinary course of business).

An officer is also liable if he or she has been privy to others conducting any of the aforementioned acts with the requisite intent.

48 *Idem,* section 253.
49 *Idem,* section 251.
50 *Idem,* section 252.
51 *Idem,* section 244; Schedule of Contraventions.

3.4 Transactions defrauding creditors[52]

Where a company enters insolvent administration or is being wound up by the court or voluntarily by way of resolution, an officer of the company is liable to a fine of USD 25,000 if he or she has:

- made or caused to be made, a gift, transfer, charge or execution against property of the company (if this conduct was carried out over five years before the commencement or winding up or insolvent administration); or
- concealed or removed any part of the company's property after or two months before the date of any unsatisfied judgment or order for monetary relief.

It is a defence if, at the time of the conduct, the officer can prove he or she had no intent to defraud the creditors of the company.

3.5 Misconduct in the course of winding up or insolvent administration[53]

In circumstances where a company is being wound up or is in insolvent administration, a past or present officer is liable to a fine of USD 50,000 if he or she, with the intention of defrauding creditors:

- does not to the best of its knowledge and belief, assist the officeholder with discovering certain information in relation to the company's property, or deliver any company property (including books and papers) in its custody or control;
- knows or believes that a false proof of debt has been submitted and fails to inform the officeholder; or
- prevents production of documentation relating to the company's property or affairs.

An officer may also be liable for any attempt to account for company property by fictitious losses or expenses irrespective of any intention to defraud company creditors.

3.6 Falsification of company's books[54]

Where a company is being wound up or has entered insolvent administration, an officer or contributor (i.e. someone liable to contribute to a company's assets in its winding up) who destroys, alters or falsifies the company's books or documents with an intention to defraud or deceive any person, is liable to a fine of USD 50,000.

3.7 Material omissions from statements relating to company's affairs[55]

Where a company is being wound up or has entered insolvent administration, an officer (including past officer) is liable to a fine of USD 50,000 if he or she makes any material omissions in any statement relating to the company's affairs (including a Statement of Affairs) intending to defraud the company's creditors.

3.8 False representations to creditors[56]

A past or present officer is liable to a fine of USD 50,000 if he or she makes any false representation or commits any other fraud with the purposes of obtaining the company's creditor's consent in relation to the company's affairs, winding-up or administration either during or prior to a winding up or administration.

3.9 Summary remedy against delinquent officers[57]

The Insolvency Regulations contain a "catch all" offence whereby any person who is or has been an officer of the company (or even those who have taken part in the promotion, formation or management of the company) has misapplied, retained or become accountable for company money or property, been guilty of misfeasance or a breach of a fiduciary or other duty. If found liable, the court may compel him or her to repay or account for the money or property (with interest), or otherwise contribute to the company's assets.

3.10 Disqualification of directors

Director misconduct in an insolvency context may result in disqualification. The Registrar is compelled to make a disqualification order if satisfied that a person who is or has been a director of a company that has become insolvent (irrespective of whether he or she was a director while the company was insolvent or if the company has since become insolvent), and that the director's conduct (whether taken alone or individually with their conduct in respect of any other company) renders that individual unfit to be concerned in the management of a company.[58] Shadow directors are also captured by these provisions.[59]

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52 *Idem,* section 245; Schedule of Contraventions.
53 *Idem,* section 246; Schedule of Contraventions.
54 *Idem,* section 247; Schedule of Contraventions.
55 *Idem,* section 248; Schedule of Contraventions.
56 *Idem,* section 249; Schedule of Contraventions.
57 *Idem,* section 250.
58 Companies Regulations, sections 233 and 238.
59 *Idem,* section 238(3).

The factors that the Registrar shall consider in determining whether a person is unfit include general considerations as well as insolvency-specific factors, such as the failure to comply with obligations imposed pursuant to the Insolvency Regulations (e.g. cooperation with the office holder) and the extent of the director's responsibility for the cause of the company's insolvency.[60]

A disqualification order prohibits an individual from acting as a director, as well as being directly or indirectly concerned with the promotion, formation or management of a company (unless the Registrar has given approval) for a minimum of two years and a maximum of 15 years.[61]

Disqualification orders may also be made in circumstances where a person is guilty of fraudulent trading as set out in section 857 of the Companies Regulations.[62]

Where the court makes a declaration of liability to contribute to a company's assets as a result of, for example, fraudulent trading or wrongful trading, the Registrar may also make a disqualification order.[63]

4. New money and super priority

The Insolvency Regulations provide for priority funding in the context of an administration, which has similarities with the provisions for priority financing contained in the United States' Chapter 11 process for debtor-in-possession funding. The ability to obtain financing ranking ahead of secured creditors provides valuable flexibility to an administrator, and a potential route to rehabilitation for a distressed entity.

Pursuant to the Insolvency Regulations, as introduced in amendments made in 2020, an administrator can obtain unsecured credit and incur unsecured debt in the ordinary course of business, with such credit or debt being payable as an expense of the administration.[64]

Alternatively, if the administrator is unable to obtain unsecured credit as set out above, the court may (on application by the administrator) permit obtaining credit or the incurring of debt as set out below, irrespective of any prior rights or restrictions on doing so (for example, pledges within existing financing arrangements):[65]

- ranking in priority to any or all of the expenses of the administration;
- security over unencumbered company property;
- security against encumbered company property, ranking below any existing security interest; or
- if the administrator is unable to otherwise obtain credit and if there is "adequate protection" of the existing security holder's interests, security against encumbered company property and ranking equally with or above any existing security interest.

Where adequate protection is required, the administrator bears the burden of proof to demonstrate the same.[66] Adequate protection may be provided by requiring the administrator to make cash payments, providing additional or replacement security, or granting such other relief that would result in the realisation of an equivalent interest in the property. Adequate protection will be provided if, to the court's satisfaction, the provision of credit or debt would:[67]

- enable the administrator to achieve the First or Second Objective of the administration; and
- be likely to achieve a better result for each creditor benefiting from an existing security interest of the property than what would likely be achieved if the new security interest was not granted.

5. Voidable transactions

Voidable, or antecedent, transactions provisions are available to a liquidator or administrator. These powers enable an officeholder to challenge certain transactions entered into by the company prior to the commencement of the insolvency process, offering a method of protecting creditors from a situation in which assets are dissipated.

5.1 The relevant time

The Insolvency Regulations provide that, where a company is in administration or liquidation, an application can be made to the court to set aside transactions at an undervalue or preference occurring at a "relevant time". The definition of relevant time depends on the specifics of the transaction in question:[68]

- for either a transaction at an undervalue or preference with a Connected Person (other than an employee; see further below in relation to the meaning of Connected Person), the relevant time is the two-year period prior to the onset of insolvency;

60 *Idem,* Schedule 2.
61 *Idem,* sections 233(1) and 238(4).
62 *Idem,* section 237(1).
63 *Idem,* section 243.
64 Insolvency Regulations, section 109A(1).
65 *Idem,* sections 109A(2) and 109A(3).
66 *Idem,* section 109A(3).
67 *Idem,* section 109B.
68 *Idem,* section 259(1).

- where a preference transaction is with someone other than a Connected Person, the relevant look-back period is six months prior to the onset of insolvency; and
- transactions entered into in the period between making an application for administration or liquidation and the order being given will also be captured by the voidable transactions provisions.

In any event, if the transaction is before the application for administration or liquidation, the timing is only considered a "relevant time" if during that period the company was unable to pay its debts (including in circumstances where a statutory demand exceeding USD 2,000 is unpaid), or becomes unable to do so as a result of the transaction. In transactions at an undervalue with a Connected Person, there is a rebuttable presumption the company became unable to pay its debts due to the transaction.[69]

The statutory definition of "Connected Person" includes directors and employees of the company, as well as those associated with a director or the company. A person is considered to be "associated" if they are a current or former spouse or relative, and a company is classified as an associate of another company if they are subject to common control (among other factors).[70]

5.2 Transaction at an undervalue

A transaction constitutes one at an undervalue if the company makes a gift or does not receive any consideration, or the consideration received by the company (whether in money or money's worth) is significantly less than the consideration provided by the company.[71]

It is a complete defence to a claim of a transaction at an undervalue if, to the satisfaction of the court, the company entered into the transaction in good faith and for the purpose of carrying on its business, and that there were reasonable grounds at the time of the transaction to believe that the transaction was one that would benefit the company.[72]

With leave of the court, a person who considers that a transaction at an undervalue was intended to prejudice their interests, or a liquidator or administrator (with no requirement for leave of the court), may make an application to the court. If the court is satisfied that the transaction was entered into in order to put assets beyond the reach of a person who is or may make a claim against it, or is otherwise prejudicing the interests of a person in relation to a claim or potential claim, the court has discretion to make an order. This order may restore the position as if the company had not entered into the transaction or protecting the interests of any victim. The Insolvency Regulations provide that the court will have regard to a bona fide purchaser for value without notice.[73]

5.3 Preference transactions

A preference transaction is one in which the company does, or suffers to be done, anything which has the result of one of the company's creditors, a surety or guarantor being in a better position than they would otherwise have been in without that transaction being entered into in the event of the company going into insolvent liquidation.[74]

In order to set aside a preference transaction, the court must be satisfied that the person benefiting from the preference transaction influenced the company to enter into it by a desire to put the person benefiting from it in a better position.[75] There is a rebuttable presumption of influence in a preference transaction in circumstances where the transaction was with a Connected Person (other than one who is only a Connected Person by virtue of them being an employee).[76]

5.4 Post-petition dispositions

In instances of a compulsory winding-up, after a winding up petition has been presented any disposition of the company's property, transfer of shares or change in the status of the company's shareholders, is void unless the court orders otherwise.[77] This therefore captures transfers occurring after presentation of the petition but before a winding up order is made.

Similarly in instances of a creditors' voluntary winding up, any transfer of shares or change in the status of the company's shareholders without the liquidator's sanction is void.[78]

6. Cross-border recognition

The ADGM has, with certain modifications, incorporated the UNCITRAL Model Law on Cross-Border Insolvency (Model Law).[79] As such, foreign insolvency proceedings can be recognised in the ADGM, and the ADGM court

69 *Idem,* section 259(2).
70 *Idem,* sections 298 and 300. The statutory definition of Connected Person is modified for Limited Liability Partnerships, as set out in Schedule 13 of the Insolvency Regulations.
71 Insolvency Regulations, section 257(2).
72 *Idem,* section 257(3).
73 *Idem,* sections 257(4)-257(6).
74 *Idem,* section 258(2).
75 *Idem,* section 258(3).
76 *Idem,* section 258(4).
77 *Idem,* section 209(2)(b).
78 *Idem,* section 196.
79 *Idem,* section 271 and Schedule 10.

DUBAI INTERNATIONAL FINANCIAL CENTRE

1. Statutory framework and substantive law

The Dubai International Financial Centre (DIFC) is a federal financial free zone with the authority and ability to self-regulate in civil and commercial areas.

On 13 June 2019, the DIFC passed Law No. 1 of 2019 (DIFC Insolvency Law), which repealed and replaced the DIFC Law No. 3 of 2009. The DIFC Insolvency Law was later amended by DIFC Law No. 2 of 2022.

On 8 March 2024, the Insolvency Regulations (Regulations) came into effect, which seek to supplement and clarify the DIFC Insolvency Law.

The DIFC Insolvency Law and the Regulations have been introduced as a means of enhancing and facilitating a more efficient and effective bankruptcy regime within the free zone. New concepts have been introduced by the DIFC Insolvency Law to provide creditors and debtors with a larger toolkit to deal with insolvency situations, such as rehabilitation and appointment of an administrator, as referred to below.

2. Insolvency procedures

2.1 Company voluntary arrangements

A company voluntary arrangement (CVA)[1] allows the directors of a company to make a proposal to shareholders and creditors for the arrangement of the company's affairs. The directors appoint a nominee (who is a registered insolvency practitioner)[2] to supervise the implementation of the CVA (Nominee). The proposal from the directors must contain an explanation as to the reasons why the directors believe that a moratorium will be of benefit to the company's creditors.

The Nominee then convenes a meeting of the company's shareholders and creditors to decide whether to approve the CVA proposal. The directors are responsible for preparing and delivering to the Nominee a proposal containing numerous points (including but not limited to the following):

- an estimate of the value of the company's assets;
- the extent (if any) to which such assets are secured in favour of the company's creditors;
- the extent (if any) to which particular assets of the company are to be excluded from the CVA;
- particulars of any property, other than assets of the company itself, proposed to be included in the arrangement, the source of such property and the terms on which it is to be made available for inclusion;
- the nature and amount of the company's liabilities, and the manner in which they are proposed to be met, modified, postponed, or otherwise dealt with by means of the arrangement;
- whether any, and if so what, guarantees have been given of the company's debts by other persons, specifying which (if any) of the guarantors are persons connected with the company;
- the proposed duration of the CVA;
- the proposed dates of distributions to creditors, with estimates of their amounts;
- how it is proposed to deal with the claim of any persons who have not consented to the arrangement;
- the amount proposed to be paid to the Nominee (as such) by way of remuneration and expenses;
- the functions which are to be undertaken by the Nominee; and
- whether it is likely that there will be other proceedings in the jurisdiction.[3]

Modifications may be made to the proposal provided they do not affect the rights of any preferential or secured creditors without their consent.

The approved CVA then takes effect as if made by the company at the creditors' meeting and binds every person who, in accordance with the DIFC Insolvency Law and Regulations, was entitled to vote at that meeting.

Upon approval of the proposal, the Nominee is retitled as the Supervisor of the approved CVA and is tasked with carrying out their functions.

1 DIFC Insolvency Law, Part 2, Articles 7-12.
2 *Idem,* Part 10.
3 Regulations, regulation 2.1.1.

2.2 Rehabilitation

The DIFC Insolvency Law introduces a new concept referred to as "rehabilitation",[4] which mirrors the debtor in possession regime of Chapter 11 in the United States.

Rehabilitation allows the directors of a company to apply for a rehabilitation plan in circumstances where the company is (or is likely to become) unable to pay its debts and there is a reasonable likelihood of a rehabilitation plan being successfully agreed between the company and its creditors and shareholders.

A rehabilitation plan may only be initiated by the debtor company itself and, importantly, cannot be initiated by a creditor of the company.

The key benefit of a rehabilitation plan is that, unless otherwise ordered by the DIFC court,[5] an automatic moratorium of 120 days shall immediately apply to all creditors (secured or unsecured and without their consent), therefore freezing any enforcement proceedings against the debtor. The moratorium prevents creditors from taking further action against the company during the moratorium period, such as submitting an application to wind up the company or seeking to attach any company property as part of an enforcement action.

In addition, during the moratorium period, any termination clauses in contracts with creditors that are triggered on the potential or risk of insolvency of the company would not be effective absent express approval for their activation from the company, the court, or in relation to debts falling due after the commencement of the moratorium which were agreed to by the company and remain unpaid after payment falls due.

While the company is required to appoint a rehabilitation nominee as part of any application, existing management will (in the absence of fraud, dishonesty or mismanagement) retain control of the business throughout the process (this is similar to other "debtor in possession" processes).

Creditors are permitted to apply to the court to terminate the moratorium for cause (which allows for evidence of bad faith) and the court may grant relief from the moratorium period, subject to such requirements that the court deems fair and equitable in the circumstances.

The company's creditors are also invited to review and assess the rehabilitation plan. If at least three quarters in value of any class of creditors or shareholders agree to the rehabilitation plan and it is sanctioned by the court, the plan becomes binding on all persons within such class that have or could have a claim against or interest in the company before the court sanctions the plan.

During the process of seeking approval of the plan and following the votes of the classes of creditors or shareholders, any member may challenge the plan in the court if they believe that the plan is unfairly prejudicial, provided in bad faith, or if they believe there has been procedural impropriety.

If the company is unable to obtain credit, the court may authorise the provision of priority funding to the company, which will take priority over the company's unsecured debt. The court may allow for the issuance of credit, or the incurrence of debt secured by a senior or equal security interest on any property of the company that is already subject to a security interest.

If the court does not sanction the rehabilitation plan, it must immediately proceed to take steps to wind up the company.[6]

2.3 Administration

In principle, directors of an indebted company that has initiated a rehabilitation process may continue to manage the company's assets and business operations and shall remain liable for any losses suffered by the company due to their exercise of position. However, where there is evidence of fraud, dishonesty, and / or mismanagement by the directors, the court may appoint an independent administrator to manage the company's affairs.

An application for the appointment of an administrator[7] (who must be a DIFC registered insolvency practitioner) may only be made by one or more creditors either jointly or separately in circumstances where an application for rehabilitation has been filed and there is evidence of misconduct. Notice of the application for the appointment of an administrator must be provided to all creditors of the company.

The court will only appoint an administrator where the company is (or is likely to be) unable to pay its debts and the court finds that an administrator is likely to achieve a rehabilitation plan, CVA, scheme of arrangement (under DIFC Law No. 5 of 2018) and / or investigate the mismanagement or illegality in the company's affairs.

During the period for which an administrator is appointed, a moratorium (in accordance with regulation 4 of the Regulations) shall apply.

The administrator shall, on its appointment, take into custody or under its control all the property to which the company appears to be entitled. The administrator has widely defined powers to manage the company's affairs, property, and business, for example by taking possession of or selling company property, raising financing or

4 DIFC Insolvency Law, Part 3, Articles 13-31.
5 References to the court are to the DIFC court unless stated otherwise.
6 DIFC Insolvency Law, Article 28.
7 *Idem,* Part 4, Articles 32-41.

borrowing money, as well as granting security over company property, commencing and defending actions or legal proceedings and removing or appointing any directors. Additional powers can also be granted to the administrator by the court to enable the administrator to rehabilitate the company.

Upon discharge, the administrator is entitled to compensation for its services, as well as reimbursement of any justified incurred expenses, both of which have priority over other unsecured debts of the company.

2.4 Receivership

The DIFC Insolvency Law establishes that a secured party may appoint a receiver (who is a registered insolvency practitioner) for the purpose of realising and disposing of secured assets and applying the proceeds in reduction of the secured liabilities.[8] If a receiver is appointed in respect of assets which comprise all or substantially all of the assets of the debtor, the receiver will be deemed an administrative receiver under the DIFC Insolvency Law, with additional powers over the affairs of the company.

The DIFC Insolvency Law indicates that the role of a receiver is to coordinate the ultimate disposal of the secured asset but does not (in contrast with the statutory position of administrative receivers under English law) expressly contemplate a receiver or administrative receiver "managing" assets other than in connection with an ultimate disposal.

The receiver or administrative receiver of a company is deemed to be the company's agent unless and until the company goes into liquidation.

Save for (in relation to an administrative receiver) the obligation to: (a) provide periodic reports to the secured creditors of the company; and (b) summon a meeting of unsecured creditors to deliberate on those reports, the DIFC Insolvency Law is silent on the nature and extent of the duties which are owed by a receiver or an administrative receiver and who such duties would be owed to.

2.5 Liquidation

The DIFC Insolvency Law provides a framework for an orderly liquidation of a debtor's assets. Liquidation[9] can be either voluntary by the debtor company itself (i.e. its members) or by any creditor following the passing of a resolution to appoint a liquidator for the purpose of liquidating the company's affairs and distributing its assets.

Where it is proposed that a company be wound up voluntarily, the directors may make a statutory declaration, having made a full inquiry into the company's affairs, to confirm that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of the liquidation. Where a statutory declaration is made under Article 59 of the DIFC Insolvency Law, it will be deemed to be a solvent liquidation.[10]

It is vital that the director making the declaration satisfies himself / herself that the company will be able to pay its debts in full, together with interest within the period specified and that their opinion is based on reasonable grounds. Otherwise, the director could be liable for a fine of up to USD 20,000.[11]

In a members' voluntary liquidation, the shareholders of the company by ordinary resolution (in accordance with the company's Articles of association or any applicable laws) shall appoint one or more (DIFC licensed) liquidators to liquidate the company's affairs and distribute its assets. On the appointment of a liquidator, all the powers of the directors cease, except so far as the company, by ordinary resolution, or the liquidator, sanctions their continuance. From the commencement of the liquidation, the company shall cease to carry on its business, other than any business for the proper liquidation of the company.[12]

In addition to the voluntary liquidation of a company by its members or creditors, the DIFC Insolvency Law also provides for a compulsory liquidation if one or more of the following criteria have been satisfied:

- the company has resolved to be wound up by the court;
- the company is unable to pay its debts;[13]
- the moratorium for a company under Article 8 of the DIFC Insolvency Law has come to an end and no approved CVA has effect in relation to the company;
- a rehabilitation plan has not been approved by the court; or
- the court finds it just and equitable that the company be wound up.

Under compulsory liquidation, the liquidator assists the court by ensuring the company's assets are retrieved, secured, released and distributed to the creditors, and where there is a surplus, to the persons entitled to it.[14] The liquidator also has a duty to investigate the dealings, failings and affairs of the company.[15]

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8 *Idem,* Part 5, Articles 42-50.
9 *Idem,* Part 6, Articles 51-116.
10 *Idem,* Article 60.
11 *Idem,* Article 59(4).
12 *Idem,* Article 57.
13 *Idem,* Article 82.
14 *Idem,* Article 93.
15 *Idem,* Article 89.

The application for the liquidation of a company by the court may be filed by the company, its directors or any of its creditors (including contingent or prospective creditors).[16] Where a company intends to oppose a petition for its liquidation, it must notify the court no less than seven days before the date fixed for the first hearing.[17]

At any time after an application for liquidation has been made, and before a winding up order has been issued, the company, its creditors or any other person liable to contribute to the assets of the company may perform the following:[18]

- apply for a stay of proceedings where an action is pending in the court; and / or
- apply to restrain any other action or proceedings pending against the company.

Any liquidation must be formally approved by the court and, if so approved, will be binding on the debtor and all of its creditors. Once a winding up order has been issued by the court, this must be forwarded to the Registrar of Companies (under the DIFC Companies Law No. 5 of 2018) or the Dubai Financial Services Authority, or both, where appropriate.

Any liquidator appointed in a liquidation (voluntary or compulsory) has extensive powers under Schedule 3 of the DIFC Insolvency Law,[19] for example, to perform the following:

- pay any class of creditors in full;
- make any compromise or arrangement with creditors;
- bring or defend any action or proceedings in the name and on behalf of the company;
- carry on the business of the company so far as may be necessary for its beneficial liquidation;
- sell any of the company's property by public auction or private contract; and
- do everything necessary to wind up the company's affairs and distribute its assets.

3. New money and super priority

The term "new money" refers to the additional financing used for a company that is undergoing restructuring. Some examples of new money can include loans, other forms of credit and investments once the insolvency process commences in an effort to support a company's restructuring plan. The "new money" must be approved by the insolvency practitioner or the court and a detailed plan must be provided to exhibit how the funds will be used to stabilise and revive the company.

"Super priority" is a term that refers to the legal status granted to new money lenders to give creditors priority over others in terms of repayment. Accordingly, in the event of liquidation or asset distribution, new money lenders are often paid before other unsecured creditors, depending on the court's decision on whether to grant such a legal status. This (super priority) status is granted to motivate investors and / or lenders to provide new money to financially distressed companies by offering a higher level of security on their investments. The most notable practical implication of granting a "super priority" right to a lender is the fact that existing creditors may be affected, as super priority can alter the hierarchy of claims which can lead to push back from existing secured creditors who may find their priority being diluted. Accordingly, these provisions must proceed with careful application.

4. Secured creditors rights

Secured creditors under DIFC law are granted priority over unsecured creditors regarding the assets subject to their security interests. This means they have a preferential right to payment from the proceeds of the sale of collateral before other creditors.

In general, secured creditors have the right to enforce their security interests at the beginning of the insolvency process. To fulfill their claims, secured creditors can enforce the authority to seize, sell, or otherwise deal with the secured assets. Specific guidelines and requirements for this kind of enforcement are provided under the DIFC Insolvency Law.

The DIFC Insolvency Law aims to ensure that secured creditors are afforded adequate protection of their interests during the insolvency process, wherein the value of collateral is maintained and there are periodic payments that are made to offset any potential decline in the collateral's value.

16 *Idem,* Article 83.
17 Regulations, regulation 6.2.5.
18 DIFC Insolvency Law, Article 96.
19 *Idem,* Article 53(1).

5. Jurisdictional challenges and cross-border insolvency

In the event collateral or debtor's assets are located outside the jurisdiction of the DIFC, they may face jurisdictional challenges. Enforcement of court orders in other jurisdictions may require additional legal proceedings, depending on international agreements / treaties and the legal framework of the foreign jurisdiction.

The DIFC Insolvency Law incorporates the UNCITRAL Model Law on Cross-Border Insolvency[20] (Model Law), which is designed to assist in cross-border insolvency proceedings in cases involving companies that have assets or creditors in more than one country. The Model Law has been fully adopted (i.e. without amendments or modifications) into the DIFC Insolvency Law.

The Model Law applies where:

- assistance is sought in the DIFC in connection with foreign proceedings;
- assistance is sought in a foreign country in relation to proceedings under the DIFC Insolvency Law;
- a foreign proceeding and proceedings under the DIFC Insolvency Law are taking place concurrently; or
- creditors or other interested persons in foreign countries are interested in commencing or participating in proceedings under the DIFC Insolvency Law.

The Model Law seeks to ensure that insolvency officials from one jurisdiction are recognised in other jurisdictions and in case foreign proceedings and proceedings under the DIFC Insolvency Law are taking place concurrently, regarding the same debtor, the court shall seek cooperation and coordination with the foreign jurisdiction.

6. Directors' liabilities

The DIFC Insolvency Law, the Regulations and the companies' law (DIFC Companies Law No. 5 of 2018) are designed to ensure that directors are responsible for good housekeeping, corporate governance and the protection of shareholders and creditors' interests. In the context of insolvency, directors must act with diligence, prioritise the interests of creditors and comply fully with all statutory requirements in respect of any remedy enforced by the courts. As such, it is paramount for directors to understand and adhere to their duties to maintain corporate integrity and financial stability.

Directors are under a duty to act in good faith, prioritise the company's best interests and exercise care, skill and diligence. This type of duty includes taking into consideration the interests of creditors when an entity is facing insolvency. In particular, the directors must:

- avoid "insolvent trading";
- act in the best interests of creditors; and
- promptly initiate insolvency proceedings when appropriate and necessary.

Under the DIFC Insolvency Law, the trigger for insolvency is if the company is or is likely to become unable to pay its debts as and when they fall due. The company will be deemed unable to pay its debts if any of the following apply:

- a creditor to whom the company is indebted for a sum exceeding USD 2,000 which is due and payable has served a written demand on the company requiring it to pay the sum, and the company has neglected to pay the sum or to agree terms relating to its payment to the reasonable satisfaction of the creditor;
- an execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
- it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; and / or
- the value of the company's current assets is less than its current liabilities (taking into account its contingent and prospective liabilities).

The DIFC Insolvency Law specifies certain acts for which directors may be held liable in the event of a liquidation or an administration of the company, including (but not limited to) the following:

- fraud in anticipation of liquidation.[21] This applies to any director (past or present) who within the 12 months immediately preceding the commencement of the liquidation has (including but not limited to) concealed or removed company property to the value of USD 1,000 or more, concealed company debt, made false entries in company books or pawned or pledged any property held on credit;
- transactions in fraud of creditors.[22] Upon the date of deemed insolvency, directors can be held liable for gifting, charging, transferring, concealing, removing and / or causing or conniving at the levying of any execution against the company's property;

20 *Idem,* Schedule 4.
21 *Idem,* Article 107.
22 *Idem,* Article 108.

- false representations to creditors.[23] Directors (past or present) may be held liable for any losses suffered as a result of false representations made to creditors and / or committing any other fraud for the purpose of obtaining the consent of the company's creditors to an agreement relating to company affairs in the context of its insolvency;
- fraudulent trading.[24] Directors will face liability where they are involved in carrying out business with the intent to defraud creditors of the company or of any person for any fraudulent purpose;
- wrongful trading. [25]Directors can be held liable for debts incurred if they continue to trade when they knew, or ought to have known, that there was a reasonable prospect of the company going into an insolvent liquidation. However, the court shall not make a declaration under this Article if it is satisfied that the directors took every step taken to minimise the potential loss to the company's creditors; and
- sanctions for non-compliance. These will be ordered where there has been a failure to comply with the requirement to file for insolvency or to cooperate with officeholders can result in criminal penalties.

Directors must promptly file for insolvency proceedings in the event the company is unable to pay its debts as they fall due. If the directors do not settle debts in a timely manner, this could give rise to personal liability.[26] Directors are held accountable through both civil and criminal liabilities.

Directors must ensure that the company is not trading if it does become insolvent. If the directors are aware, or ought to be aware, that there is no reasonable prospect of avoiding insolvency, they are obligated to take every step to minimize potential loss to the company's creditors.

If directors are found guilty of breaching their duties, the court can enforce a judgment on the directors compelling them to compensate the company for losses resulting from the breach of duties.

In relation to wrongful trading (referred to above), the criteria for a director being aware of the reasonable prospect of insolvency are detailed in the DIFC Insolvency Law. In the event that a director of a company ought to know or ascertain, the conclusions which he / she ought to reach and the steps which he / she ought to take are those which would be known, ascertained, reached or taken, by a reasonably diligent person having both:

- the general knowledge, skill, and experience that may be reasonably expected of a person carrying out the same functions as are carried out by that director in relation to the company; and
- the general knowledge, skill, and experience that the director has.

In light of the above, it is prudent for directors to be mindful of their obligations and duties. To mitigate the risk of any breach, directors should:

- engage in proactive risk management, ensuring thy have robust financial oversight and are mindful of any preliminary warning signs to detect signs of insolvency, which includes maintenance of comprehensive records;
- ensure they receive up-to-date training and are aware of their responsibilities under the current insolvency regime;
- obtain directors' and officers' liability insurance to protect themselves from potential claims arising from their duties or purported claims of a breach. However, insurance will not cover all types of liability, such as cases of fraud and / or wilful misconduct; and
- contemplate restructuring and turnaround strategies when dealing with a distressed company. Early intervention can help to mitigate insolvency risks and protect the interests of creditors and stakeholders.

The DIFC Insolvency Law and Regulations place a strong emphasis on the personal accountability and fiduciary duties of directors in upholding company integrity. Directors are required to navigate a complex landscape of legal obligations and practical concerns to protect the financial stability of their companies and to avoid personal liability.

Where a director has been in breach of any of the above acts, the court may (in response to an action by any aggrieved person including an administrator, liquidator, administrative receiver, creditor or shareholder) make any order it sees fit against the director, requiring him or her to:

- repay or account for any funds misapplied or retained (with interest);
- pay compensation for any breach of duties; and / or
- contribute to the company's assets.

Directors found to be in breach of their duties may also be disqualified from serving as a director of any company within the DIFC for a specified period. It is therefore important that directors pay close attention to their duties and potential liabilities as they go about making decisions, particularly for a company in financial distress.

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23 *Idem,* Article 111.
24 *Idem,* Article 112.
25 *Idem,* Article 113.
26 *Idem,* Article 115.

7. Voidable transactions

Voidable transactions are specific transactions that can be invalidated or reversed by the court following an application by an administrator or liquidator, if certain conditions are met. These transactions are typically scrutinised to ensure fairness and prevent any undue preference or fraudulent activity that may disadvantage creditors. They include:

- preferences.[27] The effect of a preference transaction is to place a creditor in a position which, if the debtor were placed into insolvent liquidation, would be better than the position it would have been in had that transaction not been entered into. No order will be made in relation to a preference unless the court is satisfied the debtor was influenced by a desire to prefer the relevant person. In the case of a transaction entered into with a connected person, there will be a rebuttable presumption that such a desire existed; and

- transactions at an undervalue.[28] These occur where a company has made a gift to a person or otherwise entered into a transaction with a person on terms that provide for the debtor to receive no consideration, or consideration the value of which, in money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the debtor. No order will be made in respect of a transaction at an undervalue if the court is satisfied that: (a) the debtor entered the transaction in good faith and for the purpose of carrying on the business of the debtor; and (b) at the time of the relevant transaction, there were reasonable grounds for believing that the transaction would benefit the debtor.

In order to constitute a preference or a transaction at an undervalue, the relevant transaction must have been entered into (in the case of a transaction at an undervalue or a preference which is given to a connected person) within the two year period preceding the onset of insolvency or (in the case of a preference which is given to an unconnected person) within the six month period preceding the onset of insolvency.

These provisions are designed to maintain equity among creditors and ensure that the company's assets are fairly distributed during insolvency proceedings.

8. Conclusion

The recent legislative changes by the UAE in relation to its insolvency procedures (including the enactment of its new bankruptcy law)[29] evidence the UAE's appetite to better position itself as a key player in cross border restructurings. This has been further enhanced by the DIFC Insolvency Law's inclusion of a rehabilitation process and its incorporation of the Model Law, which should also provide for a more coordinated and predictable approach for the many international businesses in the DIFC which may eventually be involved in multi-jurisdictional restructuring proceedings.

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27 *Idem,* Article 132.
28 *Idem,* Article 131.
29 Federal Law Decree No. 51 of 2023.

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