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Guidance Text

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INSOL International

6-7 Queen Street, London, EC4N 1SP, UK
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384

www.insol.org

Module Authors

Mr Bill Gambrill
Barrister and Solicitor (New Zealand)
Everys Legal Consultancy
Dubai
United Arab Emirates

Updated for 2020/ 2021 by **James Iremonger**,
Peter Somekh and **Alex Clamon**
of DLA Piper Middle East LLP

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN THE UNITED ARAB EMIRATES (UAE)[1]

Welcome to **Module 7E**, dealing with the insolvency system of **The United Arab Emirates (UAE)**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of the UAE's insolvency laws;
- a relatively detailed overview of the UAE's insolvency systems, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of the UAE.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2021**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2021 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in the UAE:

- the background and historical development of the UAE insolvency law;
- the various pieces of primary and secondary legislation governing UAE insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in the UAE;
- the rules relating to the recognition of foreign judgments in the UAE.

[1] The Law is stated as it is understood to be as at 1 May 2021.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of UAE insolvency law; and
- be able to answer questions based on a set of facts relating to UAE insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in Appendix A.

3. AN INTRODUCTION TO THE UNITED ARAB EMIRATES[2]

3.1 Brief history

The United Arab Emirates (the UAE) is a federation of seven emirates in the North-East of the Arabian peninsula (an emirate is a territory ruled by an "emir" – an Arabic word which roughly translates to "lord" or "commander" in relation to a group of people). Until 1971, the constituent emirates of the UAE were parties to treaties with the United Kingdom, which governed each emirate's foreign affairs.

The UAE came into existence on 2 December 1971 as a federal union of six emirates: Abu Dhabi, Ajman, Dubai, Fujairah, Sharjah and Umm al Quwain. The Emirate of Ras al Khaimah joined the Union in 1972. The UAE is a federal state, and each emirate retains authority over matters which are not reserved to the federal government under the Constitution. Each Emirate is ruled by an Emir, who is the source of authority in each of the respective Emirates.

3.2 Population

The population of the UAE is approximately 9.9 million (as at May 2021), of which approximately 12% are Emirati (citizens of the UAE) and 88% are expatriates. The expatriate population comes principally from South Asia (mainly India, Pakistan and Bangladesh), although the population contains people from many nationalities.
In each case, the principal city in each Emirate has the same name as the Emirate. The principal cities in the UAE are Abu Dhabi, the federal capital (approximate population 1.45 million), Dubai (approximately 3.3 million) and Sharjah (approximately 1.7 million) (the city of Sharjah is essentially contiguous to the city of Dubai).

3.3 Economy

The UAE has many characteristics of a fully-developed economy, but it is considered by many analysts to be an "emerging market". It is a capitalist economy, albeit with a significant degree of state involvement in a number of important economic sectors. The UAE has a Gross Domestic Product of USD 656 billion (estimated 2019 USD purchasing power parity) (ranked as 34th largest globally), which is a *per capita* GDP of USD 67,119 (13th highest globally) (data in 2017 dollars).

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[2] Population figures and economic data are taken from the CIA's World Factbook.

From the time of the initial oil and gas extraction in the 1950s, the UAE economy has relied principally on oil and gas, but there has been increased economic diversification in more recent years. Oil and gas now comprises 30% of the value of Gross Domestic Product. Other important economic sectors (particularly in the Emirate of Dubai) include trade, transportation and logistics, tourism, real estate, financial services and manufacturing.

The UAE was ranked 16th globally in the World Bank's 2020 Ease of Doing Business Index. However, there are a number of important limitations on the conduct of business and investment in the UAE, including some significant restrictions regarding foreign ownership of companies.

Like many other countries in the region, the UAE has operated an exchange rate whereby the currency, the UAE dirham, is fixed against the United States dollar. Since 1997, the rate has been fixed at AED 3.6725 to USD 1.

3.4 Constitution and government

The constitution of the UAE provides for the federal government of the country, as comprised by the constituent Emirates.[3] The constitution creates the Federal Supreme Council (FSC), the membership of which is made up of the rulers of each of the Emirates. The FSC is the highest constitutional authority of the UAE. The FSC elects the UAE's president and vice-president from among its members. The President chooses a prime minister and deputy prime minister. The Prime Minister appoints a cabinet, which is approved by the President. Since the establishment of the UAE, the practice has been for the ruler of Abu Dhabi to be the president of the UAE, and for the ruler of Dubai to be the prime minister.

The Constitution also provides for the Federal National Council (FNC). The FNC is a law-making body, being a unicameral assembly of 40 members. The membership of the FNC is divided among the Emirates reflecting the relative population size of each. Half of the members are elected by an electoral college selected by the ruler in each emirate (the electoral college had 224,279 members in the 2015 elections); half of the members are appointed by the respective rulers of each of the emirates. The members serve four year terms.

Federal law is made in the name of the President of the UAE. Laws are presented in draft in the Federal National Council and, if passed, submitted to the President for presentation and approval by the Federal Supreme Council. In addition to Federal laws, there are decrees and cabinet directives that have legal effect, and which are enacted outside the process of creating federal laws through the Federal National Council.

The individual emirates have all created “free zones”, particularly industry or sector specific free zones in which, to encourage foreign investment, various laws and regulations are not applied (in particular, in most cases, laws preventing full foreign ownership); most free zone authorities have the ability to create their own laws and regulations regarding corporate and other business structures.

Under an amendment made to the Constitution in 2004, the Federation has exclusive right to establish financial free zones and, by federal laws, the UAE has established

[3] The authoritative language for the Constitution, any laws, treaties and other documents is Arabic (except for a number of free zone laws and regulations, including DIFC and ADGM laws); any references are to translations, which might not completely capture the meaning of the original Arabic.

financial free zones in both Dubai and Abu Dhabi. The financial free zones are the Dubai International Financial Centre (DIFC), established in 2004, and the Abu Dhabi Global Market (ADGM) in 2013. Although the financial free zones are created under federal law, the implementing legislation has been enacted at emirate level. Furthermore, both the DIFC and ADGM have legislation which specifically governs matters of civil and commercial law in the relevant free zone.

For the purposes of further discussion, although "mainland" UAE is not a term which has any legal effect, the financial free zones will be described as DIFC and ADGM, while the remainder of the UAE will be described as "mainland" UAE.

This Module will consider the insolvency environment in both "mainland" UAE and, principally, the DIFC as a financial free zone, rather than on the ADGM. While the ADGM will be mentioned, the module will focus on DIFC law, by way of contrast to mainland UAE law. In particular, there will be no detailed examination of the law of security or insolvency law in the ADGM but rather a high level overview. The legal system in the ADGM shares many characteristics with the DIFC, and there are many similarities in the laws which apply in the two financial free zones.

The DIFC has been operating for longer than the ADGM and, simply because of the longer history, there is more experience of DIFC insolvencies and other legal matters than in the ADGM (it appears that there have, at the time of writing, been a limited number of formal insolvency processes undertaken in the ADGM). The key purpose of describing the operation of insolvency law from one of the financial free zones in greater depth is to illustrate how the parallel legal systems in the UAE operate alongside each other.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

The UAE legal system outside of the financial free zones draws on elements of Islamic law (principally in relation to personal matters) and civil law, predominantly from France via Egypt (in relation to commercial matters).

The DIFC and the ADGM are common law legal systems and draw primarily, although not exclusively, on the laws of England and Wales for the laws applicable in the free zones.

4.2 Institutional framework: The courts

4.2.1 Court structure: UAE Mainland and Financial Free Zones

The Constitution provides for a federal court structure. The Constitution also recognises the Courts of each individual emirate. However, only the Emirates of Abu Dhabi, Dubai and Ras al Khaimah continue to operate separate judicial structures; and, except for matters specifically reserved to the Federal Courts by the Constitution, the final courts of appeal in both Dubai and Ras al Khaimah are the Courts in those Emirates.

The DIFC and the ADGM financial free zones each have their own civil and commercial laws, based on common law models; each of the financial free zones also has its own separate judiciary, being the DIFC Courts and the ADGM Courts, the judges of which are separate from those of the rest of the UAE court system (many are judges appointed from common law countries). The final Courts of Appeal

for both the DIFC Courts and the ADGM Courts are the DIFC Courts Court of Appeal and the ADGM Courts Court of Appeal respectively. The orders of both the DIFC Courts and the ADGM Courts are capable of recognition and enforcement by the Courts of mainland Dubai and Abu Dhabi respectively without any re-examination of the substance of the order or the merits of the case (the orders of the Dubai and Abu Dhabi Courts can also be enforced in a similar manner in the respective financial free zones).

The existence of parallel judicial systems in Dubai, being both the Courts of mainland Dubai and the DIFC Courts, with recognised and reciprocal enforcement mechanisms, has been used extensively by creative litigants to obtain outcomes that might not have been possible if there was only one court system. This has been used in relation to enforcement of arbitration awards and foreign judgments and there have been a number of jurisdictional disputes as parties have attempted to pursue matters through one court system and to exclude the operation of the other.

Some of the issues arising from having the separate jurisdictions was addressed by the creation of the Joint Judicial Committee by Dubai Decree No 19 of 2016, in an attempt to create some over-arching body to determine issues relating to the existence of two separate jurisdictions in Dubai. The Joint Judicial Committee is made up of judges from both the DIFC Courts and the “mainland” Dubai Courts, with jurisdiction to resolve conflicts of jurisdiction between the two court structures.

Because the ADGM is a newer creation, it is not apparent how the issues arising from having two separate judicial systems will develop; although there is the possibility that the existence of parallel jurisdictions could create similar jurisdictional issues as transpired in Dubai.

While the DIFC and ADGM are only small physical areas and they have relatively few legal persons incorporated in them, the experience of the DIFC Courts is that the broad jurisdiction which they enjoy, and the ability to have their orders enforced in Dubai (and, from Dubai, elsewhere in the UAE and more widely) has had far-reaching legal implications; while that has not been evident in insolvency matters to date, it might well be of considerable importance in insolvency matters in the future.

4.2.2 Institutional framework: Court efficiency and contract enforcement

Although the “efficiency” of a Court system will always be a matter of opinion, and the various Court systems operating in the UAE all work differently, the World Bank Doing Business Survey for 2020 does rank the UAE as ninth, amongst the 190 countries surveyed, for the enforcement of contracts. The “score” given (out of 100) to the UAE was 75.88, with a time-frame of 445 days and a “cost” relative to claim value of 21%. The Quality of the Judicial Process, using an index of 1 to 18, was rated as 14.0.

In the UAE, debts can be enforced both as matters of civil and, in many cases, criminal law; in particular, dishonouring cheques is a criminal offence, which means that many lenders look to take an undated cheque as the principal security for any transaction, and took no real cognisance of the security being provided (if any) or, in many cases, the debtor’s ability to pay. That did mean that there could be considerable incentive for a debtor (or those signing cheques on behalf of a debtor, such as management of a debtor company), to leave the UAE whenever a debtor might encounter financial difficulties.

While security over collateral can be given in mainland UAE, and there are mechanisms for registering and enforcing such security, these mechanisms often require the intervention of the Courts, which does mean that cost of enforcement is increased, and efficiency of enforcement is less than it might be. (In the financial free zones, the taking of security and enforcement reflect processes adopted from common law countries.)

The overlap of debt enforcement with the criminal process, particularly when combined with the large proportion of expatriates living in the UAE, has led to a particularly unfortunate outcome when a debtor encounters financial difficulties: there is tremendous incentive for the debtor, or those involved in its management, to leave the UAE, and to avoid any potential criminal liability for those financial difficulties; that, in turn, makes restructuring more difficult, because the active engagement of those individuals would normally be critical to any successful restructuring, but those individuals are absent and there is often no effective means of engaging those individuals remotely.

4.2.3 Institutional framework: Insolvency legislation

Mainland UAE

Until 2016, in the UAE mainland, insolvency law was undeveloped. There were provisions in Law No 18 of 1993 relating to commercial transactions (the "Commercial Transactions Law") governing a bankruptcy by traders; the law provided for a basic mechanism for insolvency for those engaged in commerce, which was a process to be pursued through the Courts, but these procedures were rarely, if ever, utilised.

The shortcomings in the UAE insolvency regime were highlighted in 2009, when Dubai World, an investment company owned by the Dubai Government, faced the possibility of defaulting on its debts; any such default would have been the largest government default since 2001; the possibility of default caused international concern. While Dubai World was ultimately able to address its issues with creditors (and a special tribunal was created to address claims relating to Dubai World), the experience gave impetus to establishing a properly functioning insolvency regime.

The previous legal position changed in 2016, with the adoption of Federal Decree Law (No 9) of 2016 relating to bankruptcy, which has since been amended in 2019 and 2020 (the "Bankruptcy Law"). The Bankruptcy Law repealed the bankruptcy provisions of the Commercial Transactions Law and put in place a consolidated insolvency regime for commercial (but not consumer) insolvencies in the UAE. The Bankruptcy Law draws on experiences from a number of jurisdictions.

Further in 2019, the adoption of Federal Decree Law (No 19) of 2019 ("Personal Bankruptcy Law") put in place a consolidated insolvency regime for debtors who did not fall within the ambit of the Bankruptcy Law, filling a gap which had previously existed within the legislation.

Both the Bankruptcy Law and the Personal Bankruptcy Law provide for several Court-supervised processes, including "Preventive Composition" (or in the case of the Personal Bankruptcy Law, "Financial Settlement Proceedings" and "Bankruptcy"; Bankruptcy is further divided into formal restructuring (in the case of commercial debtors) and liquidation (in the case of commercial and non-commercial debtors). Furthermore, the Bankruptcy Law creates a "Financial Restructuring Committee",

appointed by the Minister of Finance, with a degree of supervisory control over insolvency practice and procedure in the UAE.

While the introduction of the Bankruptcy Law and the Personal Bankruptcy Law has generally been welcomed by the commercial community, although there are no official statistics available, anecdotally it is generally understood that there have only been a handful of insolvency processes conducted under the these laws; there certainly have not been a sufficient number to assess meaningfully how they will apply in practice.[4]

Financial Free Zones

In the DIFC, the Insolvency Law DIFC Law No 1 of 2019 ("DIFC Insolvency Law") and the associated DIFC Insolvency Regulations ("DIFC Insolvency Regulations"), are modelled on and adopt a number of provisions of the United Kingdom Insolvency Act 1986. The DIFC Courts play a central role in the insolvency process, alongside the role played by insolvency practitioners, who can be appointed as "Rehabilitation Nominees", administrators, receivers and liquidators.

Again, there have not been many insolvencies in the DIFC (and certainly very few since the 2019 DIFC Insolvency Law was introduced) – and very few of any substance. While the DIFC Courts have been ready to draw upon the decisions of English Courts in insolvency matters, and practitioners have also looked to English law and practice for guidance in conducting insolvencies, it cannot be said that there is a substantial and coherent body of DIFC-specific law governing insolvencies in the DIFC.

In the ADGM, the Insolvency Regulations 2015 and the further amendments to those Regulations are also based largely on the United Kingdom Insolvency Act 1986. However, the ADGM Insolvency Regulations are lengthier than the DIFC Insolvency Law and arguably appear to reflect the adoption of more of the United Kingdom legislation.

4.2.4 Institutional framework: Insolvency practitioners

In the mainland UAE, in addition to any obligations that insolvency practitioners have to the respective courts in relation to any appointment, "experts" appointed by the courts are approved by the Financial Restructuring Committee. The Financial Restructuring Committee is appointed by the UAE Minister of Finance.[5]

Insolvency practitioners in the DIFC are appointed, on application, by the DIFC Registrar of Companies.[6] The Registrar of Companies has a broad discretion regarding appointment, albeit subject to any regulations issued by the Board of Directors of the DIFC Authority.

Insolvency practitioners in the ADGM are appointed by the ADGM Registration Authority under the ADGM Commercial Licensing Regulations 2015.

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4 *Arabian Business*, 17 October 2017: (https://www.arabianbusiness.com/industries/banking-finance/381252-lawyers-report-low-take-up-of-uae-bankruptcy-law).

5 Bankruptcy Law, arts 2 and 3.

6 DIFC Insolvency Law, Pt 9.

Self-Assessment Exercise 1

Study the basic aspects dealt with in the previous section.

Question 1

What are some of the challenges that could arise for the efficient implementation of an insolvency regime in the United Arab Emirates, given the institutional framework described?

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Security in Mainland UAE

In mainland UAE, there is security available over both real and personal property.

In relation to real property, while UAE law makes general provision for the granting of mortgages over land, each emirate maintains its own land registration system; the registration and enforcement of mortgages can be subject to slightly different laws and procedures in each emirate, although the substance of the law is generally the same.

There are also various types of other financing structures available, many of which have their origins in Islamic finance, such as *musataha* (a long-term right of use), *ijara* (a form of leasing) and *murabaha* (instalment sale), whereby the person who would normally be seen as the “debtor” in a conventional financing scenario acquires a lesser interest in the asset, while the “ownership” interest is taken by the financier.

While the law provides for the right of a mortgagee to sell the mortgaged property following the debtor’s default, this right must be exercised through the Courts. There have been a number of cases, in several of the Emirates, which have sought to determine whether the mortgagee must first obtain judgment for the mortgage debt before proceeding with sale; although the general approach adopted appears to be that a mortgagee can petition the Court for an order for sale without first obtaining judgment for the debt. Once an order for sale is obtained, the Court’s execution department will conduct the sale of the mortgaged property.

In relation to personal property, until recently, UAE law was such that security was (at least in the case of moveable property) predominately only created alongside possession which rendered most security commercially useless; also, there was no form of security over unspecified or future property. However, the introduction of Law No 20 of 2016 on the Mortgage of Moveable Property to Secure Debt created a system whereby creditors could take security over personal property without taking possession, and it also provided that security could be granted over both tangible and intangible assets, whether present or future; the law also provided for how such interests were to be created (as between debtor and creditor), for the creation of a searchable register of security interests and for procedures to be adopted in enforcement of any such security interest, including granting creditors the right to

enforce without court orders in some cases. The law does not directly apply to types of property for which there are separate registers of ownership, such as motor vehicles, ships, aeroplanes and shares.

Law No. 20 of 2016 on the Mortgage of Moveable Property to Secured Debt was repealed in 2020 with the introduction of Federal Law No. 4 of 2020 on Guaranteeing Rights Related to Movables (the UAE Movables Security Law) (which came into effect on 1 June 2020). Whilst this law retains most of the positive features of the 2016 law, it contains some key differences which include, but are not limited to:

(a) the introduction of a new security registry;

(b) the possibility of registering a security interest before the conclusion of the underlying security agreement (provided written consent is received from the security provider);

(c) the sale of secured assets passing to a purchaser free from any security interests provided that the purchaser was unaware of such interests over the assets at the time the underlying sale agreement was entered into (this is different from the 2016 law which stated that ownership passed without security interests regardless if the purchaser was aware of the security interests over the assets during the sale); and

(d) that security interests shall now survive any bankruptcy procedure brought against the security provider and retain the priority they had prior to the commencement of any such procedure. This is in contrast to the provisions of the 2016 law which stated that none of the execution procedures on the assets would be valid in the case of commencement of bankruptcy procedures against the security provider.

Both in relation to real and personal property security, the secured creditor's rights are not substantially affected by any formal insolvency process; the secured creditor can generally enforce its rights notwithstanding the debtor's insolvency. The only significant exception to that is that a secured creditor must obtain the permission of the Court to do so, principally, it appears, to ensure that any security has not been granted as a result of any collusion between the debtor and the creditor (discussed further below).

5.2 Security in the DIFC and the ADGM

In the DIFC, debtors can grant security over both real and personal property.

In relation to real property, the position is governed by DIFC Law No 10 of 2018 (the DIFC Real Property Law). The DIFC Real Property Law provides for a system of registration of interests in land, adopting the Torrens system from Australia, whereby registration in the land registry is the exclusive method (subject to some minor exceptions) of determining interests in land and the rights arising therefrom. The DIFC has a separate register of ownership and other interests in land, including mortgages and other charges. Under the applicable legislation, in the event of non-payment or other default by a debtor, a creditor holding a mortgage over the debtor's land can enter into possession of the land by providing 60 days' notice to certain relevant parties and without the need for a court order; the creditor can sell the whole or party of the land, receive rents and profits from the land and apply the proceeds of sale in payment of the mortgage debt. A mortgage creditor may also apply to the DIFC Court for an order for forfeiture.

In relation to personal property, the position is governed by the DIFC Law of Security, DIFC Law No 8 of 2005. The DIFC Law of Security over personal property is based substantially on North American models and seeks to characterise all transactions by reference to "security interests" (the types of security available) and "collateral" (the debtor's personal property subject to a security interest). The specific form of security as between debtor and creditor is generally a matter of contract, but the effectiveness of the creditor's security interests as against other creditors is determined by registration in in the DIFC's Security Registry. Again, in the event of non-payment or other default by a debtor, a creditor holding a security interest in the debtor's collateral can take possession of the collateral, without the need for a court order; the creditor can sell the collateral and apply the proceeds of sale in reduction of the debt.

Both in relation to real and personal property security, the secured creditor's rights are not substantially affected by any formal insolvency process; the secured creditor can generally enforce its rights notwithstanding the debtor's insolvency.

The position in the ADGM is broadly similar to that of the DIFC, both in relation to real property, which is governed by the ADGM Real Property Regulations 2015, and personal property – although no specific personal property regulations have been adopted, and the default English common law position appears to be the applicable law.

Self-Assessment Exercise 2

Study the basic aspects dealt with in the previous section.

Question 1

Particularly in the light of recent changes to the law, in what ways does the law of security allow for more efficient provision of credit, particularly compared with the "post-dated cheque" security mechanism described above?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General: Insolvency in Mainland UAE

As discussed, insolvency in mainland UAE is governed by the Bankruptcy Law and the Personal Bankruptcy Law. We have focussed on the terms of the Bankruptcy Law in this section as it has been in place for a longer period of time and is lengthier and more detailed than the Personal Bankruptcy Law. Moreover, the Personal Bankruptcy Law largely mirrors the applicable terms and procedures contained in the Bankruptcy Law   The Bankruptcy Law is largely comprehensive and governs essentially all aspects of the insolvency process. The law applies to:

(a) all companies governed by the Commercial Companies Law (the principal corporate legislation in mainland UAE);
(b) any companies established under other legislation who by law or voluntarily have submitted to the provisions of the Bankruptcy Law;

(c) free zone companies and establishments not governed by other insolvency procedures (which is essentially all free zone companies and establishments except those in the financial free zones);

(d) any person who is a “trader” (engaged in commercial activities in a personal capacity); and

(e) licensed civil companies of a professional character (professional partnerships, etc).

The Bankruptcy Law is available to essentially all commercial entities and individuals carrying on commercial activities (in respect of the individuals’ commercial affairs), except for state-owned companies, unless they have opted into the application of the law.

As mentioned above, the Personal Bankruptcy Law is available to debtors who do not fit within the ambit of the Bankruptcy Law.

While the Bankruptcy Law has been in effect since 2016, as previously discussed it appears that there have been no more than a handful of applications decided under it. It is too soon to say whether the law is considered to be “friendlier” to debtors or to creditors. What can be said is that the availability of an insolvency process has ensured that any negotiations between debtors and creditors regarding payment difficulties have taken place in an environment of greater legal certainty than there was before 2016.

6.2 General: Insolvency in the DIFC

Insolvency in the DIFC is governed by the DIFC Insolvency Law; the Insolvency Law is applied to companies and other commercial entities registered in the DIFC, including branches of foreign companies (in respect of those branches’ DIFC assets although the law also contains clear provisions relating to the recognition of any insolvency proceedings in place in respect of those foreign companies). The Insolvency Law and the regulations made under it, govern all aspects of the insolvency process.

While there has been an Insolvency Law in place in the DIFC since 2005, there have not been a significant number of formal insolvencies – and only a handful have been in any way significant or contentious.

While the DIFC Insolvency Law has followed many aspects of the United Kingdom Insolvency Act 1986, it differs from the United Kingdom position in the inclusion of an insolvency procedure referred to as Rehabilitation. Rehabilitation is a debtor in possession type procedure allowing for debtors to reach agreement with their creditors pursuant to a plan known as a Rehabilitation Plan and to achieve a court sanctioned plan which binds creditors, backed by a moratorium. Administration is available to a debtor who applies for a Rehabilitation which subsequently fails.

The formal insolvency processes provided for are Rehabilitations, Administrations, Receiverships and Administrative Receiverships, and Windings Up (whether by the shareholders or by Court order). With the exception of the Rehabilitation process, all of the insolvency mechanisms require the shareholders and management of a company facing financial difficulty to surrender control to an insolvency practitioner; and that insolvency practitioner’s principal obligation is to maximise the return for the secured creditor appointing the insolvency practitioner (in the case of a receivership)

or the unsecured creditors (in the case of a winding up). With the inclusion of the Rehabilitation Procedure the DIFC strikes a balanced approach between the interests of creditors and the debtor.

As noted, the ADGM Insolvency Regulations follow the Insolvency Act 1986 (United Kingdom); it appears that there have been very few insolvencies in the ADGM. The position in the ADGM will not be discussed in this section.

6.3 Personal / consumer bankruptcy

As stated above, the Personal Bankruptcy Law addresses the personal consumer bankruptcy regime in the UAE. The laws of the DIFC and ADGM do not govern the legal status of individuals and the insolvency laws of those jurisdictions make no provision for personal bankruptcy, which would likely be dealt with under the Personal Bankruptcy Law.

6.4 Corporate rescue: Mainland Dubai

Informal and consensual restructurings have been a feature of the UAE insolvency landscape; as with any consensual restructuring, there have been a range of solutions and outcomes negotiated. The absence of any effective insolvency legislation, combined with the diversity of the experiences of those engaged in restructurings, has meant that there have been a range of outcomes – although, anecdotally, it could be said that one common feature of such restructurings has been deferral and postponement, simply because there has been no mechanism to compel the parties to address issues.

However, the introduction of the Bankruptcy Law has made specific legal provision for debtor-led corporate rescue, by specifically providing for “Preventive Compositions”; as stated in article 5 of the Bankruptcy Law:

> “The purpose of the preventive composition procedures … is to assist the debtor to reach settlements with his creditors under a preventive composition scheme, under the supervision of the Court, and by assistance of a composition trustee appointed according to the provisions of this Section [of the Bankruptcy Law].”

Preventive Composition is governed by section 3 of the Bankruptcy Law (articles 5 to 66).

The Bankruptcy Law has also made provision for a separate restructuring regime, described as “restructuring”: “restructuring” is one of the two possible outcomes following the application by the debtor for the commencement of bankruptcy procedures[7] (the other being a declaration of bankruptcy and liquidation of the debtor’s assets). The difference between “preventive composition” and “restructuring” is principally that a debtor can seek preventive composition as an option, whereas restructuring is an alternative to liquidation, it can be initiated by either a debtor or a creditor, and it is dealt with as part of the bankruptcy procedure.

6.4.1 Bankruptcy Law: Preventive composition: Application and form of application

The Bankruptcy Law applies to all companies governed by the Commercial Companies Law, state-owned companies established by federal or local government

[7] Bankruptcy Law, art 67.

which have chosen to submit to the Bankruptcy Law, free zone companies (other than those incorporated in the ADGM or DIFC), persons who engage "in trade" and professional firms.[8] While most commercial enterprises are subject to the Bankruptcy Law, the procedures are not available for consumer debt, which is dealt with in the Personal Bankruptcy Law. There are no specific mechanisms governing groups of companies, although the Bankruptcy Law does acknowledge that there may be scenarios in which the UAE Courts will make an order for a number of connected debtors where it is clear that there are grounds to do so.

There is only one mechanism available for entering preventive composition, which is under article 6 of the law. The only mechanism is the Court-supervised mechanism prescribed and only the debtor can apply to the Court for the appointment of a composition trustee by the Court.[9] An application for preventive composition terminates what would otherwise be the debtor's obligation to apply to initiate bankruptcy proceedings (discussed below).[10] If the debtor is subject to the control of a "competent controlling body" (which is determined by separate cabinet direction), the debtor may apply for preventive composition, subject to the debtor giving the controlling body ten days' notice of the application.[11]

The application for preventive composition is made to the Court, by way of an application setting out the debtor's position, the debtor's proposal for preventive composition and the name of the proposed appointee as trustee to oversee the preventive composition.[12] Upon receipt of the application, the Court may make interim orders to preserve the position, may request further information and may require funds to pay the costs of the preventive composition procedures.[13]

6.4.1.1 Bankruptcy Law: Preventive composition: Initial court response

Upon receipt of the preventive composition application, the Court is required to appoint an expert to prepare a report on the financial position of the debtor, which should include the expert's views on whether the debtor has met the criteria necessary to accept the preventive composition application procedure. The report must be delivered no later than 20 business days from the date of the expert being instructed to prepare the report.[14]

The Court is required to decide on the preventive composition application within five business days of application (if the application meets all necessary criteria) or from the date of the expert's report.[15] If the Court accepts the application, the preventive composition procedure commences.

The Court is required to reject an application if the debtor is subject to liquidation proceedings, the debtor does not provide the information or any funding required, the debtor acts in bad faith or is abusing court procedures by making an application, there has been a final judgment in relation to dishonesty against the debtor, the procedure is evidently inappropriate for the debtor or if the Court decides to initiate the bankruptcy procedure under the Bankruptcy Law.[16]

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8 *Idem*, art 2.
9 *Idem*, art 6.
10 *Idem*, art 68.
11 *Idem*, art 8.
12 *Idem*, art 9.
13 *Idem*, arts 10-12.
14 *Idem*, art 13.
15 *Idem*, art 14.
16 *Idem*, art 15.

6.4.1.2 Bankruptcy Law: Preventive composition: Effect of trustee's appointment

If the Court decides to accept the preventive composition procedure, the Court is required to appoint a trustee, being either a person nominated by the debtor or a person enrolled in the table of experts appointed by the Financial Restructuring Committee.[17] The trustee can be a natural or legal person, and up to three trustees may be appointed to act jointly at any one time. Any creditor may object to the appointment of a trustee within five business days of the date of publication of the appointment; the objection is by way of application to the Court, which is required to determine any objection within a further five business days, on a final basis. The preventive composition procedure will continue during the period of any such objection and determination.

The trustee of any preventive composition may not be a creditor, a relative or spouse of the debtor, a person who has been convicted of certain dishonesty offences, and any person who has had prescribed commercial relationships with the debtor in the previous two years.[18] The trustee may ask the Court for whatever might assist the trustee to perform his or her task, including the appointment of and delegation to one of the experts from the panel of experts.[19] The Court may substitute the trustee, either on its own volition or (if it is proven that the appointment thereof may be detrimental to the interests of the debtor or the creditors) upon the application of a creditor or the debtor. The trustee may also request to be relieved of his or her role by the Court.[20]

The Court is responsible for determining the trustee's fees and authorises payment from the funds deposited by the debtor when making the application. Any interested party may object to the trustee's fees, and the Court is required to determine any objection within five business days of such an application being made. If the funds lodged are insufficient for the payment of the trustee's fees, the Court is required to compel the debtor to provide further funds.[21]

Upon making the appointment of a trustee, the Court is to provide all information that it holds about the debtor to the trustee. The debtor is also required to provide all information and details related to the proposed procedure within the time-frame requested by the trustee.[22]

Upon being appointed, the trustee is required to take an inventory of the debtor's assets and produce a report of the assets to the Court.[23] The assets of the debtor are deemed to exclude the rights of beneficiaries to retirement pensions of the debtor, whether acquired before or after the date of the commencement of the preventive composition procedure. The trustee is also required to produce a report on the debtor's creditors and submit the report to the Court.[24] The trustee is entitled to seek information from persons holding information about the debtor; if the person requested fails to provide such information, the trustee may apply for a Court order to compel provision of information.[25]

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[17] *Idem*, art 17.
[18] *Idem*, art 19.
[19] *Idem*, art 18.
[20] *Idem*, art 21.
[21] *Idem*, art 21.
[22] *Idem*, art 23.
[23] *Idem*, art 22.
[24] *Idem*, art 24.
[25] *Idem*, art 25.

The debtor is obliged to continue to operate the debtor's business during the period of any preventive composition, under the supervision of the trustee. The trustee may require the debtor to take specific actions to maintain the interests of the debtor during the preventive composition process, or may take specified actions on behalf of the debtor.[26] The trustee may also seek Court orders suspending the business of the debtor.[27] The trustee may seek a Court order allowing the debtor to obtain finance, which enjoys statutory priority, during the period of any preventive composition. During the period of preventive composition, secured creditors may not enforce their security without the prior permission of the Court.[28]

The Court may also appoint one or more supervisors from the body of the debtor's creditors. If several creditors seek to be appointed, the Court is to determine which creditor is to be the supervisor. If both secured and unsecured creditors have been nominated, one supervisor is to be appointed from each group. Any competent controlling body in relation to the debtor can also request to have a supervisor appointed representing that competent controlling body. The debtor may object to the appointment of a supervisor and the Court, either on its own initiative or at the request of the trustee, can also seek to have a supervisor removed.[29] The supervisor is required to assist the trustee and the Court and shall serve the general body of creditors.[30] The supervisors are not entitled to fees and they have no liability as supervisors except for any fatal or intentional mistakes by them.

From the date of the decision of the Court's decision to begin the preventive composition procedure, the debtor is not entitled to pay any claims arising before the issue of the commencement decision, nor to dispose of any assets nor borrow any money except in accordance with the provisions of the Bankruptcy Law (and in the ordinary course of business and with the Court's approval), nor to change its ownership in any way.[31]

Except as otherwise provided for in the Bankruptcy Law, the commencement of the preventive composition procedures results in the suspension of legal proceedings against the debtor until the earlier of the approval of the preventive composition plan or 10 months following the court's decision to open preventive composition procedures (although the court may, in consultation with the trustee, extend this time period for up to an additional 4 months).[32] Likewise, the commencement of preventive composition procedures will also suspend any criminal proceedings brought in relation to a dishonoured cheque, including against the signatory of the cheque.[33] However, secured creditors may enforce their securities provided they have obtained Court permission to do so. The Court is required to determine any such creditor's application within 10 working days of the date the application is made. The Court is required to satisfy itself that there has been no collusion between the debtor and the secured creditor and, if making an order in relation to property subject to several security interests, determine the degree of priority. The Court's decision is subject to appeal.[34]

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26 *Idem*, art 26.
27 *Idem*, art 27.
28 *Idem*, arts 28 and 181.
29 *Idem*, art 29.
30 *Idem*, art 30.
31 *Idem*, art 31.
32 *Idem*, art 32.
33 *Idem*, art 212.
34 *Idem*, art 32.

Any decision by the Court to commence the preventive composition does not cause any debts owed by the debtor to fall due, nor does it result in a suspension of interest.[35] Furthermore, any such decision shall not rescind or terminate any contract between the debtor and a contracting party. The contracting party is to remain liable to perform any obligations unless the contracting party obtains a judgment relieving it from further performance and it does so before the date of issue of the composition commencement decision.[36] At the request of the trustee, the Court may also order the rescission of an effective contract to which the debtor is a party, if it is necessary to allow the debtor to carry on business, or if it would be in the interests of creditors and would not be unduly prejudicial to the contracting party's interests. The trustee can also require the division of any common properties held by the debtor and others – even if there are agreements to the contrary.[37]

6.4.1.3 Bankruptcy Law: Preventive composition: Notification of commencement

Within five business days of the trustee's appointment, the trustee is required to publish a summary of the Court's decision to commence the preventive composition procedure (all advertisements and publications of notifications by the trustee require the trustee to publish any such notifications in two widely-read newspapers, one newspaper publishing in English and the other publishing in Arabic). The notice given by the trustee is also required to invite creditors to file claims within 20 business days from the date of publication.[38] The trustee is also required to notify all known creditors with known addresses within the same time period. The creditors are required to provide any documents verifying their claims to the trustee, along with the details thereof, within the period stated; the trustee may request further documents from any creditor so claiming.[39]

Following the expiry of the period for lodging claims, the trustee is required to prepare a list of claimants, including details of the debts and the supporting information in relation thereto, the trustee's views as to whether to accept or reject the claims and any proposal regarding repayment. The trustee is required to lodge the list with the Court within 10 business days from the date of the period for lodging claims, which period can be extended, once for a similar period, by the Court. The trustee is also required to advertise the list.[40]

The Court is responsible for finally determining the list of creditors. The debtor and any creditor, whether the creditor has been accepted or not, may object to the list by way of application to the Court within seven business days from publication of the list. The Court is required to determine any application within 10 business days of the application. The Court's decision may be appealed. The Court may decide to admit the debt on an interim basis (although no debt may be admitted if the creditor has brought a criminal claim in relation thereto).[41] A creditor who fails to make a claim in the prescribed time period without good reason is not entitled to be part of the preventive composition procedure, although there is a mechanism for acceptance of claims made outside the prescribed period.[42]

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[35] *Idem*, art 33.
[36] *Idem*, art 34.
[37] *Idem*, art 34.
[38] *Idem*, art 35.
[39] *Idem*, art 36.
[40] *Idem*, art 37.
[41] *Idem*, art 38.
[42] *Idem*, art 39.

6.4.1.4 Bankruptcy Law: Preventive composition: Preventive composition scheme

The preventive composition scheme must be submitted to the Court within 45 business days from the date of publication of the decision initiating the preventive composition procedure. The debtor is required to assist the trustee to prepare a preventive composition scheme. At the request of the debtor or the trustee, the Court may extend this period for periods of up to 20 business days. The preventive composition scheme is required to include:

(a) a report on the debtor's financial position and proposals regarding restructuring;

(b) the proposed means of settlement of debts;

(c) any proposed debt for equity exchanges; and

(d) how long the proposed scheme implementation period would be.[43]

The period for the implementation of a preventive composition scheme may be no more than three years from the date of approval, although the period can be extended for a similar term with the consent of a majority of the creditors holding two-thirds of the debt remaining unpaid.[44]

As part of the implementation of the scheme, the debtor may offer a secured creditor alternative security. If the secured creditor rejects the security, the Court may compel the creditor to accept it if the Court finds that the proposed alternative security is of equal value to the existing security and it would not prejudice the creditor to accept the alternative. Any decision may be subject to appeal within five business days from the date of the issue of the decision.[45]

If certain assets are considered to be essential to the operation of the debtor's business, the Court may direct that those assets not be sold, without the Court's permission, for any specified period during the scheme. If the asset is subject to any security interest, the Court can also require the replacement of the secured asset, in accordance with the provisions of the law.[46]

Joint debtors with the debtor and any guarantors are not entitled to the benefit of the composition and they remain liable for their obligations; but those owners of a company jointly liable for the debts of the company shall enjoy the benefits of the scheme, unless the scheme provides otherwise.

6.4.1.5 Bankruptcy Law: Preventive composition: Creditor approval

Within 10 business days from the date of submission of the scheme, the Court is required to review the draft to confirm that it takes account of the interests of all interested parties.[47] The Court may require the trustee to make amendments to the scheme; if the Court does so, the trustee must return the amended scheme to the Court within 10 business days of such a request (such period may be extended once for a similar period). If the Court is satisfied with the terms of the proposed scheme, the Court is required to direct the trustee to issue invitations (by way of public advertisement, as well as any other means directed by the Court) within five business

[43] *Idem*, art 40.
[44] *Idem*, art 41.
[45] *Idem*, art 51.
[46] *Idem*, art 53.
[47] *Idem*, art 42.

days, to be given to the debtor's creditors, for the purpose of attending a creditors' meeting to discuss the proposed scheme. The trustee is required to provide the creditors with a copy of the proposed scheme. The meeting is to be held within 15 working days of the date of direction to invite creditors. The Court may make further directions about the proposed meeting, including postponing the same.[48] The Court may also direct the formation of classes of creditors and may give directions about the appointment or conduct of any representatives of those classes at the meeting of creditors.[49]

At the creditors' meeting, the trustee and the debtor are required to explain the proposed preventive composition scheme. A creditor may propose amendments to the scheme at the meeting and the Court may direct further meetings to consider the proposed amendments.[50]

Only creditors whose debts have been admitted may vote on the scheme; except that the Court may direct that creditors whose debts have been admitted on an interim basis may vote, if proposed by the trustee, subject to any terms and conditions imposed by the Court.[51] There are no provisions governing the rights of priority creditors, other than secured creditors, in any scheme.

Secured creditors may not vote on the scheme, unless they have surrendered their securities. If a secured creditor does vote on a scheme, such an action is deemed to be a surrender of the security (but only if the scheme is approved).[52]

The requisite majority for approval of the draft scheme is a majority of creditors holding two-thirds of the debtor's debt (including those temporarily admitted). If the requisite majority is not achieved, the meeting must be adjourned for seven days. If the majority is not achieved after the adjourned meeting, the scheme is deemed to have been rejected. Any creditor who attended and voted at the first meeting is considered to have voted in favour at the second meeting, unless the creditor attends the subsequent meeting and withdraws the prior approval, or if there has been a change to the proposed scheme. The law prescribes procedures for minuting the results of the meeting and communicating with creditors following the meeting.[53]

6.4.1.6 Bankruptcy Law: Preventive composition: Court approval

Once the scheme has been approved, the trustee is required to put the draft scheme before the Court within three business days, for the Court either to approve or reject the scheme. Any creditor who voted against the scheme may object to the proposed scheme within a further three business days and the Court is required to make a determination within five business days from the date of submitting the objection. The Court's determination is final.[54]

The Court is required to give any decision approving or rejecting the scheme urgently. The Court must be satisfied that all affected creditors will receive at least as much as the creditors would have received if the debtor's assets had been liquidated on the date of voting on the scheme. The Court may not approve a scheme that

48 *Idem*, art 42.
49 *Idem*, art 43.
50 *Idem*, art 44.
51 *Idem*, art 45.
52 *Idem*, art 46.
53 *Idem*, art 47.
54 *Idem*, art 49.

affects the priority of any secured creditor rights.[55] However, the Court may accelerate payment dates of longer-term debts, if that would be in the interests of the success of the scheme.

If the Court rejects the scheme, the scheme is to be returned to the trustee to make any amendments to the scheme within 10 business days from the date of disapproval. The trustee is required to return the scheme to the Court, either for approval or for a decision to initiate the declaration of the debtor's bankruptcy. The debtor, or any creditor whose debts are admitted, may object to the Court's decision disapproving or amending the scheme; any such objection shall be made within 10 business days from the date of the decision disapproving or amending the scheme.[56]

6.4.1.7 Bankruptcy Law: Preventive composition: Implementation of preventive composition

Within seven business days of the date of approval of the scheme by the Court, the trustee is required to register the Court's decision confirming the approval in the debtor's governmental corporate register and publish a summary of the scheme.[57]

The trustee is responsible for supervising the implementation of the scheme. The trustee is required to monitor progress and inform the Court of any failure of implementation and to report to the Court every three months in any event. If the trustee considers that amendment to the scheme is required and that such an amendment would affect the rights of any party, Court approval is required. If an application for approval is made, the Court is required to notify all creditors who voted on the scheme, along with any other creditor the Court considers it necessary to notify, to make any application in relation to the proposed amendments within 10 working days of the notification. The Court may make a decision on the proposed amendment, approving, in whole or in part, or rejecting the amendment.[58]

The trustee is responsible for ensuring that any assets of the debtor be sold as part of the scheme at the best price possible in the market prevailing on the date of sale. The trustee is required to deposit any funds received for the sale of any assets, subject to any security being paid to the creditors holding security.[59]

Following the discharge of the obligations provided for in the scheme, the Court is required to confirm the complete implementation of the scheme. The Court's decision is to be advertised.[60]

6.4.1.8 Bankruptcy Law: Preventive composition: Failure of preventive composition

If criminal proceedings for certain specified dishonesty crimes are commenced against the debtor, an interested party may seek to annul a preventive composition scheme (subject to time limits).[61] Any such scheme shall be considered null and void, unless otherwise ordered, if the debtor is convicted of specified dishonesty offences. In the event of criminal proceedings being commenced, the Court may make

55 *Idem*, art 49.
56 *Idem*, art 50.
57 *Idem*, art 54.
58 *Idem*, art 55.
59 *Idem*, art 52.
60 *Idem*, art 56.
61 *Idem*, art 59.

preservation orders in terms of the debtor's property, notwithstanding that a scheme is being proposed or implemented.[62]

A creditor may also seek the rescission of a scheme if the debtor fails to satisfy its conditions, or if satisfaction becomes impossible.[63]

Notwithstanding the annulment or rescission of a scheme, dispositions made pursuant to a scheme before any annulment or rescission are binding, unless otherwise open to challenge under the general law regarding the voidability of transactions.[64] Likewise, payments made to creditors shall be retained by the creditors in reduction of the debtor's debts to them.[65]

Following any annulment or rescission of preventive composition, the debtor is then automatically subjected to bankruptcy procedures provided for under the Bankruptcy Law.[66] The Court may terminate the preventive composition and commence bankruptcy procedures on its own initiative, or on the application of a creditor, if the debtor has evidently committed the act of bankruptcy, namely if the debtor has been in default for more than 30 days before the making of the preventive composition procedure, or if the scheme's implementation is impossible and the termination of the procedure will result in the debtor being unable to pay its debts for more than 30 business days.[67]

Following the initiation of any bankruptcy procedures, the appointment of the trustee for the preventive composition terminates (unless the trustee is appointed as the bankruptcy trustee); the Court continues to act as the Court implementing the procedures for declaring bankruptcy and liquidation of the debtor's assets under the Bankruptcy Law.[68]

6.4.2 Corporate rescue: DIFC

As noted above, Rehabilitation is a new DIFC insolvency procedure introduced by the 2019 law, which allows companies unable to pay their debts but able to reach agreement with its shareholders and creditors to agree to a plan referred to as a Rehabilitation Plan to achieve a court sanctioned plan that binds creditors.

Upon application by the Company for a Rehabilitation Plan, a moratorium comes into effect for an initial 120 days preventing creditors from commencing or continuing legal action against the Company.[69] The moratorium also disapplies contractual provisions which would otherwise enable a contract to be terminated upon insolvency.[70] Any creditor materially prejudiced by the moratorium may apply to court seeking the disapplication of the moratorium in relation to a particular contract.[71]

In order to initiate the rehabilitation process the Company is required to make an application to court submitting the Rehabilitation Plan and nominating the proposed Rehabilitation Nominee.[72] [the Rehabilitation Nominee must be a licensed insolvency

62 *Idem*, art 58.
63 *Idem*, art 60.
64 *Idem*, art 62.
65 *Idem*, art 63.
66 *Idem*, art 64.
67 *Idem*, art 65.
68 *Idem*, art 66.
69 DIFC Insolvency Law, arts 15(2) and 16.
70 *Idem*, art 18.
71 *Idem*, art 19.
72 *Idem*, arts 15 and 20.

practitioner.[73] Whilst the directors will continue to run a Company subject to an approved Rehabilitation Plan, the Rehabilitation will perform such functions as the court directs.[74] The Rehabilitation Nominee must also upon the making of the application by the Company confirm the Rehabilitation Plan has a prospect of being approved and successful.[75]

The Rehabilitation Plan must be approved by three quarters in value of the Company's creditors with admitted claims and its shareholders.[76] Creditors who believe that they will be prejudiced by the Rehabilitation Plan must file an objection within 10 days.[77] A secured creditor may only vote to the extent of any unsecured portion of its debt.[78]

The court has certain discretionary power which it may exercise in order to facilitate the Rehabilitation Plan including allowing new funding where the repayment terms take priority over existing unsecured creditors.[79]

6.4.3 Administration: DIFC

In the course of a rehabilitation in circumstances where there is evidence of fraud, dishonesty, incompetence, mismanagement, or any other offence set out in Chapter 7, Part 6 of the DIFC Insolvency Law, upon application or one or more creditors the Court may appoint a licensed insolvency practitioner as administrator to manage the business and affairs of the company in accordance with Part 4 of the law.[80] The order appointing an administrator must specify the purpose for which an administrator is appointed (which include the approval of a rehabilitation plan, voluntary arrangement or scheme of arrangement, or to use investigation procedures in relation to misconduct).

The Court may give the necessary powers to enable the administrator to rehabilitate the company, and the administrator's powers include generally the power to do all things necessary for the management of the affairs, business and property of the company, and those powers set out in Schedule 2 of the DIFC Insolvency Law; an administrator may also remove any director of the company and appoint replacements.[81] A moratorium is also in place during the period of an administrator's appointment.[82]

If it appears to the administrator that the purpose(s) of the administration specified in the order have been achieved (or are incapable of achievement), the administrator must apply to the Court for the discharge of the administration order, and the Court may discharge or vary the order and make further orders as it thinks fit (including a winding up order under Part 8 of the DIFC Insolvency Law). The order may also be discharged in other circumstances including at the direction of creditors.[83] Following a person ceasing to be an administrator the person is released at such time as the

73 *Idem*, art 21.
74 *Idem*, arts 20 and 22.
75 *Idem*, art 24(2)(a).
76 *Idem*, art 25.
77 *Idem*, art 26.
78 DIFC Insolvency Regulations, Annex I, reg 1.7.4.
79 DIFC Insolvency Law, arts 30 and 31.
80 *Idem*, arts 22(2) and 32.
81 *Idem*, art 32.
82 *Idem*, arts 34 and 36.
83 *Idem*, art 39.

Court may determine (except that in the case of the death of the administrator, upon notice to the Court).[84]

6.4.4 Receivership: UAE Mainland and DIFC

For the reasons discussed relating to the limitations on the type of security which could be granted under UAE law, there was, historically, no concept of receivership whereby a creditor could appoint an insolvency practitioner to operate and sell assets for the purposes of repaying the debtor's debt to the creditor. It could be that, under the 2016 law, provisions are now being made in security agreements for creditors to appoint receivers and managers to the assets over which the creditor has taken security. However, such appointments would be a new step in UAE law where self-help remedies are generally not recognised and security enforcement processes are pursued through the UAE courts notwithstanding the existence of documentation which contemplates enforcement outside of a court process.

The DIFC Insolvency Law does make provision for the appointment of receivers and administrative receivers.[85]

A receiver has all of the powers granted to him or her under the security agreement appointing any such receiver, except to the extent that those powers are limited by the Insolvency Law.[86] If the security agreement is a security over all or substantially all of the debtor's assets, any receiver appointed is described as an "administrative receiver" for the purposes of the Insolvency Law.[87]

The receiver (or administrative receiver) is appointed by the creditor in accordance with the terms of the security agreement granting the creditor the right to appoint a receiver.[88]

A receiver (or an administrative receiver) is deemed to be the agent of the company up until the point of liquidation.[89] In addition to any powers provided for under the security agreement, the administrative receiver has all the powers provided for in Schedule 2 to the DIFC Insolvency Law, which are broad powers in respect of the debtor company's property.[90] An administrative receiver may, if appropriate and subject to certain conditions, seek orders from the Court allowing him or her to sell property subject to a security interest in favour of any other person (and apply the proceeds of sale to repayment of the debt owed to that person).[91]

An administrative receiver is required to send a report to all secured creditors within three months of appointment (with a copy to all known unsecured creditors), including (amongst other matters) the events leading up to appointment, disposals or proposed disposals.[92]

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[84] *Idem*, art 41.
[85] *Idem*, Pt 5.
[86] *Idem*, art 42(2).
[87] *Idem*, art 42(5).
[88] *Idem*, art 42.
[89] *Idem*, art 47.
[90] *Idem*, art 42 and Schedule 2.
[91] *Idem*, art 42 and Schedule 2.
[92] *Idem*, art 49.

6.4.5 Bankruptcy: Mainland UAE

6.4.5.1 Bankruptcy commencement

As discussed, in addition to the debtor-led preventive composition procedure, the Bankruptcy Law provides for two possible outcomes from the initiation of the bankruptcy procedure: restructuring; or the liquidation of a debtor's assets.[93]

The bankruptcy procedure is preceded by an application to the Court, by either a debtor or a creditor, for an order initiating bankruptcy proceedings. In the case of corporate bankruptcy, following the delivery of a judgment for bankruptcy, no other insolvency or liquidation steps may be taken against a company, except for those provided for in the Bankruptcy Law.[94]

A debtor is required to initiate bankruptcy procedures if the debtor is in default of its payment obligations for 30 consecutive business days. If the debtor is subject to the control of a "competent controlling body" (which is determined by separate cabinet direction), the debtor may apply for preventive composition if the debtor has given the controlling body 15 days' notice of the application.[95]

We would note that, at the time of writing, pursuant to Federal Decree Law 21 of 2020 (2020 Bankruptcy Law Amendment) a period remains in place (currently for the period from 1 April 2020 to 31 July 2021) which is intended to provide relief to debtors from the provisions of the Bankruptcy Law and which suspends the obligation of a debtor to initiate bankruptcy proceedings in accordance with the above provision if the debtor's financial condition is caused by the downturn triggered by the global COVID pandemic. In addition, the 2020 Bankruptcy Law Amendment decree law allows the UAE courts, on application by a qualifying debtor to grant a short term (40 day period) of protection to allow a debtor to negotiate a settlement of its debts with its creditors.[96] Given the shortness of the timeframe and the lack of detail contained in the decree law in respect of this mechanism, it may be that the number of creditors who have utilised it successfully are low,

In addition a creditor, or group of creditors collectively, who are owed more than AED 100,000 (USD 27,226), may also apply to the Court to initiate bankruptcy procedures if the creditor has given notice to the debtor requiring the debtor to settle the debt, and the debtor has failed to discharge the debt within 30 business days of any such notification.[97] Any creditor of a company may seek its bankruptcy, even if the creditor is also a shareholder.[98] The law gives no guidance as to what constitutes a debt under which a creditor can initiate bankruptcy proceedings. Furthermore, a "controlling body"[99] and the public prosecutor[100] may also initiate bankruptcy procedures against the debtor if the debtor is unable to pay its debts.

As above, the 2020 Bankruptcy Law Amendment suspends (currently with effect until 31 July 2021) the ability of creditors to bring an action for a debtor's bankruptcy under the above provisions.[101]

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93 Bankruptcy Law, art 67.
94 *Idem*, art 140.
95 *Idem*, art 68.
96 2020 Bankruptcy Law Amendment, art 170 bis 2.
97 Bankruptcy Law, art 69.
98 *Idem*, art 141.
99 *Idem*, art 71.
100 *Idem*, art 72.
101 2020 Bankruptcy Law Amendment, art 170 bis 3.

If the applicant is the debtor (or its competent controlling authority), the debtor is required to produce specified documents, including a description of its financial position, specified financial information, and the name of a trustee proposed to oversee the bankruptcy procedure.[102] If the creditor has made the application, the creditor must produce to the Court, as part of its application, a copy of the notice of the demand for payment of the debt and supporting evidence of the debt.[103] In any case, an applicant must provide AED 20,000 (USD 5,445), by way of payment or by way of a bank guarantee, as security for the costs of the bankruptcy procedure.[104]

6.4.5.2 Order for commencement of bankruptcy procedure and appointment of trustee

When a bankruptcy application is made, the Court is required to appoint an expert from the panel of experts to assess the financial condition of the debtor.[105] The Court may reject any application if the specified information is not provided.[106] In determining the application, the Court can require a person to provide further information,[107] it can join other parties to the proceedings and it can make interim orders in respect of the debtor's property.[108] The expert is required to report on the debtor's financial condition and to give an opinion on the possibility of the debtor successfully restructuring. The Court is required to determine the application for commencement of the bankruptcy procedure within five business days of the application initiating the procedures, or within five business days of the expert's report, as applicable.[109] If the Court is satisfied that the necessary conditions have been met, an order will be made whereby the bankruptcy procedures commence at that point.

Once the Court has made an order for the commencement of the bankruptcy procedure, the debtor may not manage its assets or pay creditors, except in accordance with the provisions of the Bankruptcy Law.[110] Except as otherwise provided for in the Bankruptcy Law, the commencement of the bankruptcy procedures results in the suspension of legal proceedings against the debtor until the earlier of the approval of the restructuring plan or 10 months following the court's decision to open bankruptcy procedures (although the court may, in consultation with the trustee, extend this time period for up to an additional 4 months).[111] Of particular importance, the commencement of restructuring procedures will also suspend any criminal proceedings brought in relation to a dishonoured cheque, including against the signatory of the cheque.[112]

However, secured creditors may enforce their securities provided they have obtained Court permission to do so, subject to the conditions for making such an order. The Court is required to determine any such creditor's application within 10 working days of the date the application is made. The Court is required to satisfy itself that there has been no collusion between the debtor and the secured creditor and, if making an order in relation to property subject to several security interests, determine the degree of priority. The Court's decision is subject to appeal.

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102 Bankruptcy Law, art 73.
103 *Idem*, art 74.
104 *Idem*, art 76
105 *Idem*, art 77.
106 *Idem*, art 79.
107 *Idem*, art 80.
108 *Idem*, art 81.
109 *Idem*, art 78.
110 *Idem*, arts 157-159.
111 *Idem*, art 162.
112 *Idem*, art 212.

If the Court decides to accept the commencement of the bankruptcy procedure, the Court is required to appoint a trustee, being either a person nominated by the debtor or a person enrolled in the table of experts appointed by the Financial Restructuring Committee. The trustee can be a natural or legal person, and up to three may be appointed to act jointly at any one time. Any creditor may object to the appointment of a trustee within five business days of the date of publication of the appointment; the objection is by way of application to the Court, which is required to determine any objection within a further five business days, on a final basis. The bankruptcy procedure continues during the period of any objection and determination.[113]

The trustee may not be a creditor, a relative or spouse of the debtor, a person who has been convicted of certain dishonesty offences, and any person who has had prescribed commercial relationships with the debtor in the previous two years.[114] The trustee may ask the Court for whatever might assist the trustee to perform his or her task, including the appointment of and delegation to one of the experts from the panel of experts.[115] The Court may substitute the trustee or an expert, either of its own volition or (if it is evidenced that the continuity of appointment of the trustee or expert may damage the interest of creditors) upon the application of the debtor.[116] The trustee may also request to be relieved by the Court. The Court shall determine the trustee's fees and shall authorise payment from the funds deposited by the debtor when making the application. Any interested party may object to the trustee's fees, and the Court must determine any objection within five business days of such an application being made. If the funds lodged are insufficient for the payment of the trustee's fees, the trustee or expert may apply to Court for payment of the fees from the Court Treasury (and any funds paid from the Treasury will be repaid in priority over all creditors upon the first realisation of additional assets).[117]

The Court may also appoint one or more supervisors.[118] The procedure to be adopted for the appointment of supervisors is to be the same as is adopted for supervisors of preventive composition (discussed above). Essentially, supervisors are representatives of the creditors.

6.4.5.3 Role of the trustee in bankruptcy

Upon making an appointment, the Court is required to provide any information which it holds about the debtor to the trustee.[119] The debtor is also required to provide all information and details related to its creditors to the trustee.

Within five business days of the trustee's appointment, the trustee is required to publish a summary of the Court's decision to commence bankruptcy procedures (all advertisements and publications of notifications by the trustee require the trustee to publish any such notifications in two widely-read newspapers, one newspaper publishing in English and the other publishing in Arabic). The publication is also to invite creditors to file claims within 20 business days from the date of publication. The trustee is also required to notify all creditors with known addresses within the same time period.[120]

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[113] *Idem*, art 82.
[114] *Idem*, art 84.
[115] *Idem*, art 83.
[116] *Idem*, art 86.
[117] *Idem*, art 85.
[118] *Idem*, art 87.
[119] *Idem*, art 88.
[120] *Idem*, art 88.

In making any claims, any creditors, including creditors whose debts have not yet fallen due for payment, are required to provide documents verifying their claims, along with the details thereof, within the period stated; the trustee may request further documents from any creditor so claiming.[121] Any guarantor of the debtor who has paid a creditor may claim in the place of the creditor.[122]

Following the expiry of the period for lodging claims, the trustee is to prepare a list of creditors, including details of the debts and the supporting information in relation thereto, the trustee's views as to whether to accept or reject the claims and any proposal regarding repayment; the trustee is required to lodge the list with the Court within 10 business days from the date of the period for lodging claims, which period can be extended, once for a similar period, by the Court. The trustee is required to advertise the list within three business days of lodging the list with the Court.[123]

The debtor and any creditor, whether the creditor has been accepted or not, may object to the list by application to the Court within seven business days from publication of the list.[124] The Court must determine any application within 10 business days of the application. The Court's decision may be appealed. The Court may admit the debt on an interim basis (although no debt may be admitted if the creditor has brought a criminal claim in relation thereto). The Court must finally determine the list of creditors.[125] A creditor who fails to make a claim in the prescribed time period without good reason will not be engaged in the preventive composition procedure, although there is a mechanism for acceptance of claims made outside the prescribed period.[126]

At the request of a trustee appointed under the bankruptcy procedures (and subject to notice to the creditor), the Court may suspend interest and other penalties for non-payment.[127] In the event of any failure by the debtor to perform its obligations, the other party may apply to the court for an order for rescission of the contract,[128] but commencement of a restructuring does not automatically lead to a rescission.[129] Terms of leases that provide for automatic termination upon an insolvency event occurring, are void,[130] although a landlord can seek a Court order for termination if the lease default continues for more than three months after the commencement of a restructuring procedure.[131] The Court may, at the request of the trustee, rescind contracts,[132] leases[133] and employment contracts.[134] Creditors may seek to exercise set-off rights as at the date of the commencement of the insolvency procedure.[135]

6.4.5.4 Trustee's report on possible restructuring

Following the appointment of the trustee, the trustee is required to produce a report on the debtor's business and to submit the report to the Court in the period specified

[121] *Idem*, art 91.
[122] *Idem*, art 92.
[123] *Idem*, art 93.
[124] *Idem*, art 94.
[125] *Idem*, art 94.
[126] *Idem*, art 95.
[127] *Idem*, art 163.
[128] *Idem*, art 164.
[129] *Idem*, art 165.
[130] *Idem*, art 166.
[131] *Idem*, art 166.
[132] *Idem*, art 165.
[133] *Idem*, art 166.
[134] *Idem*, art 167.
[135] *Idem*, art 183.

by the Court. The report should address the possibility of restructuring the debtor's business (in which case, the report requires a statement of the debtor's commitment to continuing the business) and the possibility of selling the debtor's business as a "going concern", if the debtor's assets are required to be sold.[136]

The Court is required to review the report to confirm that the report takes account of all creditor claims. The trustee is required to provide all creditors with a copy of the report following the review by the Court.[137]

Following submission of the trustee's report to the Court, the Court is to direct the trustee to convene a meeting of creditors, by way of notice and advertisement. The meeting of creditors is to take place within 10 business days from the provision of the trustee's report to the creditors. Unless the Court considers that liquidation is appropriate, the Court should direct the trustee to prepare a restructuring scheme. The Court may not approve a proposed restructuring unless the debtor confirms its willingness to continue to carry on business and unless it appears that the proposed restructuring is viable.[138]

If the Court decides that the debtor should be restructured, the trustee is required to prepare and develop a scheme within three months of the trustee's appointment.[139] Any scheme must address the possibility of the business generating profits, how liabilities will be addressed, any proposals regarding the sale of the business, possible conversion of debt to equity and how any secured debts and collateral are to be dealt with.[140] The scheme must have a time-frame for implementation of not more than five years, which can be extended by up to three years with the consent of a majority of the creditors holding two-thirds of the debt.[141]

Once the proposed scheme has been prepared by the trustee, the trustee is required to submit it to the Court. The Court is required to review the proposed scheme within 10 business days of submission. The Court can request the trustee to vary the scheme if it does not properly observe all parties' interests and to re-submit the proposed scheme within a further five business day period.[142]

Following that review, the Court must request the trustee to issue an invitation to the creditors, within five business days, to a meeting of the debtor's creditors to review the scheme. The creditors' meeting is to be held within 15 business days of the date of the invitation. The meeting is also to be advertised. The trustee is required to provide the creditors with a copy of the proposed scheme.[143] The Court may also direct the formation of committees representing classes of creditors and may give directions about the appointment or conduct of any representatives of those classes at the meeting of creditors.[144]

[136] *Idem*, art 96.
[137] *Idem*, art 97.
[138] *Idem*, art 98.
[139] *Idem*, art 99.
[140] *Idem*, art 101.
[141] *Idem*, art 102.
[142] *Idem*, art 103.
[143] *Idem*, art 103.
[144] *Idem*, art 104.

6.4.5.5 Creditors' meeting and Court approval

The trustee and the debtor must explain the restructuring at the creditors' meeting. A creditor may propose amendments to the scheme at the meeting, and the Court may direct further meetings to consider the proposed amendments.[145]

Only creditors whose debts have been admitted may vote on the scheme; except that the Court may direct that creditors whose debts have been admitted on an interim basis may vote, if proposed by the trustee, subject to any terms and conditions imposed by the Court. Secured creditors may not vote on the scheme, unless they have surrendered their securities. If a secured creditor does vote on a scheme, such an action shall be considered to be a surrender of the security (but only if the scheme is approved).[146]

The majority for approval of the scheme is a majority of creditors holding two-thirds of the debtor's debt (including those temporarily admitted). If the requisite majority is not achieved, the meeting must be adjourned for seven days. If the majorities are not achieved at the adjourned meeting, the scheme is deemed to have been rejected. Any creditor who attended and voted at the first meeting is considered to have voted in favour at the second meeting, unless they attend the meeting and withdraw their approval or there has been a change to the proposed scheme.[147]

6.4.5.6 Court approval following creditors' approval of the scheme

If the scheme is approved by creditors at the creditors' meeting, the trustee is required to put the scheme before the Court within three business days, for the Court either to approve or reject the scheme. Any creditor who voted against the scheme may object to the proposed scheme within a further three business days and the Court must make a determination within five business days from the date of submitting the objection. The Court's determination is final.[148]

The Court is required to give its decision approving the scheme urgently, provided that it is satisfied that all necessary conditions have been satisfied. The Court must be satisfied that all affected creditors will receive at least as much as the creditors would have received if the debtor's assets had been liquidated on the date of voting on the scheme. Furthermore, the Court may not approve a scheme that affects the priority of any secured creditor rights. The Court may order the acceleration of payment dates of longer-term debts, if that would be in the interests of the success of the scheme. The debtor, or any creditor whose debts are admitted, may object to the Court's decision disapproving or amending the scheme; any such objection must be made within 10 business days from the date of the decision.[149]

If the Court rejects the scheme, the scheme is returned to the trustee for amendment within 10 business days from the date of disapproval and must then be returned to the Court, either for approval or for a decision to initiate the declaration of the debtor's bankruptcy and the liquidation of the debtor's assets.[150]

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[145] *Idem*, art 105.
[146] *Idem*, art 106.
[147] *Idem*, art 107.
[148] *Idem*, art 108.
[149] *Idem*, art 108
[150] *Idem*, art 109.

6.4.5.7 Implementation of the scheme

If the scheme is approved by the Court, the trustee is required to register the decision in the debtor's governmental corporate register and publish a summary of the scheme within seven working days of the Court's approval.[151]

The trustee is responsible for supervising the implementation of the scheme. The trustee is required to monitor progress and inform the Court of any failure of implementation and to report to the Court every three months in any event.[152]

If the trustee considers that amendment to the scheme is required and such an amendment would affect any party's rights, Court approval for the amendment is required. If an application for approval is made, the Court is required to notify all creditors who voted on the scheme and any other creditor the Court considers it necessary to notify, to make any application in relation to the proposed amendments within 10 working days of the notification. The Court may approve, in whole or in part, or reject the proposed amendment.[153]

The trustee is responsible for ensuring that any assets of the debtor be sold at the best price possible in the market prevailing on the date of sale.[154] The trustee is required to deposit any funds received for the sale of any assets subject to any security, to be paid to such secured creditors upon the approval of the scheme. If certain assets are considered to be essential to the operation of the debtor's business, the Court may direct that those assets not be sold, without the Court's permission, for any specified period during the implementation of the scheme.[155]

In the restructuring procedure the Court may, at the request of the trustee or the debtor, allow the debtor to take new finance with priority over existing debt and to allow that finance to be secured against unencumbered assets.[156]

While the implementation of a scheme does not affect a secured creditor's security rights, as part of a scheme a debtor may offer a secured creditor alternative security. If the secured creditor rejects the security, the Court may compel the creditor to accept it if the Court finds that the proposed alternative security is of equal value to the existing security and it would not prejudice the creditor to accept the alternative. Any decision may be subject to appeal within five business days from the date of the issue of the decision.[157]

6.4.5.8 Completion and termination of the restructuring

The restructuring is completed following the discharge of the obligations provided for in the scheme. Upon that occurring, the Court is to make an order confirming the complete implementation of the scheme, which is to be advertised.[158]

If criminal proceedings for certain specified dishonesty crimes are commenced against the debtor, an interested party may seek to annul a restructuring scheme (subject to time limits); the Court may take measures for the seizure of the debtor's

[151] *Idem*, art 113.
[152] *Idem*, art 114.
[153] *Idem*, art 114.
[154] *Idem*, art 110.
[155] *Idem*, art 112.
[156] *Idem*, art 181.
[157] *Idem*, art 111.
[158] *Idem*, art 115.

property, notwithstanding that a scheme is being proposed or implemented.[159] If the debtor is convicted of those specified dishonesty offences, the scheme will be considered null and void, unless otherwise ordered.[160]

A creditor may also seek the rescission of a scheme if the debtor fails to satisfy its conditions, or if satisfaction becomes impossible.[161]

Notwithstanding the annulment or rescission of a scheme, dispositions made pursuant to a scheme before any annulment or rescission are binding, unless otherwise open to challenge under the general law regarding voidability of transactions.[162] Likewise, payments made to creditors must be retained by the creditors in reduction of the debtor's debts to them.[163]

The Court may also terminate a restructuring and commence liquidation of the debtor's assets, on its own initiative or on the application of a creditor, or if the scheme's implementation is impossible.[164] Following the rescission or annulment of a restructuring scheme, the debtor is subject to the liquidation of its assets.

6.4.6 Liquidation: Mainland UAE: Bankruptcy Law

6.4.6.1 Judgment of bankruptcy and liquidation

The Court is required to make an order for the bankruptcy of the debtor and the liquidation of the debtor's assets in certain prescribed circumstances, including:

(a) on the termination of a preventive composition as provided for under the Bankruptcy Law;

(b) if the debtor has applied for preventive composition in bad faith;

(c) if the restructuring procedures are inappropriate for the debtor;

(d) if the expert's or trustee's report concludes that restructuring in bankruptcy is impossible;

(e) if the creditors do not approve the restructuring;

(f) if the Court rejects it or if the restructuring is rescinded or annulled.[165]

If the Court makes an order for liquidation, the Court is required to appoint a trustee to undertake the liquidation, although it can order that any expert or trustee previously appointed in relation to any other procedure should continue in office.[166]

Following the making of the liquidation order, the appointed trustee must advertise the trustee's appointment within three business days.[167] The debtor's

159 *Idem*, art 116.
160 *Idem*, art 117.
161 *Idem*, art 118.
162 *Idem*, art 121.
163 *Idem*, art 122.
164 *Idem*, art 123.
165 *Idem*, art 124.
166 *Idem*, art 126.
167 *Idem*, art 128.

correspondence must state that the debtor is subject to a bankruptcy order.[168] The trustee is required to report to the Court monthly on the progress of the liquidation of the debtor's assets and otherwise in relation to the bankruptcy.[169]

Creditors are required to make their claims with the trustee within 10 business days from the date of the judgment; claims lodged later are not admissible unless the Court accepts the reason for any failure to claim.[170] The trustee is required to consider the claims made, unless the debtor's assets are insufficient to pay legal fees and secured creditors.[171] All debts owed by the debtor fall due upon the order for bankruptcy. Future debts can be adjusted for an amount equivalent to legally payable interest and foreign currency claims must be converted to UAE currency at the rate prevailing at that date.[172] At the request of a trustee appointed under the bankruptcy procedures (and subject to notice to the creditor), the Court may suspend interest and other penalties for non-payment.[173] In the event of any failure by the debtor to perform its obligations, the other party may apply to the court for an order for rescission of the contract,[174] but commencement of a restructuring does not automatically lead to a rescission.[175]

Following the bankruptcy of the debtor, the trustee is required to liquidate all of the debtor's property by public auction, under the supervision of the Court.[176] The trustee may ask the Court to permit the debtor to undertake the sale of the debtor's business and assets over a period of up to six months (which can be extended by up to two months), if it would be in the public interest or interest of creditors to do so.[177]

The trustee is required to notify the Court, any supervisors and the debtor of the substance of any proposals received for the purchase of the debtor's business. If any interested party objects to any proposed sale, the Court is the party to determine the objection.[178] The debtor and certain related persons are ineligible to purchase the assets of the debtor from the trustee.[179]

The proceeds of sale of the liquidation of the debtor's assets are distributed by the trustee to creditors. The trustee must pay claims in the order provided for in the law, subject to Court approval for the distribution and approval of payment of priorities. Claims for debts which have not been admitted are to be held by the Court pending determination of the claims. The proceeds of sale of any assets sold subject to a security interest are to be applied in payment of the debts owed to the secured creditor, less the trustee's costs of sale. Any surplus after sale of the assets must be returned to the debtor.[180]

In relation to other assets, the order of priority is the payment of the Court costs and the trustee's costs, unpaid wages and salary up to a maximum amount of three months' salary, alimony debts under a judgment against the debtor, amounts due to

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168 *Idem*, art 133.
169 *Idem*, art 134.
170 *Idem*, art 129.
171 *Idem*, art 130.
172 *Idem*, art 135.
173 *Idem*, art 163.
174 *Idem*, art 164.
175 *Idem*, art 165.
176 *Idem*, art 132.
177 *Idem*, art 131.
178 *Idem*, art 134.
179 *Idem*, art 136.
180 *Idem*, art 137.

governmental bodies and the costs incurred in supplying the debtor with goods and services following the commencement of the bankruptcy.[181]

Following the liquidation of the debtor's assets, the Court must make an order confirming the conclusion of the liquidation procedure, including the final list of creditors and the amounts remaining unpaid. The decision is to be advertised. The trustee is required to return all documents to the debtor following completion of the liquidation. Following completion of the liquidation, any creditor may enforce any debt remaining unpaid (as admitted in bankruptcy) against any remaining assets of the debtor.[182]

The debtor can ask the Court to terminate the bankruptcy if the grounds for the bankruptcy have ended (for instance, if all debts have been paid). Following the expiration of the period of five years from the date of the completion of the bankruptcy, the debtor is deemed to be fully rehabilitated.[183] This time period can be accelerated if the debtor is able to discharge its debts before the expiry of this period.[184]

6.4.6.2 Bankruptcy penalties

In the event of the bankruptcy of any partnership, any partners are also adjudged to be bankrupt under the same judgment. However, even if a common trustee is appointed, the partners' bankruptcy's will be dealt with separately.[185] If a company is adjudged to be bankrupt, the Court may also adjudge any individuals who acted on behalf of the company to be bankrupt as well.[186]

If the assets of a company are insufficient to pay 20% of the debts of the company, the Court may require the directors and managers of the company to pay the debts of the company, in those cases where those persons' responsibility for the losses is evident.[187] The Court may also require directors and managers to be responsible for the debts of a company if, in the period of two years before the date of the commencement of bankruptcy proceedings, any such persons acted in a way which was unduly risky, undertook transactions for insufficient consideration or paid debts of creditors in preference to other creditors.[188] If a debtor is found to be responsible for its bankruptcy, the Court may ban the debtor from taking any part in the management of any other business during the period of the debtor's rehabilitation.[189]

A number of bankruptcy offences are provided for,[190] including failure to maintain company records, payment of creditors on a preferential basis, entering into transactions for inadequate consideration, the granting of security without proper consideration and engaging in reckless transactions which are not necessary for the business of the debtor. There are also offences specifically related to the conduct of parties in the bankruptcy, including failing to provide information required by the trustee, making false claims and in relation to any misconduct by the trustee. Furthermore, creditors can also be incarcerated for offences in bankruptcy, such as

[181] *Idem*, art 189.
[182] *Idem*, art 138.
[183] *Idem*, art 217.
[184] *Idem*, arts 218-219.
[185] *Idem*, art 142.
[186] *Idem*, art 143.
[187] *Idem*, art 144.
[188] *Idem*, art 147.
[189] *Idem*, art 125.
[190] *Idem*, arts 192-216.

overstating a claim in bankruptcy, receiving any preferential payment from the debtor while being aware that any such payment harms the general body of creditors and seeking any personal concessions in return for the creditor's vote on a composition or restructuring.[191]

Dispositions by the debtor made in the period two years before the commencement of the insolvency procedure are void, unless the Court approves the transaction in the public interest or if the transaction was entered into on the basis of another party's good faith. These include any transactions unsupported by value or inadequate value, early repayment of any debts, payment of a debt by any alternative means or the creation of any fresh guarantees by the debtor. The Court also has a general power under the same provisions to set aside dispositions if the disposition is to the detriment of the debtor's creditors and the other party to the disposition is aware, or should have been aware, that the debtor is in default of its payment obligations.[192]

6.4.7 Liquidation: DIFC Insolvency Law

Under the DIFC Insolvency Law, the liquidation of a company is addressed by Winding Up.[193] Any DIFC-incorporated company can be wound up under the DIFC Insolvency Law, as can a DIFC-registered branch of any foreign company. The DIFC Insolvency Law's application is also extended to other DIFC registered or incorporated entities, such as limited liability partnerships and non-profit incorporated organisations. There are no specific legislative provisions governing small or assetless companies (subject to early dissolution, which is discussed below for assetless companies); nor are there any specific provisions regarding groups of companies.

Winding up is the process whereby a liquidator is appointed to realise the assets of the company and to distribute those assets as required by law. There are two methods of winding up: either voluntary winding up (by resolution of the company's shareholders); or compulsory winding up, pursuant to an order made by the DIFC Courts.[194] Furthermore, there are two forms of voluntary winding up: creditors' voluntary winding up (for insolvent companies) and members' voluntary winding up (for solvent companies). While there will be circumstances in which it would be prudent to do so, unless there is a specific provision in the company's constitutional documents requiring it to do so, there is no obligation on a company (or its directors) to wind up a company's affairs.

6.4.7.1 Commencement of winding up and appointment of liquidator: DIFC Insolvency Law

For both forms of voluntary winding up, the winding up is deemed to commence at the time of the passing of a resolution to wind up the company.[195] The company must cease to carry on business from the time of the passing of the resolution for the commencement of the winding up, although the company continues to exist and have legal personality during the winding up.[196] The powers of the directors cease upon the appointment of the liquidator[197] (although that appointment does not occur

[191] *Idem*, arts 192-216.
[192] *Idem*, art 168.
[193] DIFC Insolvency Law, Pt 6.
[194] *Idem*, art 51.
[195] *Idem*, art 56.
[196] *Idem*, art 57.
[197] *Idem*, arts 61 and 70.

immediately in a creditors' voluntary winding up, so the directors retain control until the liquidator is appointed).

In the case of a members' voluntary winding up, the directors must provide a statutory declaration as to the solvency of the company, whereby they confirm that, having made due inquiry, the company will be able to pay its debts within 12 months from the commencement of the winding up.[198] If the directors did not have reasonable grounds for their belief, they risk being subjected to a fine; a failure by the company to pay all debts within 12 months creates a presumption that the directors did not have grounds for their belief.[199] Furthermore, if the liquidator forms the view that the company will not be able to pay its debts, the liquidator must call a meeting of creditors; from the time of that meeting, the winding up is deemed to be a creditors' voluntary winding up.[200]

In the case of a creditors' voluntary winding up, when passing the resolution to commence the winding up, the company may nominate a liquidator to be appointed, but the liquidator shall be the person nominated by the creditors (or in absence of any nomination, the person nominated by the company).[201] Upon the appointment of the liquidator, the directors' powers cease.[202] The creditors may also appoint a liquidation committee at the meeting of creditors, to exercise the functions conferred on the committee under the DIFC Insolvency Law.[203]

In the case of a court-ordered winding up, called a "compulsory winding up", the court has jurisdiction to order the winding up of a company if the company has passed a resolution to that effect, if it is unable to pay its debts, if a moratorium under a Company Voluntary Arrangement (discussed below) has ended without an arrangement being approved, under any other provision of DIFC law, or if the court considers it just and equitable to wind the company up.[204]

The most common ground for the commencement of a compulsory winding up is that the company is not able to pay its debts. A company is presumed to be unable to pay its debts if:[205]

(a) a creditor has made demand for payment of a debt which is for a sum of more than USD 2,000, and that demand has been unsatisfied for a period of more than three weeks; or

(b) any execution process is returned unsatisfied; or

(c) it is proved that a company is unable to pay its debts as they fall due; or

(d) it is proved that the value of the company's assets exceeds the value of the company's liabilities, including any prospective and contingent liabilities.

An application to the court for the winding up of a company may be brought by the company, its directors, or any creditor (including any prospective or contingent

198 *Idem*, arts 59 and 60.
199 *Idem*, art 59.
200 *Idem*, arts 64 and 65.
201 *Idem*, art 68.
202 *Idem*, art 70.
203 *Idem*, art 69.
204 *Idem*, art 81.
205 *Idem*, art 82.

creditor),[206] or by the DIFC Authority where it considers the winding-up to be in the best interests of the DIFC and the DIFC Court is of the opinion that it is just and equitable for the company to be wound up.[207] A creditor with a debt of at least US $2,000 may apply to the Court for an order winding up the company, even if voluntary winding up has already commenced.[208]

If an order is made for the winding up of a company by the Court, the Court, in the order, must identify the person who is to be the liquidator of the company. The liquidator so appointed may then elect whether to continue as liquidator or to summon a meeting of creditors and contributories for the purpose of choosing a liquidator. If the creditors and contributories choose different people, the liquidator shall be the person chosen at the creditors' meeting.[209]

The court also has jurisdiction to make an order to appoint a liquidator provisionally any time after the presentation of a petition to the Court for the winding up of the company.[210] While there is little guidance given for the grounds of appointment or the powers to be granted, it can be presumed that the Court would principally consider whether the appointment is necessary for maintaining the value of the assets of the company pending the making of a final winding up order.

From the time a winding up order is made, no person may seek attachment against the assets of the company, nor may any person commence or proceed with any action against the company, except with the leave of the court.[211] There appears to be no similar provision in relation to voluntary windings up.

6.4.7.2 Role of the liquidator: DIFC Insolvency Law

Any liquidator appointed must be an insolvency practitioner, as provided for in Part 10 of the Insolvency Law. The liquidator's role is to wind up the affairs of the company and to gather, realise and distribute the company's assets. A liquidator has the powers set out in Schedule 3 to the law. The liquidator can (amongst other powers) carry on the business of the company (to the extent that it is beneficial to the winding up), conduct litigation in the name of the company, sell the company's property and do anything else which may be necessary for the winding up of the company's affairs and distributing its assets. The liquidator may also call for claims by creditors and to prove, rank and pay creditors' and shareholders' claims. The liquidator may enter into contracts in the name and on behalf of the company(which together with other enumerated powers would appear to cover the continued supply of goods and services to the company as may be beneficial to the winding up, however there is no provision requiring any person to continue to supply goods and services to a liquidator).[212] The liquidator may disclaim onerous property, including unprofitable contracts, unless the liquidator has been appointed in a members' voluntary winding up.[213]

The liquidator also has a duty to investigate powers the affairs of the company and the cause of its failure, and the liquidator must report its findings to the Court;[214] the

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206 *Idem*, art 83.
207 *Idem*, art 84.
208 *Idem*, arts 82 and 174.
209 *Idem*, art 90.
210 *Idem*, art 91.
211 *Idem*, arts 86 and 88.
212 *Idem*, Schedule 3.
213 *Idem*, art 100.
214 *Idem*, art 89.

liquidator can require any person to submit further information in relation to any matters included in the statement of the affairs of the company, inspect the company's books and records and require any officer of the company to attend before the liquidator and to provide information or such other assistance as the liquidator may reasonably require.[215] The liquidator must report to the creditors at various times during the winding up as to the state of affairs of the company. If a liquidation committee has been appointed, after the first meeting has occurred, the liquidator may determine when further meetings of the committee take place.[216]

Furthermore, the liquidator may take various actions to challenge transactions entered into by the company and to seek recovery of any assets of which the company was thereby deprived (either directly or indirectly) in the period prior to the commencement of the winding up. These are discussed further below.

A liquidator, whether appointed by the Court or otherwise, may pursue actions against past or present officers of the company who have committed any number of specified actions which concealed the company's property or the true state of the company's affairs with the intention of defrauding the creditors of the company, or concealing the state of the company;[217] or who has entered into any transaction in fraud of creditors.[218]

A liquidator, whether appointed by the Court or otherwise, may apply to the Court for summary orders requiring certain persons (including amongst others, officers, directors, managers and contributories) to repay, restore or account for money or other company property, to compensate for any misfeasance or breach of duty, to contribute to the company's assets or to do (or not do) any other thing, in relation to any falsification of company books, material omissions in any statement relating to the company's affairs, false representations to creditors, fraud in anticipation of winding up, misconduct in the course of winding up, fraudulent trading or wrongful trading.[219] In relation to wrongful trading, a director is potentially personally liable to the company if the company has gone into insolvent liquidation and the director knew some time beforehand that there was no reasonable prospect of the company avoiding insolvent liquidation.[220]

6.4.7.3 Creditors' claims in winding up: DIFC Insolvency Law

Under the DIFC Insolvency Regulations, it is provided that a creditor wishing to recover a debt in the liquidation of a company being wound up by the court must submit a claim for the amount in writing to the liquidator.[221] The document so lodged is described as a "proof" of debt. This provision also expressly applies to members' voluntary winding up and appears to apply to a creditors' voluntary winding up.[222]

The creditor must set out in writing the claimed amount and provide supporting information to allow the liquidator to verify the claim.[223] If the debt cannot be

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[215] *Idem*, art 130. DIFC Insolvency Regulation, regs 6.6 and 6.7.
[216] DIFC Insolvency Regulation, regs 6.38 and 6.39.
[217] *Idem*, art 107.
[218] *Idem*, art 108.
[219] *Idem*, arts 107 to 115.
[220] *Idem*, art 113.
[221] DIFC Insolvency Regulations, reg 6.16.
[222] *Idem*, reg 1.4 (which states that reg 6.16 in relation to proofs of debt applies to members' voluntary winding up; this reg also lists regs which are not applicable to a creditors' voluntary winding up which does not include reg 6.16, implying that reg 6.16 would apply to a creditors' voluntary winding up).
[223] *Idem*, regs 6.16 and 6.17.

ascertained, the liquidator may estimate its quantum.[224] A proof of debt must take into account any set-off which exists between the creditor and the company[225] and may take account of accrued interest up to the date of the commencement of the winding up.[226] A creditor may prove for a future debt[227] and for a debt in a foreign currency, converted into US dollars.[228] A secured creditor may only prove for the balance owing, or which is estimated would be owing, following realisation of any security interest.[229]

Because the DIFC is a financial centre, the DIFC also has specific legislation addressing "netting" under DIFC law, DIFC law no. 2 of 2014 (the **"Netting Law"**). The provisions of the Netting Law are expressed to override any provision of the Insolvency Law or the Insolvency Regulations (except in relation to what are defined as "the Business Rules" of "Authorised Market Institutions" – effectively exchanges or clearing houses – regarding the finality of payments). Effectively, all netting agreements remain enforceable in accordance with their terms, notwithstanding the insolvency of a party to such an agreement. Furthermore, such an agreement will be enforced notwithstanding any powers that a liquidator might otherwise have to repudiate a contract to which a netting agreement applies. Finally, any setting-off or netting will not be affected by any insolvency law (of the DIFC or presumably any other jurisdiction) which seeks to limit the exercise of any such contractual right.

Upon receipt of a proof of debt, the liquidator may require the creditor to provide such further information as may be necessary to evaluate the claim.[230] The liquidator may then admit or reject (in whole or in part) any proofs of debt for the purposes of determining whether to make a payment to the creditor, along with other creditors.[231] If a creditor is dissatisfied with the liquidator's decision regarding a proof, the creditor may then appeal against that decision within 21 days of receiving notice of that decision, by application to the Court; a member of the company or another creditor may also appeal against any such decision by the liquidator.[232]

There are no specific provisions governing contracts which have not been fully performed upon the commencement of a winding up. The value of such claims as between the company and the other party to the contract falls to be determined by the general law of liability, including the law of debt (for amounts due), damages (for any breaches of contract arising from non-performance following the commencement of winding up) and restitution (if applicable, in respect of property transferred).

6.4.7.4 Distribution of assets

Whenever the liquidator has sufficient funds, he or she may declare a dividend and distribute that dividend among the company's creditors.[233] In calculating and distributing a dividend, the liquidator is entitled to retain funds sufficient to pay the costs of the liquidation, claims which the liquidator believes could still be lodged and any disputed claims. A creditor who has not proved his or her debt by the time a dividend is paid, may not disturb a dividend paid previously but, if there are funds

[224] *Idem*, reg 6.22.
[225] *Idem*, reg 6.25.
[226] *Idem*, reg 6.28.
[227] *Idem*, reg 6.29.
[228] *Idem*, reg 6.26.
[229] *Idem*, regs 6.23 and 6.30.
[230] *Idem*, reg 6.17.
[231] *Idem*, reg 6.19.
[232] *Idem*, reg 6.20.
[233] *Idem*, reg 6.46.

available for the liquidator to do so, the creditor is entitled to be paid for any dividend he or she has failed to receive previously (a so-called equalising dividend).[234]

All debts of an insolvent company rank equally in any distribution, unless they are preferential debts as provided for by regulation.[235] In a voluntary winding up, the expenses of the winding up (principally the liquidator's expenses) are payable out of the assets of the company in priority to all other claims.[236] In a compulsory winding up, if the company has insufficient assets to satisfy its liabilities, the Court may make such order as to payment of the expenses of the winding up in such priority as it thinks just (including, for example, that such expenses are to be paid in priority to creditors' claims).[237]

Preferential creditors' claims are governed by the Preferential Creditor Regulations 2008. These regulations provide that, after payment of the expenses of the winding up, preferential creditors' claims should be paid in priority to unsecured claims and in priority to claims secured by a security interest over all or substantially all of the assets of the company.[238] While there are a number of categories of preferential debts, they are all debts which represent any amounts owed by a company to an employee or amounts which the company is obliged to pay for the benefit of an employee in the employee's capacity as such (for instance, contributions to pension schemes). There are no other classes of preferential or priority claims.

In the event that the company has sufficient assets to pay all creditors in full for the creditors' claims determined to the date of the commencement of the winding up, the company must then pay interest on such of those creditors' claims as are interest-bearing.[239] In the event that all creditors (including those entitled to interest) have been paid in full, any remaining assets are paid to the shareholders and other contributories of the company, in the manner provided for in the company's constitution (article 75 specifically provides this manner of distribution for voluntary windings up).

The liquidator may, by notice to the creditors, declare a final distribution without regard to the claim of any person who has not yet proved their claim in the winding up; the Court may, on application by any person, postpone the date of a final dividend.[240]

Finally, specific provision is made for under the DIFC Insolvency Insurers Regulations 2008 for the conduct of the winding up of an insurer and, in particular, how insurance claims are to be addressed: in an insurance winding up, after the payment of preferential debts, insurance liabilities must generally be paid in priority to non-insurance liabilities; furthermore, assets and liabilities of the insurer can be attributed to specific insurance business, rather than treating all policyholders as equal creditors and all insurance assets as assets available to all creditors of the company.

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[234] *Idem*, reg 6.46.
[235] *Idem*, reg 5.47 and DIFC Insolvency Law, art 75.
[236] DIFC Insolvency Law, art 78.
[237] *Idem*, article 98.
[238] DIFC Insolvency Preferential Creditor Regulation, reg 2.1.1.
[239] *Re Forsyth Partners Middle East Limited (in liquidation) and others*, DIFC Courts, CFI, 6 Sep 2011, Sir John Chadwick.
[240] DIFC Insolvency Regulation, reg 6.49.

6.4.7.5 Dissolution

When the liquidator has done everything necessary to wind up the affairs of the company, by realising all assets and distributing the proceeds, the liquidator may seek to have the company dissolved – whereby the company's legal existence is brought to an end.

If the company has assets insufficient to cover the costs of the winding up and the affairs of the company do not require investigation, the liquidator may give the creditors and contributories 28 days' notice of intention to do so and may then apply to the DIFC Registrar of Companies for an early dissolution of the company.[241]

However, the liquidator is required to call a final meeting of creditors prior to dissolution (in the case of a creditors' voluntary winding up or a compulsory winding up), to prepare a final account of the winding up (to be presented to the creditors at the relevant meeting), and to provide the final account to the creditors (in the case of a creditors' voluntary winding up or a compulsory winding up) and the shareholders (in the case of a creditors' voluntary winding up or a members' voluntary winding up).[242] At the final meeting of creditors, the creditors may give the liquidator a release against any further obligations in relation to the winding up; if the creditors will not do so, the liquidator may apply to the Court for a release.[243] Upon the expiration of three months from the date on which the final account was sent to creditors, the company is deemed to be dissolved, although the Court may defer the dissolution date on application by any interested party.[244]

Self-Assessment Exercise 3

Study the basic aspects dealt with in the previous section.

Question 1

What incentives are there for a mainland debtor to take a pro-active approach to restructuring in any insolvency situation; and what are the potential challenges in doing so?

Question 2

In what circumstances might a restructuring of a debtor occur, even if the debtor has not sought preventive composition?

Question 3

To what extent are the different mainland procedures "debtor-friendly" or "creditor-friendly"?

Question 4

What are the material differences between the insolvency regime operating in Mainland UAE, compared with that of the financial free zones?

241 DIFC Insolvency Law, art 105.
242 *Idem*, arts 63, 74 and 95; DIFC Insolvency Regulation, regs 1.4 and 6.32.
243 DIFC Insolvency Regulation, reg 6.32.
244 DIFC Insolvency Law, art 105.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

Essentially, there is no provision in the Bankruptcy Law or otherwise under mainland UAE law for the application of cross-border insolvency law.

Part 7 of the DIFC Insolvency Law adopts the UNCITRAL Model Law on Cross Border Insolvency which is designed to encourage and allow co-operation and co-ordination of cross border insolvency proceedings.

Under the ADGM Insolvency Regulations (Schedule 10), provision is made for the UNCITRAL Model Law on Cross-Border Insolvency, and the Model Law has been adopted by way of inclusion in Schedule 10, subject to some very minor amendments to reflect its application in the ADGM.

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Recognition of foreign judgments and arbitration awards by the UAE Courts

In the UAE, there is generally only limited recognition and enforcement of foreign judgments. The UAE Courts generally take the approach that if they had jurisdiction over a matter (for instance if the defendant were a UAE resident), they will not enforce orders made or judgments given by a foreign court against that defendant. While that position might change due to an amendment to the Civil Procedure Code, due to take effect in 2019, it is too early to say what the impact of the amendment will be.

That position is subject to any applicable conventions and treaties which have legal effect in the UAE. The UAE has entered into a number of such treaties; the most important is the Riyadh Arab Agreement for Judicial Co-operation, which governs the recognition and enforcement of judgments as among a number of Middle Eastern and North African nations. The Riyadh Convention does provide a mechanism whereby judgments from Convention countries can be enforced in the UAE. The UAE is also a party to the Gulf Co-operation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications.

Under the Riyadh Convention, the UAE Courts are required to enforce a final and conclusive judgment of another Convention member state if:

> "the courts of the contracting party which made the said judgements are competent under the provisions of the rules of jurisdiction in force in the [U.A.E.], and if the legal system of the [U.A.E.] does not retain for its courts or the courts of another party the exclusive competence to make such judgements."[245]

[245] Riyadh Arab Agreement for Judicial Co-operation, art 25(b).

Under the Riyadh Convention, the UAE may refuse to recognise a judgment in certain circumstances,[246] including if recognition would be contrary to the stipulations of the Islamic Shari'a or to UAE law, if judgment was obtained in the defendant's absence, or if the defendant were otherwise precluded from properly defending itself, or if the judgment arises from a matter which is already before the UAE Courts.

The UAE is also a party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (the New York Convention), whereby foreign arbitration awards can be recognised and enforced through the UAE Courts.

8.2 Recognition of foreign judgments and arbitration awards by the DIFC Courts

The Courts of the DIFC are Courts of Dubai and, as such, are bound by any applicable laws, conventions and treaties of the UAE governing the enforcement of foreign judgments in the UAE. The Courts of the DIFC have also entered into a number of memoranda of understanding with the courts of other nations regarding the recognition of foreign judgments – albeit that such memoranda have very limited legal effect.

However, more significantly, the Courts of the DIFC have applied the common law principles related claims arising from money judgments to bring claims before the DIFC Courts, provided other jurisdictional tests are satisfied.[247] This principle allows a claimant to prosecute a claim against a defendant over whom the DIFC Courts might have jurisdiction in relation to a judgment obtained in a foreign court.

Furthermore, the DIFC Courts have interpreted the legislation determining the Courts' jurisdiction in a manner which gives the DIFC Courts a very broad jurisdiction to recognise and enforce arbitration awards and foreign judgments; the Courts have held that they will accept jurisdiction over such proceedings, even if the defendant has no physical presence or assets in the DIFC. Accordingly, even if the Courts would not otherwise have jurisdiction over a defendant, they might have jurisdiction for the purposes of enforcing foreign judgment and arbitration awards.

Once such a judgment has been obtained from the DIFC Courts, it can be enforced as a DIFC Court judgment through the Dubai Courts; such a judgment could also, potentially, be enforced elsewhere in the UAE and in other Riyadh Convention countries. Subject to any jurisdictional challenges, the mechanism potentially gives a judgment creditor a means to enforce foreign money judgments in the UAE in a way which the creditor would not otherwise have.

Likewise, foreign arbitration awards can be enforced in the DIFC and, as is the case with foreign judgments, the Courts have held that they will recognise and enforce such awards, even if the defendant has no presence or no assets in the DIFC. Because enforcement of foreign arbitration awards through the Dubai Courts has sometimes been considered to present some procedural challenges, recognition and enforcement by the DIFC Courts and subsequent enforcement by the Dubai Courts, has been used to accelerate the ratification and enforcement process by parties who have succeeded in foreign arbitrations.

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[246] *Idem*, art 30.
[247] *DNB Bank ASA* v *Gulf Eyadah Corporation and another*, CA 007/2016, 25 Feb 2016.

Self-Assessment Exercise 4

Study the basic aspects dealt with in the previous section.

Question 1

How do the jurisdictional challenges in enforcing judgments hamper the efficient operation of the insolvency regime?

Question 2

Does the existence of separate jurisdictions within the UAE assist or complicate the operation of an efficient insolvency regime?

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

9. INSOLVENCY LAW REFORM

As the UAE Bankruptcy Law is a relatively recent piece of legislation and there has, as yet, been very few applications of the law in practice, there is currently no immediate intention to reform it.

Given that the DIFC Insolvency law is relatively new we are not aware of any immediate intention to reform it.

There is no current process under way for insolvency law reform in the ADGM.

10. USEFUL INFORMATION

- CIA World Factbook: www.cia.gov/library/publications/the-world-factbook/geos/ae.html;
- World Bank: Doing Business: www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf;
- Official Portal of the UAE Government: www.government.ae;
- DIFC Legal Database: www.difc.ae/business/laws-regulations/legal-database;
- DIFC Courts: www.difccourts.ae;
- ADGM: www.adgm.com.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

What are some of the challenges that could arise for the efficient implementation of an insolvency regime in the United Arab Emirates, given the institutional framework described?

Commentary and Feedback on Self-Assessment Exercise 1

Question 1

The principal challenge that arises for the efficient implementation of an insolvency regime is the diversity of the UAE, which makes it a challenging environment in which to create and implement a uniform insolvency regime; and the creation of more than one insolvency regime in one country will inevitably lead to challenges.

There is the obvious point that the UAE is comprised of seven different emirates; and, furthermore, that there are a number of free zones within each emirate, each with their own rules regarding corporate and business organisation. Any insolvency law regime must take account of the fact that it will have to apply to a number of entities, not all of which will be structured in the same way. This situation is accentuated by the fact that the financial free zones which have distinct legal systems, which have developed their own insolvency laws to regulate insolvency in the free zones – and the financial free zone insolvency laws are very different to the "mainland" insolvency law. Furthermore, because of the way that the free zones and their Courts have approached issues of law and jurisdiction, there is considerable potential for there to be overlap in the application of the insolvency regimes.

There is also the challenge of the various potential criminal liabilities for business failure. Historically, that held back the development of an insolvency regime, as an efficient insolvency regime could be seen as "permitting" business failure. Furthermore, even though an insolvency regime has now been established by way of general application to the UAE, the use of the criminal penalties can be used by creditors to advance their position in isolation, and to exclude the operation of insolvency law; as the insolvency regime is developed, the inter-play between the criminal law and the insolvency regime, and the extent to which parties will have confidence in the workings of the insolvency law generally will determine how efficient the insolvency regime proves to be.

Finally, there are the challenges posed by the population structure of the UAE: the overwhelming majority of the residents of the UAE are "non-nationals", and they are in the UAE because of their immediate employment relationship (or that of an immediate family member). That means that, in the event of that employment relationship ending, those individuals often have few reasons for remaining in the UAE. That is one of the reasons why it is challenging to create a regime governing consumer insolvency, which the UAE has not done.

Self-Assessment Exercise 2

Question 1

Particularly in the light of recent changes to the law, in what ways does the law of security allow for more efficient provision of credit, particularly compared with the "post-dated cheque" security mechanism described above?

Commentary and Feedback on Self-Assessment Exercise 2

Question 1

Historically, the UAE legal system relied upon criminal law for enforcement of debts. The systems for enforcement of mortgages was cumbersome and, for most personal property, security over collateral could only be taken alongside possession of that collateral, which meant that much personal property was of limited value as collateral and meant that there could be no security over intangible assets (including assets which had not yet come into existence). The system essentially came to rely upon the potential for criminal punishment to enforce obligations.

The creation of a more sophisticated security regime for personal property, including the expansion of classes of assets which can be used as collateral, the creation of a searchable security register and the ability to take security without possession means that both borrowers and lenders can approach financing on a more assured basis than had existed previously; and that is something which will encourage the more efficient allocation of credit. Furthermore, the fact that security interests in collateral generally stand outside the insolvency process in the UAE will encourage lenders to see increased value in the proper granting of security for lending.

Self-Assessment Exercise 3

Question 1

What incentives are there for a mainland debtor to take a pro-active approach to restructuring in any insolvency situation; and what are the potential challenges in doing so?

Question 2

In what circumstances might a restructuring occur, even if the debtor has not sought preventive composition?

Question 3

What are the material differences between the insolvency regime operating in Mainland UAE, compared with that of the financial free zones?

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

The UAE Bankruptcy Law distinguishes between “preventive composition”, which is a debtor-led process, and the formal process of bankruptcy, albeit that bankruptcy can lead either to “restructuring” or “liquidation”. Only a debtor can seek a “preventive composition”.

The principal benefit of seeking a preventive composition for a debtor is to ensure that it complies with its legal obligation to do so, if the grounds to do so exist; but that would be the case for a debtor seeking to initiate any insolvency procedure. The main practical benefit for a debtor to enter into a “preventive composition” is that, if the debtor has a plan to restructure the business, the preventive composition maximises the debtor’s ability to have that plan carried into effect.

Finally, like all of the bankruptcy procedures, the commencement of the preventive composition procedure will prevent creditors seeking to enforce debts, and will also limit the exposure of cheque signatories to criminal penalties in relation to dishonoured cheques; although preventive composition will generally not prevent a secured creditor from taking action under the creditor’s security.

Question 2

A creditor may (subject to the existing suspension of this right due to the COVID-19 pandemic) also bring proceedings to have a debtor enter into some form of bankruptcy process. If a creditor (including a group of creditors) is owed more than AED 100,000, and the creditor has given notice to the debtor to satisfy the debt, and the debtor has failed to discharge the debt within 30 days of the notice, the creditor may bring an application to the Court to commence the bankruptcy of the debtor (Bankruptcy Law, article 69). While, in many cases, such an application will result in the liquidation of the debtor’s assets, a procedure is available whereby the trustee appointed by the Court at the commencement of the bankruptcy process is required to consider the possibility of restructuring the debtor’s affairs and to provide a report on the same to the Court (article 96); any such report must contain a statement of the debtor’s commitment to continuing the business and the possibility of the business being sold as a “going concern”. Once the report has been submitted to the Court, the trustee is required to hold a meeting of creditors, at which the report is put to the creditors.

If the Court decides that restructuring is appropriate, the trustee has three months to prepare the scheme and to put the scheme to the Court (article 103). If the Court is satisfied with the scheme, then the Court will require the trustee to invite all creditors to meet to discuss the proposed restructuring scheme (article 104). There is a mechanism for variation of the scheme, but, if it is approved, by a majority of the creditors holding two-thirds of the debtor’s debts, then the scheme is returned to the Court for approval. Creditors who voted against the scheme can be heard on any such application. The Court must be satisfied that all creditors would receive as much under any scheme as they would have received if all of the debtor’s assets were liquidated. If the Court rejects the scheme it can be returned to the trustee for amendment; if the Court approves the scheme, it can then be implemented.

Question 3

The principal jurisdictional difference between the insolvency regimes in “mainland” UAE and the regimes in the financial free zones, is that the Bankruptcy Law operating in “mainland” UAE is a law of general application, created specifically for the UAE, while the laws in the financial free zones are largely based on the United Kingdom Insolvency Act. Furthermore, looking at the DIFC, the DIFC Insolvency Law allows for receiverships, which are an extremely “creditor-friendly” mechanism (assuming the creditor has appropriate security), whilst balancing this with the more debtor friendly “Rehabilitation” procedure.

The principal procedural difference between the insolvency regimes operating in “mainland” Dubai and the financial free zones relates to the role of the Courts and the necessary procedures for giving effect to the various insolvency procedures. Under the Bankruptcy Law, the procedures are highly prescribed in relation to the various steps which need to be taken, and by when, and in relation to the roles of the various parties. There is far greater flexibility available under the insolvency laws operating in the financial free zones; while the Courts retain broad supervisory jurisdiction, insolvency officials have to take very few mandated steps in co-ordination with or pursuant to a court order.

Self-Assessment Exercise 4

Question 1

How do the jurisdictional challenges in enforcing judgments hamper the efficient operation of the insolvency regime?

Question 2

Does the existence of separate jurisdictions within the UAE assist or complicate the operation of an efficient insolvency regime?

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

The principal challenge of enforcing judgments has historically been that, without a mechanism to enforce judgments obtained from a number of jurisdictions overseas, it has been difficult for foreign creditors to recover debts from UAE debtors other than through proceedings in the UAE. Furthermore, the previous absence of an efficient insolvency regime meant that it could be very easy for a debtor to frustrate a straightforward debt recovery, simply by disputing the debt, whether there were good grounds to do so or not. While some creditors have attempted to address this through using the DIFC Courts as a jurisdiction in which debts could be recognised and then enforced elsewhere in the UAE, that was hardly an ideal mechanism to do so; furthermore, the creation of the Joint Judicial Committee has also limited the extent to which that mechanism can be used.

It remains to be seen whether a creditor can rely upon a foreign judgment to initiate bankruptcy procedures against a debtor. It also remains to be seen whether changes to the Civil Procedure Code will make it easier to enforce a foreign judgment against a debtor.

Question 2

Given the limited experience of the operation of an insolvency regime in the UAE, it is too early to say what the actual impact of a number of separate jurisdictions will be. It is likely that the most significant impact will be felt if the insolvency has implications both inside and outside the financial free zones, because there is no mechanism to harmonise the very different insolvency regimes operating as between "mainland" UAE and the financial free zones. This could be particularly accentuated for entities that have a legal presence both inside and outside the financial free zones. Even if a principal office-holder is appointed (or the same person is appointed to equivalent offices both inside and outside the financial free zones), the absence of a system for determining how competing insolvency claims should be determined and for determining which law the insolvency should proceed under, could well cause difficulties for such insolvencies.

INSOL International™

6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0)20 7248 3333   Fax: +44 (0)20 7248 3384

www.insol.org