Restructuring & insolvency in the GCC

How businesses can utilize updated procedures in the UAE, Saudi Arabia & Oman

Introduction

The worldwide economic distress caused by the ongoing Covid-19 pandemic has certainly not spared the GCC region. The pandemic has exacerbated the region's pre-existing economic challenges, many of which date from the prior distresses that occurred ten years ago and were never fully remediated. This has led to a knock-on effect whereby many corporate interests including both debtors and creditors need to consider insolvency and restructuring options in order to mitigate the increasing risks.

In recent years, several GCC jurisdictions have enacted new bankruptcy laws which have provided avenues where distressed companies can approach and remediate an insolvency scenario.

These new laws seek to enable a paradigm shift as to how debt should be treated, from that of a "punishment culture" to a "rescue culture", in line with the practices of other international commercially prominent jurisdictions such as the US and UK. Additionally, these laws provide for a process in which the injection of new capital via strategic investment can be managed, while at the same time claims based on existing debt can be both managed and mitigated, using a set legal process.

A company that previously would face crippling legal challenges in restructuring might take advantage of the formalized bankruptcy framework in order to manage and complete the restructure. Likewise, an entity that cannot successfully be restructured may have an opportunity to liquidate under the newer bankruptcy law provisions, without its management facing penalties from the entities' unsatisfied obligations.

BSA's restructuring and insolvency experts based in the UAE, Saudi Arabia and Oman discuss the new Bankruptcy Laws in these jurisdictions and how the frameworks can assist companies in need of restructuring or liquidation, as well as potential risks and considerations when understanding the restructuring & insolvency process.

United Arab Emirates

The UAE enacted Federal Law No. 9 of 2016 (the 'UAE Bankruptcy Law' or 'Law'), as amended, in order to facilitate a robust and thorough insolvency regime. The key benefit of the UAE Bankruptcy Law is that it permits an insolvent company to continue its operations with civil claims being suspended, while it works out a possible restructuring plan. A court-appointed trustee will oversee the process. Additionally, the Law provides relief from the most onerous criminal penalties regarding dishonored cheques, which had previously been in force and were being imposed against the directors and officers of companies in debt.

Who does the Law apply to?

The Law applies to:

- UAE companies established under the Commercial Companies Law;
- Companies partly or fully owned by the UAE or individual Emirates' Government;
- Free zone companies that are not governed by existing bankruptcy laws (e.g.: not including the DIFC and ADGM);
- Individuals who are classified as a "trader" under Federal Law No. 18 of 1993 relating to commercial transactions; and
- Civil companies.

A new insolvency law – UAE Federal Law No. 19 of 2019 - was also enacted with regard to personal insolvencies.

Filings under the new Law

To date, there has not been a groundswell of filings under the Law. This is most likely due to market uncertainty as to how the Law will be applied in practice, as there are provisions which may create unacceptable risks to both creditors and debtors. There is also some doubt about the viability of the "rescue culture" which was envisioned upon the Law's enactment. Therefore, the UAE market has generally continued to adhere to the pre-existing process of debt management, where debtors and creditors will often attempt to resolve their situations via an unwieldy mix of litigation – often resorting to criminal charges as well as civil claims, protracted negotiations, and refinance of facilities by lenders, who themselves are under distress from growing portfolios of non-performing loans.

Understanding the reasons why the Law has, thus far, not received widespread application requires some discussion of the basics of how the Law is structured. The Law provides two separate processes for restructuring: the less formal Preventative Composition ('PC') and more involved entry into restructuring or liquidation if the restructuring is not viable. The Law is not without its perils and includes restrictions upon bad faith filings as well as those where the available assets do not reach a statutory level, both of which may leave the debtor's directors, managers, and potentially its shareholders, open to both criminal and civil liability.

Preventative Composition

"Under Title 3 of the Law, Court supervised PC procedures are available solely on the debtor's request, with the aim of assisting the debtor to reach an agreement with creditors, pursuant to a plan of composition"

Under Title 3 of the Law, court supervised PC procedures are available solely on the debtor's request, with the aim of assisting the debtor to reach an agreement with creditors, pursuant to a plan of composition. Broadly, these procedures allow for a voluntary agreement between the debtor and its creditors, under which the creditors may accept a settlement or part payment for the debts owed. A debtor can submit a request for composition of bankruptcy if it is facing financial difficulties which require assistance to reconcile with creditors. The debtor must not have ceased to pay debts for a period of more than 30 consecutive days in order for this to be accepted.

A PC plan must be submitted to the court, which may appoint an expert selected from a list approved by the Committee of Financial Reorganization, to determine whether the debtor's assets are sufficient for composition. If the request for composition of bankruptcy is accepted, the court will then appoint a trustee to prepare a record containing all the debtor's creditors. During a scheme of composition, the debtor may continue to manage its business, subject to supervision by the appointed official. The court may appoint one or more inspectors from among the creditors to supervise execution of the scheme of composition. Any scheme of composition must be approved by the majority of creditors representing two-thirds of the total debt and must be approved by the court. This process must be completed within 3 years, although an extension is available if the creditors consent.

Restructuring or Bankruptcy Options

Title 4 of the Bankruptcy Law provides for both a more formal reorganization process and liquidation procedures where a scheme of composition is not viable and may be sought by either a creditor or debtor. As per Article 68 of the Law, a debtor "*shall*" make the request if the debtor has stopped paying debts for more than 30 consecutive days "*as a result of his difficult financial position or in case of his insolvency*".

A creditor may seek initiation of bankruptcy procedures if they have an ordinary debt of at least AED100,000, the creditor has already warned the debtor in writing to fulfil the debt, and the debtor has not fulfilled this debt within 30 consecutive working days from the date of the warning.

If the court accepts the request it will appoint a trustee, who will prepare a report on the debtor's business regarding the possibility of restructuring or selling the business. Restructuring procedures, or bankruptcy declaration and liquidation if the company cannot be restructured, may be subsequently ordered by the court. A restructuring must be concluded within 5 years and is subject to approval of creditors holding two-thirds of the total debt.

If the court declares bankruptcy and liquidation commences, the rights of secured creditors shall rank in preference to those of ordinary creditors. Statutory preferential claims include judicial fees or charges, end of service payments, unpaid wages for a maximum period of 3 months, professional fees, and any amounts due to governmental bodies. Secured creditors are not permitted to vote on the acceptance of the restructuring plan unless they waive their security rights or if the plan "*affects its secured rights*".

The Law also provides for a freeze of criminal prosecution for dishonored company cheques which bounced prior to the initiation of the proceedings, while the proceeding is ongoing - assuming no fraud is involved. This is a significant change from prior law and provides individuals who executed corporate cheques protections that were heretofore not available. Civil enforcement claims are also suspended for a period of no more than 10 months, subject to an extension upon leave of court.

Both the Preventative Composition and restructuring options provide for Debtor-in-Possession ('DIP') financing, which will allow the debtor to obtain new facilities with priority over all non-secured debt. This is a very helpful aspect of the law, insofar as it may give the debtor a previously unavailable lifeline while providing the incoming lender with greater comfort.

New Amendments and other Considerations

The Law was recently amended in response to the Covid-19 pandemic to provide for a filing with an automatic stay of the proceedings, if the debtor's insolvency arises out of an "*Emergency Financial Crisis*", defined as "*a general condition affecting trade or investment in the country, such as an epidemic, natural or environmental crisis, war, etc.... determined by a decision of the Council of Ministers*". However, in order to benefit from this suspension, the debtor must prove that the disruption of its financial position is due to the emergency.

The UAE Commercial Companies Law ('CCL') also sets forth provisions to dissolve a company, including in circumstances in which it loses most of its share capital or is otherwise no longer viable.

While this may be an appropriate option in some circumstances, the CCL does not provide for any stay of creditors' proceedings against the company and invariably will lead to a disorganized process, especially in complex cases of insolvent dissolution. While a CCL dissolution should be considered by an insolvent entity, care should be taken to also evaluate whether the UAE Bankruptcy Law provides a better option.

UAE: Key takeaways

Risks to consider

Importantly, if the debtor's assets are insufficient to satisfy at least 20% of its debts, the court may obligate members of the board or managers to pay these debts, in cases where their responsibility for the company's loss is evident, pursuant to the provisions of law.

Directors or managers may face criminal prosecution in the event of improper actions, or attempts to avoid payment of the company debts by filing a misleading bankruptcy petition.

In some circumstances, liability may even extend to the shareholders themselves, if they have been found to have been involved in improper actions related to the debtor company's management.

Key takeaways

In summary, the positives of a UAE Bankruptcy Law filing are as follows:

1. At least temporary relief from creditors;
2. Stay of criminal actions based upon bounced cheques until process is complete;
3. Opportunity to wipe away debts and avoid personal liability;
4. Avoidance of liability for failure to file for Bankruptcy; and,
5. Possibility to rehabilitate company if circumstances warrant.

The primary challenges include:

1. Uncertainty of the process and outcome;
2. Possibility of rejection and criminal prosecution in the event of fraud or other bad faith;
3. Subject to a 20% payment threshold – if this is not reached, the individual directors, shareholders, and managers may be personally liable; and,
4. Bankruptcy "stigma".

Kingdom of Saudi Arabia

The history of restructuring & insolvency in the Kingdom of Saudi Arabia

Previously, insolvency in the Kingdom of Saudi Arabia was governed by the related provisions under the Saudi Arabian Commercial Court Law, issued under the Royal Decree No. M/2 dated 15/1/1390H ('CCL') and the Settlement Against Bankruptcy Law issued under the Royal Decree No. M/16 dated 4/9/1416H ('SABL').

The CCL and the SABL did not provide a clear framework for the application of insolvency in Saudi Arabia and offered little protection to creditors and insolvent debtors with viable businesses.

Saudi Arabian courts were historically reluctant to declare a debtor bankrupt, even after all methods of debt collection were exhausted. Thus, the insolvency proceedings were considerably lengthy, and the overall business environment for creditors in Saudi Arabia was complicated.

In 2018, Saudi Arabia issued a new Bankruptcy Law by virtue of the Royal Decree No. M/50 dated 28/05/1439H, corresponding to 13/02/2018G, and its Implementing Regulations issued by the Council of Ministers' decision No. 622/1439 dated 24/12/1439 AH corresponding to 4/9/2018G (the 'Bankruptcy Law').

The Bankruptcy Law effectively replaced:

- The SABL;
- Chapter ten (10) of the CCL; and
- All provisions of any applied laws or regulations that are inconsistent with it.

The Bankruptcy Law is considered part of the Saudi Vision 2030, which, among other matters, aims to improve the current legislation by reforming outdated laws and introducing new ones - creating an investor-friendly environment and encouraging international investment in Saudi Arabia.

The Bankruptcy Law introduced a wide range of restructuring and insolvency procedures. It provided Saudi Arabia with the legal infrastructure it previously lacked to efficiently deal with companies facing financial difficulties.

The Bankruptcy Law's primary objective is to implement clear legal procedures in the areas of preventative settlement, financial restructuring, and liquidation procedures.

As such, the Bankruptcy Law paved the way to achieving financial stability while simultaneously benefiting creditors and debtors by:

- Allowing them to enter into agreements to schedule the payment of the debt;
- Reducing the costs and timeframe of the insolvency procedures, and
- Encouraging SMEs to further invest in the commercial market.

Who does the Law apply to?

The Bankruptcy Law applies to:

- Any natural person practicing commercial, professional and/or profitable activities in the Kingdom;
- All Saudi registered companies and any other businesses intending to generate profits on Saudi territory;
- Any natural and/or juristic foreign investor who owns assets, practices commercial, professional and/or profitable activities in Saudi Arabia through a Saudi-licensed entity.

Furthermore, the Bankruptcy Law applies solely to assets located in the Kingdom.

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Financial restructuring

Article 2 of the Bankruptcy Law addresses the application for financial restructuring, which is a procedure that allows the debtor to reach an agreement with the creditors by reorganizing the debtor's financials under the supervision of a licensed trustee.

Only debtors that are classified as 'Preventative Settlement Beneficiaries' may apply for financial restructuring before the competent courts under the supervision of a trustee that would be appointed to supervise the restructuring and ensure fairness of the procedure and its execution. Creditors and competent Governmental Authority also have the right to apply for the debtor's financial restructuring.

In case of an application by the creditor(s), the debtor should be notified within a period not exceeding 5 days from the day of submitting the request, which allows the debtor to object in cases where:

- The requirements for financial reorganization do not apply;
- The relevant debt is ambivalent; and
- The creditor is abusing its right to request financial restructuring.

Once the court approves the financial structuring, it applies to all creditors.

Furthermore, when there is an application for financial restructuring, no additional claims may be filed until (i) the court rejects such request, (ii) approves it, or (iii) once the associated procedures are terminated.

We note that throughout the financial restructuring procedures, the debtor, including its Shareholders, Managers, Board members, and Auditors are exempt from applying the provisions of the Companies' Law in relation to the company's obligations whenever its losses are equal to or exceed 50% of its share capital.

Preventative Settlement

Debtors may request a Preventive Settlement before the competent court in any of the following cases:

- If the debtor is facing financial disruption, which may lead to the discontinuation or insolvency of the business;
- The debtor is insolvent; or
- The debtor is bankrupt.

The Preventative Settlement aims to facilitate an agreement between the debtor and its creditors to settle the debts while the debtor maintains the right to manage the business.

Liquidation

According to Article 92 of the Bankruptcy Law, the debtor, the creditors, or any other competent Governmental Authority may apply before the Commercial Court to initiate liquidation procedures against the debtor.

The court shall review the application and shall commence the liquidation proceedings if (i) the debtor is insolvent or bankrupt and (ii) and the debtor's assets are sufficient to meet the expenses of the liquidation proceeding.

While the request for liquidation should be a last resort procedure, the court will only accept the liquidation application of the creditor provided it satisfies some strict conditions, as follows:

- The debt must be due with certain value, cause, and warranties (if any);
- The total value of the creditors' debts must not be less than the determined value by the bankruptcy committee; and
- The debt must be due based on an enforcement note or any other note, provided that the creditors must prove that they have requested the debtor to fulfil such amount within twenty-eight (28) days prior to submitting the liquidation request to the court.

The court shall appoint a bankruptcy licensed trustee to manage the liquidation process and take full control of the debtor's business. The bankruptcy licensed trustee shall (i) identify the claims of the creditors, (ii) collect the amounts due to the debtor and settle the latter's debts, (iii) identify and liquidate the debtor's assets and (iv) distribute the liquidation proceeds between the creditors according to their debt's priority.

We note in this context that for the first time in history, the Bankruptcy Law established a ranking criterion for the creditors' claims. The remunerations and expenses for the appointed bankruptcy licensed trustee and the experts and the cost of selling the debtor's assets will have priority over any other debts. However, the fulfillment of creditors' liabilities will be made in accordance with the following ranking, from highest importance to lowest, as follows:

- Secured debts;
- Secured financed debts;
- An amount equivalent to 30 days salary for the debtor's employees;
- Alimony for the debtor's family as determined by the applicable laws or a court order;
- Necessary expenses to ensure the continuity of the debtor's business operations during the relevant liquidation procedures;
- Accrued wages of the debtors' employees;
- Unsecured debts; and
- Unsecured Government official fees, membership fees, and taxes.

Administrative Liquidation

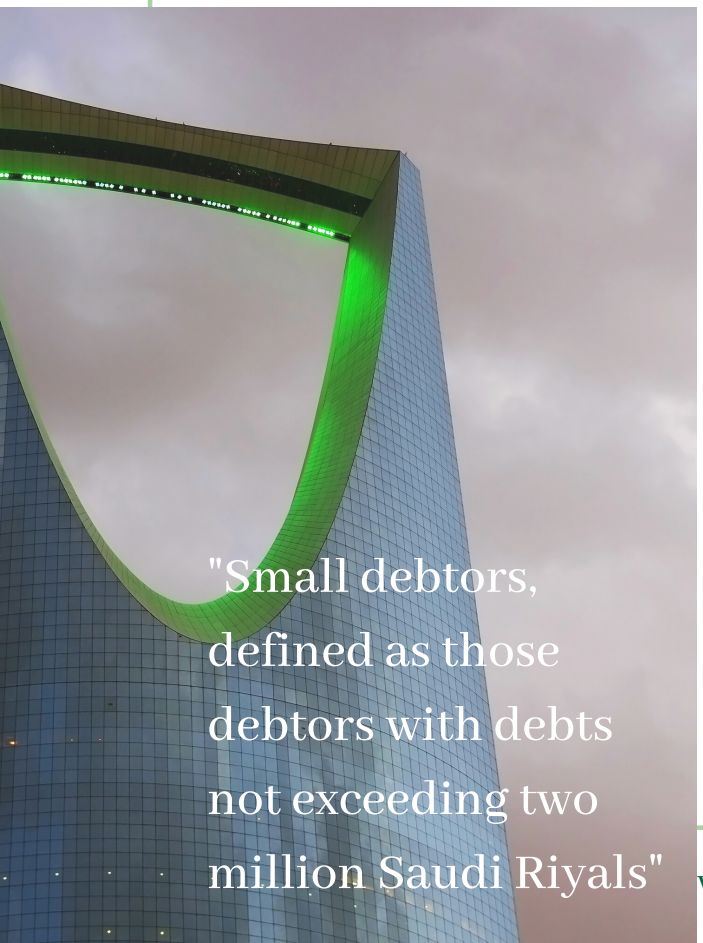
The Bankruptcy Law also provides for administrative liquidation, which is a procedure under the management of the bankruptcy commission, aiming to sell the bankruptcy assets, which sale proceeds are not expected to cover the expenses of the liquidation procedure.

Financing

Article 182 of Bankruptcy Law stipulates that the debtor is not permitted to secure any guaranteed financing after the commencement of any insolvency procedures before obtaining the court's approval. During the preventative settlement and financial restructuring procedures, a debtor may request the court's approval to secure guaranteed financing provided that such request must contain a report by an expert approving the same. The court will thereafter accept the request if it is considered necessary to continue the operations of the debtor's businesses or to protect the assets during the relevant insolvency procedures.

Small debtors

The Bankruptcy Law dedicated simpler and less costly application of the Protective Settlement, financial restructuring, and liquidation procedures to 'small debtors', defined as those debtors with debts not exceeding two million Saudi Riyals (SAR 2,000,000).



Penalties

The Bankruptcy Law provides penalties for violations of its provisions. The potential penalties stipulated under the Bankruptcy Law include:

- Imprisonment for up to 5 years and/or a fine of up to 5 million Saudi Riyals (approximately 1.3 million U.S. Dollars); and
- Restrictions on owning or operating a profitable business in Saudi Arabia.

KSA:
Key Takeaways

While the Bankruptcy Law is relatively new and has not been effectively tested, it did however introduce alternative solutions and is expected to increase the number of local and foreign investments in the Saudi Arabian market.

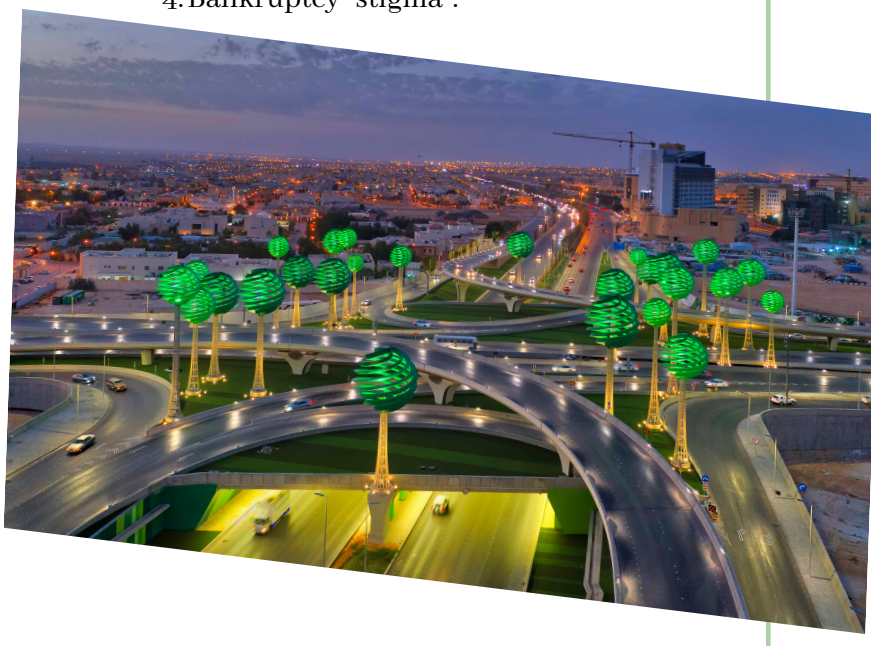
Key takeaways

In summary, the positives of the Saudi Arabian Bankruptcy Law include:

1. Possibility of debtors to maintain management of their business;
2. Reorganization in case of financial difficulties;
3. Simplified procedures for small debtors;
4. Prioritization of debts in a clear order;
5. Establishment of a public bankruptcy register; and
6. Options for amicable settlement with creditors.

The primary challenges include:

1. Uncertainty of the processes and outcome;
2. Proceedings may be initiated by creditors;
3. Strict penalties; and,
4. Bankruptcy “stigma”.



Oman

Oman recently introduced a new Bankruptcy framework through promulgating the Royal Decree No. 53/2019 ('Bankruptcy Law') which became effective on July 7, 2020 during the peak of the Covid-19 pandemic.

The new Bankruptcy Law gathered all the laws and regulations which were partially addressed in existing laws such as the Commercial Companies Law ('CCL') promulgated by Royal Decree no. (18/2019) and the Commercial Law ('CL') promulgated by Royal Decree no. (55/1990). Therefore, the new Bankruptcy Law formally revoked any articles and provisions in the other laws which conflicts its framework and provided new progressive rules and regulations with the aim of improving the methods and measures that are to be taken following a bankruptcy.

Oman now has a comprehensive and clear framework of bankruptcy which regulates international practices, is aligned with international standards and is applicable for traders as well as branches of foreign companies incorporated in Oman. The Law is applicable for the latter even if the parent company has not been adjudicated as bankrupt in a relevant foreign jurisdiction, and excludes companies licensed by the Central Bank of Oman and under the Oman Insurance Law promulgated through 12 / 1970.

For ease of understanding, the term "*trader*" is defined under the Omani Law as "*person who effects a commercial act in their own name, is qualified in the requisite manner and who makes such commercial transactions an occupation*".

The new Bankruptcy Law focuses on three key areas:

- Restructuring procedure;
- Preventive Composition; and
- Bankruptcy.

Aside from the provision of preventive composition and restructuring procedures, which are designed to avoid bankruptcy, the Bankruptcy Law also includes modified regulations and ruling regarding the procedure of the bankruptcy by itself.

"Oman now has a comprehensive and clear framework of bankruptcy which regulates international practices."

Restructuring

A significant new provision introduced by the Bankruptcy Law includes the concept of restructuring. The concept of restructuring is designed to overcome challenges and financial difficulties of corporate entities and traders where it involves proceedings that may assist the trader debtor to overcome a financial and administrative disorder, by way of settling the debtor's debts via a flexible restructuring plan. This helps the trader in avoiding legal action by its creditors and liquidation.

A restructuring under the new Bankruptcy Law is overseen by a Restructuring Committee, which is formed of registered experts and are defined to include enough persons, offices, and companies specialized in the restructuring field. The experts will be sought by the Competent Department at the Ministry of Commerce, Industry, and Investment Promotion and required to examine petitions for restructuring and the handling of the petitioner's assets.

It is pertinent to note that an application for bankruptcy under the new Bankruptcy Law may only be submitted by a trader who has practiced the business continuously for a period of 2 years prior to filing the application. In the case of a corporate entity, approval of the majority shareholders would be required.

This method is aimed to help prevent liquidation, by way of creating a settlement of the traders' debts with its creditors.

The procedure enforces strict and fast deadlines and requirements for the petition to be accepted and can only be submitted where it is found that the debtor has not committed any act of fraud and has practiced the business continuously for 2 years.

Preventive Composition

The second key area of focus under the new Bankruptcy Law is on the concept of Preventive Composition, which the trade debtor may apply for in situations when there is a disruption in the financial position, which is likely to lead to an interruption of the payment of the debtor's debts.

This method can be sought with the aim to achieve a settlement with creditors to avoid bankruptcy. Unlike the method of bankruptcy, creditors are unable to apply for a petition of Preventive Composition.

The trader may submit an application to the Court for Preventive Composition:

- If the trade has been practiced for a continuous 2 years and the trader has not committed a fraud act similar to the restructuring method;
- If the trader is facing difficulties and challenges in regard to their financial position, whereby the continuation of the business may lead to being unable to repay the debts.

The trader can continue to administer the property and undertake acts in the everyday course of business during the time of Preventive Composition. A composition trustee will be appointed by the court, who must help oversee the Preventive Composition process, such as the gathering of creditors and the publishing of the summary.

Where a Preventive Composition application succeeds, the Judge will require a majority vote of consent by the creditors, in which their approval must accumulate to two-thirds of the verified debts. For a secured creditor, they can't vote unless they give up their rights as secured creditors.

In situations where the company has issued bonds or sukuks and the outstanding amount of bonds exceeds more than one-third of the total outstanding debts, the composition will require further approval from the general assembly of the holders of the bonds or sukuks.

Bankruptcy

The chapter of bankruptcy in the Bankruptcy Law contains modified and updated provisions which were part of the Commercial Law and the Commercial Companies Law.

The third method stated in the Bankruptcy Law includes filing for bankruptcy in the case that any trader may be unable to pay his commercial debts due to the interruption of his commercial business and therefore may submit a petition in bankruptcy.

For a petition to be submitted, it must be made within 15 days from the date of cessation of payments and must include the reasons for the cessation and the appropriate documents, including statements of property and expenses.

The court may also prompt the decision of bankruptcy for a trader. Where a submission for bankruptcy is made, the trader company requires the approval of the majority of its shareholders.

Bankruptcy claims are examined by the court, who will in turn, take precautionary measures against the assets of the trader debtors to preserve the assets of the trader. The court shall also appoint a liquidator, who is obliged to publish a summary of the court's order in the Official Gazette and shall include the creditor's invitation to submit the details of the outstanding debts.

The liquidator will be the official receiver to oversee the insolvency proceedings and they will be in control of overseeing the management of assets of the debtor trader. Further, the liquidator must ensure that the bankrupt person cannot manage or dispose of any property, pay any debts, or retrieve any amounts that are owed to him.

Penalties

The new Omani Bankruptcy Law enforces penalties for petitions that are rejected by the court.

The petitioner may be found sentenced to a financial penalty in circumstances where the court considers the trader has intentionally claimed bankruptcy. Furthermore, the Law enforces an imprisonment sentence where they are found acting in bad faith, through methods of concealment, inducement, or neglects to include a creditor.

It also includes experts and liquidators who provide false information with respect to the procedures set out in the Law.

Oman: Key takeaways

The new Bankruptcy Law aims to encourage and promote investment in Oman, by helping to ensure transparency to both foreign and local investors and to withdraw any cause of business failure illuminated by the new updated methods which been made accessible and applicable to both debtors and creditors.

The new law will impact the working of companies by providing a base to seek remedy in circumstances of bankruptcy and by helping to provide more suitable conditions for companies to grow and to seek relief measures in the Omani market.

Furthermore, the new Bankruptcy Law ensures a protective and comprehensive overview for Omani businesses and foreign investors to cover any periods of financial distress and to have appropriate options with correct procedures.

Key takeaways

In summary, the positives of the Omani Bankruptcy Law are as follows:

1. Simplified and comprehensive procedures for filing bankruptcy;
2. Traders are protected from creditors from taking over their assets during times of financial distress; and
3. Transparency for Omani and Foreign businesses on the remedies in case of financial distress.

The primary challenges include:

1. Lack of local expertise for the restructuring procedure;
2. Based on the business' structure, some of the properties might be taken away to pay the creditors;
3. Financial institutions will note the bankruptcy status while applying for creditworthiness facilities and it may become difficult to get financing from financial institutions; and
4. Insurance costs may increase for the debtors.

Michael Kortbawi
Partner, UAE
+971 4 528 5555
michael.kortbawi@bsabh.com

Barry Greenberg
Of Counsel, UAE
+971 4 528 5555
barry.greenberg@bsabh.com

Arsalan Tariq
Partner, Oman
+968 2 421 8555
arsalan.tariq@bsabh.com

Jean Abboud
Senior Associate, Saudi Arabia
+966 57 186 0000
jean.abboud@bsabh.com

Reem Al Habsi
Associate, Oman
+968 2 421 8555
reem.alhabsi@bsabh.com

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