
THE RESTRUCTURING REVIEW

SIXTH EDITION

EDITOR
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

THE RESTRUCTURING REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Restructuring Review, 6th edition
(published in August 2013 – editor Christopher Mallon).

For further information please email
Adam.Sargent@lbresearch.com

THE RESTRUCTURING REVIEW

Sixth Edition

Editor
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER

Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS

Adam Sargent, Nick Barette

MARKETING MANAGERS

Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT

Lucy Brewer

PRODUCTION COORDINATOR

Lydia Gerges

HEAD OF EDITORIAL PRODUCTION

Adam Myers

PRODUCTION EDITOR

Joanne Morley

SUBEDITOR

Caroline Rawson

EDITOR-IN-CHIEF

Callum Campbell

MANAGING DIRECTOR

Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2013 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2013, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-76-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACHOUR & HÁJEK S.R.O.

ADVOKATFIRMAET HAAVIND AS

AFRIDI & ANGELL

AKINWUNMI & BUSARI LEGAL PRACTITIONERS

ASTREA

BAKER & MCKENZIE

BORDEN LADNER GERVAIS LLP

CHARLES ADAMS RITCHIE & DUCKWORTH

DENTONS

DHIR & DHIR ASSOCIATES, ADVOCATES & SOLICITORS

DUNDAS & WILSON

FASKEN MARTINEAU

GARRIGUES

GILBERT + TOBIN

GRIMALDI STUDIO LEGALE

GÜR LAW FIRM

HEATHER & HEATHER SC

KIM & CHANG

KING & WOOD MALLESONS
LEONHARDT RECHTSANWÄLTE
MOTIEKA & AUDZEVIČIUS
OPF PARTNERS
RØNNE & LUNDGREN
SCHELLENBERG WITTMER LTD
SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP
SOARES BUMACHAR CHAGAS BARROS ADVOGADOS
WASELIUS & WIST
WILLIAM FRY

CONTENTS

Editor's Prefacevii
	<i>Christopher Mallon</i>
Chapter 1	AUSTRALIA.....1
	<i>Dominic Emmett, James Lewis and Nicholas Edwards</i>
Chapter 2	BELGIUM.....15
	<i>Steven De Schrijver and Thomas Daenens</i>
Chapter 3	BRAZIL27
	<i>Laura Mendes Bumachar and Jayme Marques de Souza Junior</i>
Chapter 4	CANADA37
	<i>Michael J MacNaughton, Marc Duchesne, James H Szumski and Edmond Lamek</i>
Chapter 5	CAYMAN ISLANDS.....60
	<i>Graham F Ritchie QC and David W Collier</i>
Chapter 6	CHINA.....70
	<i>Zheng Zhibin and Kalley Chen</i>
Chapter 7	CZECH REPUBLIC.....80
	<i>Daniel Hájek</i>
Chapter 8	DENMARK.....90
	<i>Kristian Gustav Andersson</i>
Chapter 9	ENGLAND & WALES98
	<i>Christopher Mallon, Alex Van Der Zwaan and Sebastian Way</i>

Chapter 10	FINLAND	126
	<i>Timo Lehtimäki and Maria Pajuniemi</i>	
Chapter 11	FRANCE	138
	<i>Caroline Texier and Gabriel Sonier</i>	
Chapter 12	GERMANY	149
	<i>Christian Köhler-Ma</i>	
Chapter 13	INDIA	163
	<i>Nilesh Sharma and Sandeep Kumar Gupta</i>	
Chapter 14	IRELAND.....	176
	<i>Michael Quinn</i>	
Chapter 15	ITALY	189
	<i>Tiziana Del Prete and Matteo Smacchi</i>	
Chapter 16	JAPAN	199
	<i>Shinichiro Abe</i>	
Chapter 17	KOREA.....	216
	<i>Jin Yeong Chung and Milosz Zurkowski</i>	
Chapter 18	LITHUANIA.....	226
	<i>Giedrius Kolesnikovas and Emil Radzihovsky</i>	
Chapter 19	LUXEMBOURG	241
	<i>Martine Gerber-Lemaire</i>	
Chapter 20	MEXICO	253
	<i>Thomas S Heather and Eugenio Sepúlveda</i>	
Chapter 21	NIGERIA.....	266
	<i>Seyi Akinwunmi</i>	

Chapter 22	NORWAY277 <i>Ylva Cornelia Daniëls and Ellen Schult Ulriksen</i>
Chapter 23	SCOTLAND285 <i>David Gibson and Lorna Young</i>
Chapter 24	SOUTH AFRICA.....310 <i>Andrew Leontsinis and Samantha Seymour-Cousens</i>
Chapter 25	SPAIN327 <i>Antonio Fernández, Borja García-Alamán, Adrián They and Juan Verdugo</i>
Chapter 26	SWITZERLAND338 <i>Vincent Jeanneret and Olivier Hari</i>
Chapter 27	TURKEY352 <i>Feyza Gerger Erdal</i>
Chapter 28	UNITED ARAB EMIRATES.....361 <i>Bashir Ahmed and James Bowden</i>
Chapter 29	UNITED STATES372 <i>J Eric Ivester</i>
Appendix 1	ABOUT THE AUTHORS.....391
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...411

EDITOR'S PREFACE

I am very pleased to present this sixth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2012 and 2013 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

Recent trends in the world economy have presented a mixed picture. Positive economic developments in the United States, such as the robust growth in job creation, have been offset by a situation of stasis in the EU, which remains troubled by concerns about the ongoing eurozone debt crisis and political uncertainty. There have also been some indications that emerging markets, which have done much to underpin global growth in the recent past, are set to experience more challenging conditions in the coming years.

Another cause for concern is that the positive economic developments of recent years appear to have been largely predicated on the extraordinary measures taken by central banks in response to the global financial crisis; it is not clear how economies will respond when historically low interest rates and loose monetary policy eventually revert to the mean. It is to be expected that central banks will be reluctant to endanger a fragile recovery through a premature return to orthodox policy, but it is inevitable that a return will have to be made in due course. The markets' negative reaction to the signals given in June 2013 by the US Federal Reserve that it was considering an earlier end to quantitative easing than previously anticipated indicates the stress that may be placed on large parts of the global economy as current policies are reversed.

While the picture is continually changing, and the only accurate economic prediction that can be made is for more uncertainty in the months ahead, most commentators agree that a significant deleveraging at the individual, corporate and governmental levels is likely to be seen in the coming years and may be an essential prerequisite for a return to stability.

This deleveraging and the difficult global economic conditions are widely expected to contribute to a significant increase in restructuring activity in the coming years. As such, this work is becoming ever more relevant and important, in particular because of the international nature of many corporate restructurings.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom the completion of this work would not have been possible.

Christopher Mallon

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

London

August 2013

Chapter 28

UNITED ARAB EMIRATES

*Bashir Ahmed and James Bowden*¹

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The economic slowdown that affected the UAE, and Dubai in particular, from 2009 to 2011 highlighted the inadequacy of the existing legal framework for restructuring and insolvency. While liquidity shortfalls and the collapse of the construction and real estate markets have had adverse impacts on many UAE-based businesses, the existing laws relating to restructuring and insolvency remain largely untested in view of the lack of procedures for reorganisation and protective composition. While there have been many reports and statements over the past three years that the UAE is preparing a modern and practical bankruptcy law, this is yet to be promulgated. The framework discussed in Section II refers to the subsisting statutory framework.

i Overview

The UAE provides a framework for the restructuring and insolvency of commercial companies and traders,² which is contained in UAE Federal Law No. 18 of 1993 promulgating the Code of Commercial Practice (the Commercial Code). UAE Federal Law No. 8 of 1984 on Commercial Companies (as amended) (the Commercial

1 Bashir Ahmed is a partner and James Bowden is an associate at Afridi & Angell.

2 The term 'trader' is defined in the Commercial Code to include (1) any person who works in his or her own name or to his or her advantage in commercial activity while possessing the required legal capacity, provided he or she adopts this activity as a profession and (2) any company that undertakes commercial activity or takes one of the forms stipulated in the Commercial Companies Law. In this article, commercial companies have also been dealt with separately where required.

Companies Law) contains provisions for the dissolution of a company.³ The Penal Code of the UAE (contained in Federal Law No. 3 of 1987) also contains criminal sanctions for bankrupts.⁴

ii The Commercial Code

Company bankruptcy

In terms of the Commercial Code, with the exception of share partnership companies,⁵ any commercial company may be declared bankrupt (even when the company is in the process of liquidation) if it ceases to pay its commercial debts when they fall due because of disruption to its financial affairs. If an application is made to have a company declared bankrupt, it is necessary to cease examination of any application to liquidate the company or to place it in receivership. The managing director or the liquidator (as the case may be) of a company may, subject to certain conditions, apply for the company to be declared bankrupt. The creditor of a company may apply to have the company declared bankrupt even if the creditor is a partner of a company.

Bankruptcy of a trader

In terms of the Commercial Code, any trader may be declared bankrupt if the person fails to pay commercial debts by their due dates on account of the disruption of the trader's financial position and the uncertainty of the trader's credit. Any trader who in payment of its debts uses unusual or unlawful means suggesting a poor financial situation is deemed equivalent to one who has ceased payment. A trader may be declared bankrupt upon the trader's own application, upon an application by one of its creditors, or upon a UAE court declaring a trader bankrupt at the request of the Public Prosecution Service or of its own accord. Every creditor with an immediate commercial or civil debt may also apply for a judgment to declare the trader bankrupt, provided that the creditor submits proof that the debtor has ceased payment of the commercial debt.

Bankruptcy proceedings and declaration of bankruptcy

The court within the jurisdiction over the place where the business of the debtor is located has jurisdiction to declare a bankruptcy. A judge is appointed as the bankruptcy judge. Under the Commercial Code, a declaration of bankruptcy may be made where

3 This framework does not apply to all free zones within the UAE. The Dubai International Financial Centre ((DIFC – a financial free zone) is one such instance that, for example, has developed its own insolvency law and insolvency regulations for DIFC entities. Insolvency matters pertaining to free zones (e.g., DIFC) are not covered in this chapter.

4 The criminal sanctions relating to bankrupts under UAE law are not elaborated upon in this chapter, the focus being on the restructuring and insolvency framework in the UAE.

5 The Commercial Companies Law provides for the following types of companies: limited liability companies, private shareholding companies, public shareholding companies, partnership companies, limited partnership companies, share partnership companies, joint venture companies and foreign companies.

the debtor has a branch, agency or office within the UAE, even if the debtor has not been declared bankrupt by a court of a foreign state.

If a bankruptcy judgment does not specify a date for the suspension of payments by the debtor, the date on which the judgment was pronounced is deemed the provisional date for the suspension of payments. The date for suspension of payments may not be referred back to more than two years from the date the bankruptcy judgment is pronounced.

If a partnership is declared bankrupt, all the general partners must be declared bankrupt, including general partners who have left the company after the suspension of payments, provided that no more than a year has elapsed since the date on which notice of their departure from the company was entered in the commercial register.

Once the bankruptcy judgment is pronounced, no set-off is permitted between what is owed to or by the bankrupt unless there is a connection between them.

If the debtor becomes capable of paying all debts before final execution of the bankruptcy judgment, the court must cancel the judgment and the debtor must pay the cost of the action.

Administration of bankrupt's estate

The court appoints a 'trustee in bankruptcy' to manage the bankrupt's estate. The Commercial Code provides a process for matters relating to the administration of the bankrupt's estate, which includes the continuance of the operation of the business of the bankrupt if the general interest of the bankrupt debtor and the creditors necessitates the same.

Effects on debtors

As soon as a bankruptcy judgment is pronounced the bankrupt is, with certain exceptions, prevented from administering and disposing of assets. Any disposals made on the day of the judgment are deemed to have been made after the bankruptcy judgment was pronounced. If a disposal is not concluded and enforceable by a third party until after registration or other formality, it is not binding on the group of creditors of the bankrupt unless the registration or other formality is completed prior to the pronouncement of the bankruptcy judgment. Once the bankruptcy judgment has been pronounced, the bankrupt may no longer pay its debts or collect sums due to it.

The prohibition on administration and disposal by the bankrupt covers all assets owned by the bankrupt at the date on which the bankruptcy judgment is pronounced and any assets that revert to the bankrupt's ownership while the bankrupt remains in a state of bankruptcy. The prohibition on administration and disposal does not, however, cover the following:

- a* assets that are not subject to legal distraint and any allowance granted to the bankrupt;
- b* assets owned by third parties other than the bankrupt;
- c* rights connected with the marital status of the bankrupt;
- d* compensation due to the beneficiary of a guarantee in a contract validly concluded by the bankrupt prior to the issue of the bankruptcy judgment; however, unless otherwise stipulated by law, the beneficiary is obliged to return to the bankrupt's

- estate any instalment payments made under such contract by the bankrupt from the date appointed by the court for the suspension of payments; and
- e* the prohibition on administration and disposal by the bankrupt does not include rights connected with the person of the bankrupt, with his or her position as head of a household or with any purely moral interest.

Equally, the prohibition does not cover profits that may accrue to the bankrupt from his or her activities or industry, to the extent that the judge considers appropriate in relation to the needs of the bankrupt and the support of him or herself and his or her family.

Following the pronouncement of the bankruptcy judgment, legal actions may not be brought or pursued by the bankrupt or brought or pursued against the bankrupt with the exception of the following:

- a* actions connected with assets, rights and disposals that are not covered by the prohibition preventing the bankrupt from administration or disposal;
- b* actions that the law permits the bankrupt to bring in connection with the bankruptcy proceedings;
- c* actions under criminal law; and
- d* actions preparatory to a judgment to close proceedings.

If, after the date of suspension of payments and prior to the bankruptcy judgment, the bankrupt takes any of the following actions, they are not binding on the group of creditors established (see below for details on the establishment of the group of creditors):

- a* the making of any donations, with the exception of small customary gifts;
- b* the payment of any term debt, by whatever means, prior to the due date;
- c* the payment of immediate debts, other than in the form agreed; and
- d* entering into any mortgage or other agreed charge secured on the debtor's assets to guarantee a prior debt.

Any disposals made by the bankrupt during the said period other than those referred to above may be adjudged unenforceable with regard to the group of creditors if such a disposal is harmful to them and if the party to whom the disposal was made was aware at the time that the bankrupt was insolvent. In any of the cases referred to above, the creditors may bring an action for restitution.

Further, mortgages or liens secured on the assets of the bankrupt may be adjudged unenforceable with regard to the group of creditors if they are registered after the date of suspension of payments. A creditor having a second mortgage following a mortgage being ruled unenforceable with regard to the group of creditors is, however, entitled to receive from the proceeds of the sale of the asset on which the mortgage or lien is secured only what the bankrupt would obtain on the assumption that the prior mortgage was enforceable, and the difference goes to the group of creditors.

If a disposal is ruled unenforceable with regard to the group of creditors, the party to whom the disposal was made must return to the bankrupt's estate whatever was obtained from the bankrupt by virtue of the disposal or the value of the thing at the time it was received. The party is also obliged to repay any yield received from the date of receipt and any consideration for its use. The party to whom the disposal was made is entitled to the return of the consideration provided to the bankrupt if such consideration

is itself present in the bankrupt's estate. If it is not present, the party concerned is entitled to seek the benefit obtained from the disposal from the group of creditors and to share in the bankrupt's estate as an ordinary creditor for any amount in excess thereof.

In the case of a company, if it appears that the company's assets are insufficient to meet at least 20 per cent of the company's debts, the court that pronounced the bankruptcy judgment may order the members of the board of directors or some or all of the managers, whether jointly or otherwise, to pay some or all of the company's debts in cases where they are proved liable in accordance with the Commercial Companies Law.

Effects on creditors

As soon as the bankruptcy judgment is pronounced, a group of creditors is established. The group of creditors consists of persons having valid claims on the bankrupt dating from before the bankruptcy judgment. The pronouncement of the bankruptcy judgment results in the suspension of individual proceedings and actions brought against the bankrupt by ordinary creditors or preferred creditors. When a bankruptcy judgment is pronounced, all monetary debts owed by the bankrupt become payable, whether ordinary or secured by a general or particular charge. However, any interest on ordinary loans due to the group of creditors ceases when the bankruptcy judgment is pronounced. Interest may not be claimed on loans secured by a mortgage or lien, except in respect of sums arising from the sale of the assets on which the loans are secured.

Effects on creditors with debts secured by a chattel mortgage or lien

The names of creditors of the bankrupt who have debts secured by a chattel mortgage or lien are entered in the group of creditors with reference to the mortgage or lien. At the proposal of the trustee in bankruptcy, the judge supervising the bankrupt's estate may, where necessary, order that the first funds entering the bankrupt's estate be used to pay the sums due to creditors with debts secured on the chattels of the bankrupt (provided that their names are included in the final list of uncontested debts). After obtaining permission from the judge supervising the bankrupt's estate, the trustee in bankruptcy may at any time pay debt secured by such a mortgage and return the object of the mortgage to the account of the group of creditors. If a mortgage chattel is sold at the request of the mortgagee (i.e., the mortgage creditor) and the price exceeds the debt, the trustee in bankruptcy must receive the surplus for the account of the group of creditors. If the price is less than the debt, the mortgage creditor shares in the bankrupt's estate for the remaining amount as an ordinary creditor, provided that the debt arose in accordance with the provisions of law.

Effects on secured creditors with a mortgage or lien on real property

If a dividend or distribution is paid for the proceeds of real property before the proceeds for chattels, or if the two are paid together, mortgage creditors or preferred creditors that have not been paid some or all of their debts out of the proceeds of the real property may share with the ordinary creditors for the outstanding amount in the dividend or distribution due to the group of creditors, provided that their debts have been verified.

If one or more dividends or distributions are paid in respect of the proceeds of chattels before a dividend or distribution in respect of the proceeds of real property,

mortgage creditors or preferred creditors may share in the dividends or distributions for all their debts, provided that the debts have been verified.

After the sale of real property and final settlement in accordance with the rank of the mortgage and preferred creditors, no one qualified by rank to receive the whole of the debt from the proceeds of the real estate is permitted to collect the debts until deduction of the amount received by such creditor from any dividends for chattels. This amount is returned to the group of ordinary creditors.

Should the rank of a creditor entitle such a creditor to receive only a part of the debt, the creditor must return to the group of ordinary creditors any amount received in excess of this amount if the dividend or distribution in respect of real property subject to mortgage or lien is paid prior to the dividend for chattels. Such a creditor may seek the remainder of the debt from the bankrupt's estate.

Mortgage creditors and preferred creditors who receive nothing from the proceeds of the properties on which they have a charge are deemed ordinary creditors and are subject to all the effects arising from the work of the group of creditors and, where applicable, a judicial arrangement.

Effects on concluded contracts

The pronouncement of a bankruptcy judgment does not generally result in the rescission of a contract to which a bankrupt is a party. If the trustee in bankruptcy does not perform the contract or will no longer continue to do so, however, the other party may seek rescission of the contract. In such a case, the contracting party is entitled to share in the bankrupt's estate as an ordinary creditor in respect of compensation arising from the rescission.

Preferential payments

In the course of bankruptcy proceedings, preference is given to the following:⁶

- a* wages and salaries due to workers and staff for the period of 30 days prior to the declaration of bankruptcy;
- b* amounts due to a trustee in bankruptcy where the trustee in bankruptcy pays a debt of the bankrupt from his or her own funds or, if the debt is paid by another person, the debt is paid from the first monies to enter the bankrupt's estate;
- c* payment of government taxes due from the bankrupt for the two years preceding the pronouncement of the bankruptcy judgment; and
- d* certain rents payments to the owner of premises leased to the bankrupt.

6 The Commercial Code does not set out an exact order of priority of payments as set forth above. However, UAE Federal Law No. 8 of 1980 on Regulating Labour Relations does refer to certain payment priorities, and Article 4 thereof states as follows: 'All amounts due to the employees according to the provisions of this law or due to his inheritors, shall have priority over the employer's property including moveables and estates. They shall be settled immediately after judicial expenditure and amounts due to treasury and alimony awarded to wife and children.'

Restitution

Any person is entitled to restitution from the bankrupt's estate in respect of specific items that the person can prove he or she owned at the time of the bankruptcy judgment.

Verification and schedule of debts

The Commercial Code sets out the procedure and timetable for the verification of debts of creditors by the trustee in bankruptcy and the establishment of a final schedule of uncontested debts by the judge supervising the bankrupt's estate.

In the case of companies, debentures issued by same in accordance with the Commercial Companies Law are not subject to the procedures for the verification of debts. Such debentures are to be accepted at their nominal value after deduction of any amounts paid by the company.

Judicial composition

Following the establishment of a final schedule of uncontested debts, the judge supervising the bankrupt's estate is required to invite creditors whose debts have been finally or provisionally accepted to attend deliberations on a composition. It is not permitted to contract a composition with a bankrupt who has been convicted of fraudulent bankruptcy. A composition can only take place with the agreement of the creditors and the fulfilment of the conditions prescribed by the Commercial Code. A composition may be concluded on condition of payment if the debtor becomes solvent within five years of the date that the composition takes effect. The composition may include granting to the debtor periods of grace for payment of debts and waiver towards a debtor of a part of the debt. The creditors may demand that one or more guarantors be offered to guarantee the implementation of the conditions of the composition. All the effects of bankruptcy are removed with the pronouncement of the court decision to ratify the composition; however, this does not affect any criminal prosecution.

In the case of a company, proposals for a composition or arrangement must be drawn with the approval of a majority of partners in general and limited partnerships, and with the approval of the extraordinary general meeting of shareholders in other types of companies. If an arrangement relates to a company that has issued debentures amounting to 20 per cent of its total debt, the arrangement shall not be allowed unless the conditions are approved by a general meeting of the debenture holders. In any event, approval is required if the arrangement contains conditions that are not in accordance with the conditions on the basis of which the debentures were issued.

If the bankruptcy proceedings of a company and the partners result in a composition or arrangement, each composition or arrangement is to be separate from each other and the conditions thereof only apply to the creditors of the particular arrangement.

Union of creditors

The creditors are deemed to be in a 'state of union' by law if a judicial composition is not concluded. After the state of the union has been established, the judge supervising the bankrupt's estate is required to invite each creditor to deliberate on the affairs of the bankrupt's estate. The appointed trustee referred to at this stage of the bankruptcy proceedings as the 'trustee of the union of the creditors' is permitted to sell moveable

property of the bankrupt. The sale of immoveable property of the bankrupt is carried out under the supervision of the bankruptcy judge and in accordance with the UAE Civil Procedure Code.⁷ The union trustee is not permitted to continue the business of the bankrupt until requisite approvals of the creditors and the bankruptcy judge are obtained.

If six months elapse from the date of establishment of the state of union without the liquidation having been completed, the trustee must submit a report to the judge supervising the bankrupt's estate on the state of the liquidation and the causes for the delay in completing it. Whenever the work of liquidation is complete, the union of trustees is required to submit a final account to the judge supervising the bankrupt's estate. The judge must invite the creditors to discuss the account and the bankrupt must also attend the meeting. The union is dissolved and the bankruptcy proceedings are deemed complete in law once the account has been approved.

Further, if the bankruptcy proceedings of a company end in union and an arrangement is reached with one or more of the general partners, the funds of the company may not be allocated to comply with the conditions of such an arrangement or to guarantee its execution. If an arrangement is reached with a company and bankruptcy proceedings of the partners end in union, the company remains in existence unless the basis for the arrangement was the surrender of the company's assets.

A company is not dissolved if the bankruptcy proceedings end in union. However, the court that pronounced the bankruptcy judgment may decide to dissolve the company if it is apparent that the assets remaining after the liquidation of the union are insufficient to carry on the business profitably.

It should be noted that after the state of union has ended, each creditor regains the right of enforcement against the debtor to obtain the remainder of his or her debt.

Closure of bankrupt's estate

If the bankruptcy proceedings are halted because of insufficiency of assets prior to ratification of a judicial composition or establishment of a state of union, the court may, at its own discretion or in accordance with a report from the judge supervising the bankrupt's estate, order that the bankrupt's estate be closed. In such instance, each creditor once again has the right to take steps and to initiate individual actions against the bankrupt.

iii The Commercial Companies Law

The Commercial Companies Law provides for the dissolution of a company in certain prescribed circumstances. This includes for instance where the losses to a company amount to half of its capital.

All debts of the company become due and owing upon the company's dissolution. If the company's assets are not sufficient to meet all of the debts, then the liquidator is required to make proportional payment of such debts, without prejudice to the rights of

7 Federal Law No. 11 of 1992.

preferred creditors. Every debt arising from acts of liquidation must be paid out of the company's assets in priority over other debts.

The liquidator is required to complete his or her task in the time period specified in his or her deed of appointment. The liquidator is required to present to the partners or the general assembly of a company a provisional account of the acts of liquidation every six months.

Upon termination of liquidation, the liquidator must present to the partners or the general assembly a final account of the acts of liquidation. Such acts end with the certification of the final accounts.

iv Composition to prevent bankruptcy – restructuring

Provisions for a composition to prevent the bankruptcy of a debtor are contained in the Commercial Code.

In terms of the Commercial Code, any trader whose financial affairs are so disturbed so as to lead to a suspension of payments may, within 20 days of such cessation, apply for a composition with his or her creditors. This option is available to a trader even if he or she has applied to be declared bankrupt. Generally, a composition with creditors may be granted to any company that meets the same conditions as those applicable to a trader. However, such a composition is not available to a company that is in liquidation.

An application for a composition with creditors can be accepted only from an applicant that has carried on business continuously for the year prior to the application and during this period has complied with applicable provisions pertaining to the Commercial Register and commercial books.

Accepting the application for a composition

If the court decides to accept the application for a composition, it orders the opening of proceedings. The court (which is required to be a court competent to declare bankruptcy) appoints one of its judges to supervise the composition, and one or more trustees for the composition. The debtor is required to deposit with the court cashier a determined sum as a bond to meet the expenses of the proceedings. The court must order the composition proceedings to be cancelled or stopped if the debtor fails to lodge the security within the appointed period. The proposed settlement cannot be less than 50 per cent of the debt and the period for payment must not be more than three years from the date of ratification of the arrangement.

Administration of assets

After the decision to open composition proceedings, the debtor continues to administer the assets under the supervision of the composition trustee and may carry out all ordinary transactions required for its business affairs. All actions and enforcement proceedings against the debtor cease. Actions brought by the debtor and enforcement proceedings that it has initiated remain in effect with the intervention of the trustee.

Deliberations on composition proposals

After the debts owing to creditors have been verified under the procedure provided for in the Commercial Code for this purpose, a period is designated for the creditors' meeting to deliberate on the composition proposals.

The composition may be concluded only with the approval of the requisite majority of the creditors and conditions provided for in the Commercial Code.

The composition agreement may include a condition that the debt be paid in full if the debtor becomes solvent within five years of the date of the composition occurring. The debtor is not deemed to have become solvent unless the value of its assets exceeds the debts incumbent on the debtor. The creditors may demand one or more guarantors to guarantee the fulfilment of the composition conditions.

Enforcement of composition

The composition becomes effective upon the issuing of a decision for its ratification. The Commercial Code sets out the procedure for ratification of the composition.

III RECENT LEGAL DEVELOPMENTS

The Dubai World debt crisis in 2009 led to the promulgation of Decree No. 57 for 2009 (Establishing a Tribunal to decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries) (the Dubai World Law). Dubai World is a holding company with a diverse portfolio of investments, and was established under Law No. 3 of 2006; it thereby enjoys a special legal status. The Dubai World Law provides for the formation of a tribunal that has jurisdiction to, *inter alia*, hear and decide any demand or claim against the corporation, including hearing and deciding any demand to dissolve or liquidate the corporation. The term 'corporation' is defined in the Dubai World Law as 'Dubai World and/or its Subsidiaries'. The Dubai World Law states that the tribunal will decide the demands and claims submitted to it by virtue of:

- a* DIFC Law No. 3 of 2009 Concerning the law of insolvency according to the amendments set out in the Schedule to the Dubai World Law;
- b* the Regulations Issued by the Board of Directors of the DIFCA⁸ Concerning DIFC Insolvency Regulation according to the amendments stated in the Schedule to the Dubai World Law;
- c* DIFC Law No. 10 of 2004 Concerning the Courts of DIFC, according to the amendments stated in the Schedule to the Dubai World Law;
- d* legislation in force in the Emirate of Dubai;
- e* commercial custom; and
- f* principles of justice, and rules of righteousness and equity.

Therefore, under the Dubai World Law any dissolution or liquidation matters relating to Dubai World or its subsidiaries will be dealt with in accordance with the Dubai World Law. At the time of the promulgation of the Dubai World Law, Nakheel (one of the

8 The Dubai International Financial Centre Authority.

largest property developers in the UAE) was a subsidiary of Dubai World and, therefore, enjoyed the protection of the Dubai World Law. With effect from 23 August 2011, however, Nakheel ceased to be a subsidiary of Dubai World. Claims against Nakheel are no longer referred to the tribunal. The provisions of the Commercial Code previously discussed will not have a bearing on insolvency matters pertaining to Dubai World.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

As mentioned above, there are limited means to gauge market trends with respect to restructuring procedures, as generally little information is published or released with respect to businesses facing financial difficulties. *Inter alia*, depressed global and local economic conditions continue to adversely affect the UAE construction and real estate markets. Liquidity-related issues locally and overseas (overseas investors being a major contributing factor to the growth in these business areas) have resulted in a low demand for real estate and a corresponding oversupply of real estate. While developers and sellers of real estate projects are said to be negotiating their respective positions and exposures, there is little that has taken place by way of the initiation of formal proceedings relating to restructurings or reported insolvencies of businesses operating in the property and real estate market.

V INTERNATIONAL

The UAE has not entered into any international treaties specifically covering insolvency or restructuring. Neither the Commercial Code nor the Commercial Companies Law envisage how judicial assistance would be provided in the UAE to proceedings commenced in another jurisdiction.

VI FUTURE DEVELOPMENTS

As mentioned above, the UAE is expected to promulgate a new insolvency law that will repeal the relevant provisions of the Commercial Code. The new law is expected to introduce financial reorganisation procedures and a protective composition process. The law is also expected to introduce a personal insolvency regime, including an insolvency procedure for non-traders.

Appendix 1

ABOUT THE AUTHORS

BASHIR AHMED

Afridi & Angell

Bashir Ahmed joined Afridi & Angell in 1988 and became a partner in 1993. He was seconded for 18 months to the regional office of an international bank as counsel for the Middle East and South Asia operations. He advises clients in cross-border, private equity, licensing and maritime issues. He has extensive experience advising international and domestic banks on a wide range of matters including loan and credit facilities, syndications and regulatory matters, and has also advised on a number of mining, refinery and infrastructure projects.

Mr Ahmed is a regular contributor to leading publications including the PLC *Cross-border Handbook: Dispute Resolution*, the *Doing Business in...* handbooks and *The Restructuring Review*.

Mr Ahmed is admitted to the New York State Bar Association and the Lahore High Court Bar Association.

JAMES BOWDEN

Afridi & Angell

James Bowden qualified in Ontario, Canada in 2005, and worked with Afridi & Angell in Dubai from 2006 to 2009, rejoining the firm in 2011. He has advised extensively on a broad range of corporate and commercial, M&A and restructuring matters in the UAE and Canada.

AFRIDI & ANGELL

Emirates Towers Offices – Level 35

Sheikh Zayed Road

Dubai

PO Box 9371

United Arab Emirates

Tel: +971 4 330 3900

Fax: +971 4 330 3800

general@afridi-angell.com

www.afridi-angell.com