Bankruptcy and Restructuring in the GCC: An Update on Recent Developments

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The global impact of the financial crisis, a slump in oil prices and a growing realisation that insolvency and restructuring laws in the Middle East have not kept pace with the speed of developments in the business environment have all fuelled a recent wave of restructuring law reforms in the GCC over the past few years.

While bankruptcy regimes have never been a focus for legislators in a region where corporate difficulties tend to be resolved privately, an emerging awareness that robust policies and procedures and certainty of outcomes are critical to foreign investors has led to the advent of several new legal and regulatory regimes.

The first mover was the United Arab Emirates, which in September 2016 published a new bankruptcy law that came into force that year. As part of the government's plans to modernise business laws, the new law introduced measures to rescue businesses in distress, such as preventive compositions and debt restructuring, and reformed the bankruptcy regime.

Then, in 2018, came two further pieces of legislation: in May, Bahrain adopted its new Reorganisation and Bankruptcy Law; and new bankruptcy laws in Saudi Arabia came into effect in August.

In both cases amendments are focused on attracting foreign investors, removing stigmas and modernising the existing regime to offer debtors greater opportunities for reorganisation, provide a simplified liquidation process, and ensure fair treatment of creditors.

We are yet to see anything similar in Kuwait, though reforms have been suggested to bring its bankruptcy and insolvency

regime more in line with the Chapter 11 process in the United States, while Oman is lagging behind on reform and Qatar is pursuing a different path. It is also worth noting that wholly different regimes operate in the free zones of the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).

In this paper, we review developments in bankruptcy legislation in the UAE, Bahrain and Saudi Arabia, highlight recent developments, and seek to showcase common themes and points of differentiation between the new regimes.

Key Features of New GCC Bankruptcy Regimes

	UAE	Bahrain	Saudi Arabia
Available proceedings	Preventive composition; bankruptcy.	In court reorganisation; pre-packaged reorganisation and liquidation proceedings.	Preventative settlement, financial reorganisation and liquidation proceedings.
Court role	The court appoints a bankruptcy or reorganisation trustee, authorizes the bankrupt debtor to carry on its trade and supervises and ratifies the reorganisation plan or liquidation.	The court appoints a bankruptcy or reorganisation trustee, approves transactions outside the ordinary course and supervises and ratifies the reorganisation plan or liquidation.	The court appoints a bankruptcy trustee in financial reorganisation and liquidation, ratifies the proposals in preventive settlement and financial reorganisation.
Creditors' rights to initiate restructuring and propose a plan	Creditors cannot initiate involuntary reorganisation but can participate directly, and, while they cannot propose a plan, they can propose changes to the plan put forward.	Creditors can commence proceedings and, in certain circumstances, can file a reorganisation plan.	Creditors can initiate a restructuring procedure and propose to the court the name of the trustee he/she wishes to appoint in the case of a financial reorganisation and may request a liquidation order if certain conditions are met.
Plan approval levels	2/3 majority of unsecured claims.	Majority of creditors in a class provided they represented at least 2/3 of the total amount of voting claims in a class; court has discretion to ratify a plan without a class approval if such class receives pursuant to the plan more than in liquidation.	2/3 of the value of claims in the same category, including creditors whose claims represent more than half of the value of the debts of a non-related party (if any).
Secured creditors' status	Secured creditors allowed to vote only if they forego security. Plan binds unsecured creditors only.	Plan binds all affected creditors.	Proposals bind all affected creditors.
Debtor's right to initiate restructuring	A preventive composition application can be made by a debtor who has defaulted on debts but is not insolvent, provided it has not been in default for more than 30 business days.	A debtor can commence proceedings if it has failed to pay its debts for 30 days, will be incapable of paying its financial liabilities as they fall due, or if the value of its liabilities exceeds the value of its assets.	A debtor can initiate a preventive settlement procedure if it expects financial distress, has ceased paying debts as they fall due, or if its assets are not sufficient to pay off its debts.
Moratorium	A moratorium is imposed on all claims and enforcement proceedings until the plan is approved and unless the court decides otherwise.	A moratorium on claims against the bankrupt estate is activated when the court approves the commencement of proceedings and lasts for an initial period of 120 days.	Under a preventative settlement and liquidation process, the court may grant a suspension order with respect to any claims arising from the creditors in which they aim to declare the debtor bankrupt or to execute on the debtor's assets. Under a financial reorganisation, a moratorium is automatically imposed on all claims until the date on which the court either rejects or ratifies the proposal or the proceedings terminate at an earlier date.

United Arab Emirates[1]

The new UAE Bankruptcy Law No. 9 of 2016 came into force on December 29, 2016, establishing the Financial Restructuring Committee's ability to, among other things, supervise restructuring proceedings undertaken by licensed financial institutions.

The law primarily applies to corporate entities, including financial institutions established under the laws of the UAE, excluding companies in the DIFC and ADGM. It is broadly composed of two main schemes for debtors in financial difficulties – preventive composition and bankruptcy. The amendments were aimed at ensuring survival of the business undergoing financial difficulties, while addressing one of the major concerns under the old regime, namely strict criminal liability on issuers of bounced cheques; without, however, fully removing the risk of criminal liability in conjunction with insolvency proceedings.

Amendments further sought to make the restructuring process as orderly as possible, by prohibiting *ipso facto* clauses (similar to the U.S. bankruptcy law) making void any provisions in a financing agreement qualifying commencement of the preventive composition proceedings an event of default. Both types of proceedings are coupled with a moratorium on any claims and enforcement proceedings unless the court decides otherwise. Further, to enhance the chances of a successful restructuring, the amendments introduced new provisions regulating the extension of new financing to a debtor who is subject to the debt restructuring proceedings.

Preventive Composition: Process in a Nutshell

Preventive composition is similar to the voluntary arrangements under English law and *sauvegarde* proceedings under French law, providing a scheme for solvent debtors to avoid liquidation by agreeing with creditors to repay debts via a court-approved plan. An application can be made by a debtor who has defaulted on debts but is not insolvent, provided it has not been in default for more than 30 business days.

The application to the court sets out cash flow projections and a proposed plan, and, if the application is accepted, the court then appoints a trustee to supervise the settlement process. The debtor and the trustee put together a settlement plan, which is then, with the permission of the court, voted on by unsecured creditors and can only be approved by a two-thirds majority vote.

Once approved, the plan is sent to the court for final approval, following which it binds all the unsecured creditors whether or not they voted in its favour. The regime does have its drawbacks, however, not least due to it being limited to unsecured creditors only. Secured creditors are allowed to vote but only if they forego all of their security.

Bankruptcy: Process in a Nutshell

Bankruptcy proceedings no longer necessarily lead to a liquidation of the debtor, as was previously the case, and the primary aim is now to restructure the debts of an insolvent debtor with a view to it continuing as a going concern. The proceedings can be initiated by the debtor, the creditors or the Office of the Public Prosecutor. For unsecured creditors to be able to apply, the value of their debt must exceed AED 100,000 and they must first serve the debtor with a 30-day written request for payment. The Public Prosecutor can initiate proceedings if it deems them in the public interest.

Once the petition is approved, the court appoints a trustee to supervise proceedings and the initiation of the proceedings is publicly announced. As part of proceedings, the trustee prepares a list of claims and, based on its review of those and debtor's resources, prepares a report outlining whether the restructuring is feasible or if the debtor should be declared bankrupt. The proceedings can have two possible outcomes: restructuring or liquidation.

In the first instance, a restructuring plan is prepared and put to a vote by the unsecured creditors (with thresholds, process and effect similar to preventive composition). In the latter case, the debtor's assets are liquidated and all its debt becomes due. It is worth noting that the law provides an exhaustive list of events that can lead to declaring the debtor bankrupt or liquidated, where debt restructuring is deemed either inappropriate or unfeasible.

CASE STUDY 1 – ABU DHABI

In March 2019, it was reported that the Abu Dhabi Judicial Department had saved a company from bankruptcy through restructuring, in the first case under the new law. The case in the Abu Dhabi Court of First Instance involved a limited liability company that was unable to pay debts that exceeded its available capital by 18 times.

The court restructured the business after appointing a trustee to implement and oversee the restructuring, allowing the business to pay off debts, renew its commercial license, achieve a liquidity level of five times its capital and resume business.

Bahrain[2]

Bahrain adopted its new Reorganisation and Bankruptcy Law (Bahrain Law No. 22/2018) on May 30, 2018, with the stated aim of maximising the value of bankrupt estates, creating a safety net for start-ups and encouraging corporate reorganisation over liquidation. The law introduces a purpose-built tool for commercial companies and merchants (with respect to their trade liabilities) that borrows restructuring concepts from the U.S. Bankruptcy Code's Chapter 11 and the U.K.'s pre-packaged insolvency procedures—both familiar, and popular with, international companies and investors.

Key highlights include the ability to cram down across classes, a moratorium on enforcement proceedings, the ability to sell assets out of the bankrupt estate free of liens, the ability to obtain DIP-type financing, and the right of the debtor to continue to manage its business in the ordinary course. The debtor also has the option to submit a pre-packaged reorganisation plan for ratification by the court, substantially similar to the English law pre-pack procedure.

In-Court Reorganisation: Process in a Nutshell

Under the new law, either a debtor or its creditors may commence proceedings if the debtor has failed to pay its debts for a period of 30 days from their due date, will be incapable of paying its financial liabilities as they fall due, or if the value of its liabilities exceeds the value of its assets. An independent reorganisation trustee is appointed to prepare a reorganisation plan and produce an inventory of assets.

Upon the commencement of the proceedings, the court will form a creditors' committee consisting of up to five unsecured creditors. Within three months of the commencement of reorganisation proceedings, the reorganisation trustee, acting as the debtor's supervisor, must submit a reorganisation plan that it prepares in consultation with the debtor and the creditors. Alternatively, the creditors' committee or creditors holding at least one-third of the total claims can file a reorganisation plan, but only when proceedings have been pending for at least six months and the supervisor has failed to make progress.

A meeting and vote of the creditors is required to be held within 30 days of filing the initial reorganisation plan, or within 20 days of filing a modified plan. No quorum is required for a class to approve the plan. If the majority of creditors that participate in the vote in each affected class accepts the plan it will be approved, provided creditors voting in favour of the plan account for at least two-thirds of the total amount of debts in that class that participated in the vote. Classes that are unaffected or are fully discharged pursuant to the plan are deemed to have approved it without a vote.

The plan duly approved by the creditors is submitted to the court and, once ratified by the court, becomes binding on all creditors, wherever located and regardless of whether or not they voted for it. The court has the discretion to ratify the plan even if it is not approved by a class of creditors, if such creditors will receive more pursuant to the plan than they would have in a liquidation. Ratification of the plan discharges and releases the debtor from all affected debts and liabilities that arose prior to such date.

CASE STUDY 2 – GARMCO OF BAHRAIN

In the first test case for Bahrain's new Reorganisation and Bankruptcy Law, in January 2019, Bahrain-based Gulf Aluminium Rolling Mill (Garmco) filed a voluntary petition for relief and was granted a moratorium on all claims pending finalisation of its reorganisation plan. The company disclosed that it had undertaken an accelerated effort in 2018 to prepare a strategic plan for reorganising the business, but that it required additional time to build consensus among stakeholders, including bank lenders. The protections under the new law will enable it to meet its legal obligations and obtain the necessary protection to continue operating while undergoing a full reorganisation, the company said in a statement.

Saudi Arabia

Saudi Arabia's Ministry of Commerce and Investment (MOCI) published a new set of investor-friendly rules and regulations in 2018, including a new bankruptcy law that came into effect in August 2018. Similar to other jurisdictions, the law aims at providing bankrupt or insolvent debtors with an opportunity to reorganise and rescue their businesses, while also providing for a simplified liquidation process and a fairer distribution to creditors upon liquidation.

The law introduces the formation of a specialist bankruptcy committee that reports to the MOCI and is an independent administrative and financial legal body. The committee's responsibilities include managing a bankruptcy register and coordinating the relevant liquidation and bankruptcy procedures.

The law provides for three main procedures: preventive settlement, financial reorganisation and liquidation proceedings. Short of liquidation, a debtor now has two options to reach an agreement with its creditors to settle its debts, both with the involvement of the court: in preventative settlement the debtor maintains the management of its business, while the financial reorganisation procedure is run under the supervision of a bankruptcy trustee.

Preventive Settlement: Process in a Nutshell

The debtor can submit a settlement request to the court and may also request that the court suspend any claims arising from the creditors in which they aim to declare the debtor's bankruptcy, or any requests to execute on the debtor's assets.

This procedure is available to debtors with expected as well as actual financial distress and also to debtors who are already bankrupt (but not to debtors who have been granted settlement within the previous 12 months). Qualifying debtors may submit a preventative settlement request to the court and the court will then determine a hearing date, which must occur within 40 days of the debtor submitting the request.

When and if the court rules to open the preventive settlement process, it shall set a date for the vote of the creditors on the proposal for preventive settlement usually within a period not exceeding 40 days from the date of opening the proceedings.

Any settlement proposal shall be approved by creditors whose claims represent two-thirds of the value of the claims in the same class, including creditors whose claims represent more than half of the value of the claims of non-related parties (if any). Proposal is then ratified by the court and even if the creditors fail to vote on it, the Court may still rule in its favour if it deems it appropriate.

The debtor may request that the court suspend any claims arising from the creditors in which they aim to declare the debtor's bankruptcy or any requests to execute on the debtor's assets for a period not exceeding 180 days. In order to make such a request, however, it must be accompanied by a report prepared by a bankruptcy licensed trustee and the court will be unable to accept a request if the trustee's report does not confirm that the majority of the concerned creditors are likely to approve the settlement proposal.

Financial Reorganisation: Process in a Nutshell

A debtor, competent authority or creditor may submit a request for reorganisation, and the court will then appoint a bankruptcy trustee and notify creditors. Once initiated, the trustee will replace the debtor in managing the business.

Once appointed the trustee shall prepare a proposal for financial reorganisation and file it with the court. The proposal shall include a description of the debtor's financial situation and the effects of the economic situation upon it. The trustee

must also give the court an indication of the likelihood of the creditors' approval of the proposal. Once the proposal has been filed with the court, the court shall set a date upon which the proposal will be put before the creditors. As above, a proposal shall be approved by creditors whose claims represent two-thirds of the value of the claims in the same class, including creditors whose claims represent more than half of the value of the claims of non-related parties (if any). Proposal is then ratified by the court and even if the creditors fail to vote on it, the Court may still rule in its favour if it deems it appropriate.

The registration of the petition to open the financial reorganisation proceeding results in a suspension of claims. The suspension period will remain in effect until the date on which the court either rejects or ratifies the petition, or the financial reorganisation proceeding terminates.

Liquidation: Process in a Nutshell

Finally, the law sets out new liquidation procedures and details the ranking of debt in the Kingdom (with rough ranking (top down): secured debts, certain priority debts (e.g., worker's wages; family expenses; continuing business expenses during liquidation process); unsecured debts and, unusually, last ranking - taxes), so that any proceeds obtained from a liquidation process will be distributed in accordance with a clear order of priority.

Before a debtor or creditor may seek an order for liquidation the following conditions need to be met: (i) the debt must have matured and be of a fixed amount; (ii) the debt must not be below the amount stipulated by the Bankruptcy Committee; and (iii) the creditor must prove that it has requested the debtor to pay its claim 28 days before the date of registration of the petition with the court. Liquidation process is supervised by a court appointed trustee and shall be completed when the Trustee applies to the court to terminate the liquidation proceeding. The Trustee may only make such an application upon completion of: (i) the procedure for the sale of bankruptcy assets; (ii) the end of the legal proceedings to which the debtor is a party; and (iii) the final distribution to creditors. The Trustee must provide final accounts and financial reports with its petition and notify the creditors before filing the petition. An interested party may object to the Trustee's petition before the court within 14 days of its filing.

Upon the registration of a liquidation proceeding or of the Court judgment to open such proceedings, there shall be a period of suspension of all claims until the date of the Court's judgment dismissing the petition or terminating the proceeding. However, the court may *sua sponte*, or at the request of an interested party, rule the recovery of any assets disposed of during the period of suspension of the claims, as it deems appropriate. The court also has the ability (at the request of the relevant interested party) to suspend the time limit for suspension of specific claims for which an action has been taken prior to the suspension, if it is found to be in the interests both of the debtor and the majority of creditors. Note, however, that no one other than the court may take any legal action during the duration of the suspension of claims against any guarantor who has provided a personal guarantee or real security to secure the debtor's obligation.

CASE STUDY 3 – SAAD

In March 2019, the Saudi Court approved an application by the detained and indebted billionaire Maan Al Sanea and his company, to be resolved under the new bankruptcy regime. Saad defaulted in 2009, leaving banks with unpaid debts of about USD 22 billion. Over the last ten years, creditors have pursued Saad for claims between USD 11 billion and USD 16 billion. A court in Dammam has approved an application for financial reorganisation under the terms of the Saudi Bankruptcy law and a trustee has been appointed to oversee the process. The new laws have provided creditors and debtors with greater options and could lead to the resolution of one of the kingdom's largest and longest-running debt issues.

The Road Ahead

The implementation of these more sophisticated and streamlined regimes has been much anticipated and represents a significant cultural shift for the Gulf region. It is hoped the new laws will ease the restructuring of companies, support troubled businesses and mitigate bankruptcy risk for investors.

It is too early to assess the success of these regimes, which will depend on the way in which the judiciaries in each jurisdiction choose to apply and implement the new rules and will require the support of key players across the economy. ■

1. See Lawale Ladapo and Mohamed Taha, "The New Bankruptcy Law of the UAE: Towards A More Business-Oriented Bankruptcy Regime," *Emerging Markets Restructuring Journal Issue No. 4 – Fall 2017.*
2. See David Billington and Buthaina Amin, "Legislation Watch: Bahrain's New Bankruptcy Law," *Emerging Markets Restructuring Journal Issue No. 9 – Summer 2019.*

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