SQUIRE PATTON BOGGS

Routes to Reorganisation

A Comparative Study of the Insolvency Procedures Available in the United Arab Emirates, Kingdom of Saudi Arabia, United States and England and Wales

This article was first published in the INSOL Restructuring Alert (November 2023) but has been updated to reflect changes introduced by the publication of Federal Decree-Law No. 51 of 2023 on Financial Restructuring and Bankruptcy (repealing Federal Decree-Law No. 9 of 2016 on Bankruptcy)

Introduction

Against the current economic and political landscape of the world today – rising interest rates, higher inflation and increased costs across supply chains, geopolitical uncertainties caused by conflicts in Europe and the Middle East and the ongoing trade tensions between global superpowers such as the US and China – companies operating in the global markets are under increasing financial pressure.

Gulf nations, such as the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (KSA), have raised their interest rates in line with the US in a bid to tackle raising inflation. This increased cost of capital, together with the suspension of the support schemes provided to companies in the aftermath of the outbreak of COVID-19, has resulted in an inevitable surge in insolvencies across the globe. In the 12 months leading up to 30 June 2023, insolvencies in England and Wales more than doubled against the same period in 2020, and while there is no formal and well-established insolvency register in the UAE and the KSA, a similar picture is perhaps emerging in the Middle East.

With an ever-increasing ability to undertake business across multiple jurisdictions, it is important that companies facing financial difficulties can deal with those challenges across all assets and with all creditors, wheresoever they might be situated.

This article considers the extent to which the UAE and KSA insolvency laws provide a framework for the recognition of cross-border insolvency and compares the available procedures against the more established insolvency regimes of the US and England and Wales.

Insolvency Laws of the UAE and the KSA

UAE

In response to the global financial crisis of 2007/2008, the effects of which accentuated the inadequacies of the UAE's insolvency regime, the UAE enacted Federal Decree Law No.9 of 2016 concerning Bankruptcy, as supplemented and amended from time to time (Current UAE Bankruptcy Law). The Current UAE Bankruptcy Law codifies provisions and principles that existed under several UAE laws, and introduces new mechanisms informed by the bankruptcy regimes of other jurisdictions, such as the US, England and Wales and France. The Current UAE Bankruptcy Law provides for three court supervised procedures for businesses in financial difficulty, being (i) the debtor led preventive composition procedure, (ii) a court supervised bankruptcy rescue and (iii) a court supervised liquidation. However, effective from 1 May 2024, the Current UAE Bankruptcy Law will be repealed and replaced by Federal Law Decree No. (51) of 2023 concerning Financial Restructuring and Bankruptcy (the New UAE Bankruptcy Law). Neither the Current UAE Bankruptcy Law nor the New UAE Bankruptcy Law (together, the UAE Bankruptcy Laws) apply in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Markets (ADGM), which have their own standalone insolvency laws and courts that are not covered by this article. References in this article to the UAE are to "onshore" UAE, and exclude the DIFC and the ADGM.

In so far as the onshore UAE regime is concerned, the New UAE Bankruptcy Law updates and builds upon the Current UAE Bankruptcy Law. As such, we are presently in a transition period between UAE Bankruptcy Laws. Market participants seeking to use certain restructuring tools will be unable to utilise them until the New UAE Bankruptcy Law comes into force (and must, therefore, look to the current regime until 1 May 2024).

KSA

In 2018, the KSA introduced insolvency reforms with the enactment of the Saudi Bankruptcy Law, which came after three years of rigorous reviews by KSA lawmakers and consultations with the World Bank and the United Nations Commission on International Trade (UNCITRAL), as well as a series of events with international bankruptcy experts organised by the KSA legislature and the US Department of Commerce. Prior to this, the KSA's insolvency legislation was underdeveloped, and the Saudi Bankruptcy Law is a significant step to the KSA achieving its Vision 2030. The stated objectives of the Saudi Bankruptcy Law include permitting the reoganisation and business continuity of debtors while ensuring the fair treatment of creditors. The Saudi Bankruptcy Law is heavily inspired by sophisticated regimes, such as those of the US and England and Wales, and governs three main procedures: (i) the debtor-led protective settlement procedure, (ii) the supervised financial restructuring procedure, and (iii) liquidation.

The UNCITRAL Model Law

In 1997, the UNCITRAL developed a Model Law on Cross-Border Insolvency (Model Law). The Model Law provides the framework for a more predictable and clear process in any cross-border insolvency situation. This, in turn, should encourage the flow of capital into a jurisdiction that has adopted the Model Law, incentivising cross-border investment. The Model Law encourages cooperation between the main insolvency proceeding and other locations to maximise the debtors' assets and preserve company operations, thereby protecting investments, jobs and a healthier continuing economy. It does not have binding status but rather provides a legislative framework that can be adopted, either wholesale or adapted as necessary, into national legislatures.

Ultimately, the Model Law seeks to establish a regime among adopting states where foreign representatives (typically insolvency officeholders authorised to administer the reorganisation of a debtor's assets) of a debtor under a collective insolvency proceeding may request the local courts (i.e. within the jurisdiction that has adopted the Model Law) for foreign proceedings to be recognised in that local jurisdiction.

The Model Law categorises foreign insolvency proceedings into two categories:

- **Foreign main proceedings** – When a foreign proceeding takes place in a state where the debtor has the centre of its main interests.
- **Foreign non-main proceedings** – When a foreign proceeding, other than a foreign main proceeding, takes place in a state where the debtor undertakes economic activity with human means and goods or services on a non-transitionary (i.e. regular) basis.

Upon recognition in the local courts, depending on how a foreign proceeding is categorised, the foreign representative can seek to benefit from various automatic and discretionary rights and powers that simplify the asset recovery process and the ability to pursue litigation in the local jurisdiction. The Model Law focuses on four elements identified as key in cross-border insolvencies:

- **Access** – These provisions seek to address issues regarding inbound and outbound access to judicial systems in a cross-border insolvency context. A foreign representative of a Model Law jurisdiction would be entitled to (i) rights of direct access to other adopting Model Law countries' courts, (ii) apply to commence local proceedings in those courts if the conditions to apply for proceedings were otherwise met, and (iii) apply for recognition of their foreign proceedings in adopting countries' courts.
- **Recognition** – The central functions of the Model Law aim to streamline the procedures related to the recognition of foreign proceedings, provide certainty with respect to the decisions to recognise those proceedings and minimise time-consuming legalisation and administrative procedures. Recognition is not automatic, as certain criteria will need to be met for it to be granted, and it may be refused by local courts if recognition would be manifestly contrary to public policy.
- **Relief** – The principal driver behind seeking recognition of foreign insolvency proceedings is to obtain the benefit of relief measures in the local jurisdiction. Following an application to the local courts (but prior to determination), the local courts can make interim orders such as suspending the rights of the debtor to transfer, encumber or otherwise dispose of any assets. On recognition of foreign main proceedings, the primary relief is an "automatic stay"; where non-main proceedings, the stay is not automatic, but discretionary to the relevant local court.
- **Cooperation** – The Model Law expressly empowers the courts and officeholders in the local jurisdiction to cooperate with foreign courts and foreign representatives of foreign insolvency proceedings. Cooperation is not dependent upon recognition and can occur at an early stage before an application for recognition is even made.

The Model Law in the KSA and the UAE

In December 2022, the KSA adopted the Model Law, making it an attractive jurisdiction for companies in the Middle East to undertake corporate restructuring or insolvency, particularly where there is any sort of cross-border reach. The implementation of the Saudi Bankruptcy Law, together with the adoption of the Model Law, has created a significant shift in the KSA's attractiveness for such companies.

The UAE, on the other hand, has not signed the Model Law and, therefore, does not have an established internationally recognised mechanism for dealing with cross-border insolvencies out of the UAE jurisdiction. This is an aspect of the UAE Bankruptcy Law that can yet be improved. While the current legislation has recently been updated, in our view, adoption of the Model Law would be a welcome tool in the updated regime.

Set out below is a comparative summary of the insolvency procedures available in the UAE, the KSA, England and Wales and the US, as well as the applicability of the Model Law to each jurisdiction. With respect to the UAE, the implementing regulations related to the New UAE Bankruptcy Law (which will cover matters such as the minimum debt threshold to initiate bankruptcy proceedings) are yet to be issued. The implementing regulations and decisions issued under the Current UAE Bankruptcy Law will continue to apply until replaced by equivalent regulations and decisions issued under the New UAE Bankruptcy Law. The focus of the UAE aspects of the summary below is on the position under the Current UAE Bankruptcy Law (which is in force at the time of publication). Where relevant, we have included limited commentary regarding the position under New UAE Bankruptcy Law. We may, in due course, publish more detailed analysis on the New UAE Bankruptcy Law.

<table>
<tr><th></th><th>UAE</th><th>KSA</th><th>England and Wales</th><th>US</th></tr>
<tr><td>Model Law adopted?</td><td>No.</td><td>Yes.</td><td>Yes.</td><td>Yes.</td></tr>
<tr><td>Enacting legislation</td><td>NA.</td><td>Rules of Cross-Border Bankruptcy Proceedings on 07 December 2022.</td><td>Cross-Border Insolvency Regulations 2006 (SI 2006/1030).</td><td>Chapter 15 of the US Bankruptcy Code.</td></tr>
<tr><td>Debtor in possession procedures</td><td>Preventative Composition

Only available to solvent debtors facing financial difficulties and where the debtor is not more than 30 days overdue on its debts.

Allows debtors to enter a compromise with their creditors and/or members pursuant to a preventative composition scheme, prepared by a court appointed trustee and the debtor.

Debtor may retain control of the business, but under the supervision of the composition trustee.

If an initial application is accepted by the court, an automatic moratorium applies to all unsecured creditor claims.

The draft preventative composition requires approval by the court (which must be satisfied that no creditor would be in a worse position than if the assets of the debtor were to be liquidated) and approval by a simple majority of creditors whose debts have been admitted and who hold a minimum of two-thirds in value of those debts.

Secured creditors can still enforce against their security (with the court's approval).</td><td>Protective Settlement Procedure

Allows debtors to continue operating their business while attempting to reach agreements with creditors to settle its debts.

Requires approval of the court, which must find that the debtor's business can continue, and its creditors can be repaid within a reasonable time period.

Moratorium of creditor claims available for a maximum of 180 days.

To come into effect, support of two-thirds of each class of creditor is required, which will bind all creditors. Such a vote is ratified by the court.</td><td>Company Voluntary Arrangement (CVA)

Allows debtors to reach a compromise agreement with unsecured creditors in relation to the payment of debts.

Debtors remain in control of the business, but under supervision.

No automatic moratorium, but creditors bound by the CVA may not take steps that breach the terms of the CVA.

To come into effect, 75% (in value) of creditors must vote in favour of the proposal, which will bind all affected creditors.

Restructuring Plan

Available to English companies or any company with "sufficient connection" if the company is encountering, or is likely to encounter, financial difficulties that are affecting, or may affect, its ability to carry on business as a going concern.

A plan to propose an arrangement or compromise with the debtor's creditors to deal with financial difficulties.</td><td>Chapter 11 Reorganisation or Orderly Liquidation of Business

Allows a debtor to (a) preserve its business as a going concern and judicially adjust or compromise its debts; and (b) implement an operational restructuring by rejecting unprofitable agreements or selling all or part of the business.

Can be voluntarily filed by the debtor, or involuntarily filed by its creditors (typically at least three creditors, which is open to challenge by the debtor).

A debtor, or a related debtor entity, must be domiciled or have its place of business or property in the US – this is a low threshold.

There is no requirement for a debtor to be insolvent or unable to pay its debts as they fall due.

Debtors will use Chapter 11 to reorganise or to implement an orderly liquidation of assets, which liquidation typically allows for greater creditor recovery than a Chapter 7 liquidation.</td></tr>
</table>

	UAE	KSA	England and Wales	US
	The composition must not initially exceed three years, but may subsequently be extended with the approval of a simple majority in number and two-thirds in value of creditors with outstanding debts. The court may permit the debtor to incur new financing with priority over its existing unsecured debts. This may be secured on the debtors unsecured and, in certain circumstances, secured assets. If a preventative composition scheme is not approved, rescinded or terminated by the court, the court may initiate insolvent liquidation proceedings. The New UAE Bankruptcy Law replaces the preventative composition scheme with a new procedure called a "Preventive Settlement". Under this new framework, debtors will have the autonomy to manage their business operations and assets while engaging in negotiations with creditors for settlement terms, crucially, without the need to appoint and be supervised by a trustee. A moratorium may also apply for a period of up to six months from the acceptance of the petition to commence proceedings.		To be approved, 75% (in value) of creditors in each class of creditors must vote in favour. The court may "cram down" a dissenting class of creditors if they would be no worse off than in the "relevant alternative" (typically administration or liquidation). Requires sanction and oversight by the court. **Scheme of Arrangement** Similar to a restructuring plan; however, there is no requirement for a company to be encountering financial difficulties. To be approved, 75% (in value) of creditors in each class of creditor must vote in favour. There is no "cram down" mechanism; dissenting classes cannot be bound.	A Chapter 11 case will typically follow one of three tracks toward a confirmed plan of reorganisation or plan of liquidation: • **Pre-packaged** – The debtor reaches an out-of-court agreement with its creditors and then initiates a bankruptcy proceeding to confirm the plan. • **Pre-arranged** – The debtor reaches an agreement with a relevant majority of creditors, and votes in support of such a plan are solicited after the case commences. • **Traditional (freefall)** – The debtor initiates a Chapter 11 proceeding and then proceeds to develop and solicit votes in favour of plan. Automatic stay (moratorium) protects the debtor and its assets from creditor intervention. Debtor remains in control and the business continues to operate but is subject to the supervision of the court. Official committee of unsecured creditors represents and safeguards the interests of unsecured creditors during the process. Debtor may raise post-petition financing and conduct sales of assets free and clear of claims and interest.

	UAE	KSA	England and Wales	US
Office holder procedures	**Bankruptcy Rescue** Similar to a preventative composition, except for certain differences, including the following: • May be commenced by one or more unsecured creditors (or secured creditors whose debt is not fully collateralised). • Those creditors must have debts exceeding AED100,000 (circa £22,000/US$27,000) which is more than 30 business days overdue. • May be commenced by the public prosecutor or regulator of a regulated corporate debtor. • Creditors may nominate the proposed trustee. • The debtor cannot continue to run its business, which will instead be managed by the trustee. • Must not exceed five years (which may be extended by three years in the same way as a preventative composition).	**Financial Restructuring** Enables the business to continue as a going concern under the supervision of a qualified trustee. The debtor applies to court and thereafter agrees with its creditors to restructure the business. More creditor friendly, as the application may also be made by government authorities and creditors. Here, a debtor may object if: • Requirements stipulated in the Saudi Bankruptcy Law have not been met. • Existing disputes relating to the concerned debt exist. • There is an abuse of process. The court must be satisfied that the debtor is likely to be able to continue its business following the implementation of the financial restructuring proposal. Automatic moratorium on claims until such time as the application is rejected or for a maximum of 360 days.	**Administration** Primary purpose is to rescue the business as a going concern under the control of a qualified insolvency practitioner. If the main aim cannot be achieved, then the purpose is to achieve a better result for creditors than if the company were wound up or, failing that, to realise the property to make distribution to one or more secured or preferential creditors. Typically commenced by the directors of the debtor, or secured creditors. While certain documents need filing with the court, this is typically an out-of-court process, although a court process may be commenced in certain circumstances. Automatic moratorium on creditor claims. Administration automatically ends after 12 months unless extended. Distributions are made to creditors in accordance with their priority ranking.	N/A.

	UAE	KSA	England and Wales	US
Terminal procedures	**Liquidation** May be initiated if: • The court terminates or rescinds a preventative composition scheme or bankruptcy rescue plan. • The debtor is the applicant in a preventative composition scheme or a bankruptcy rescue plan and has acted in bad faith or sought to evade its financial obligations. • A bankruptcy rescue plan is proposed and not approved. • The court terminates or rejects a bankruptcy rescue plan. • The debtor or relevant creditor (being a creditor owed a debt exceeding AED100,000 that is overdue by more than 30 business days) may request the court approve an insolvent liquidation. Aim is to maximise value for creditors received from the disposal of the debtor's assets. Debtor is prohibited from managing and operating the business; a trustee will be appointed to take control under the court's supervision. Distributions are made to creditors in accordance with their priority ranking.	**Liquidation** Aim is to maximise value for creditors received from the disposal of the debtor's assets. Debtor is prohibited from managing and operating the business; a bankruptcy trustee will be appointed to take control. May be commenced by a debtor, government authority or creditor applying to court for the debtor's liquidation. A debtor may object to a government authority or creditor application, seeking for it to be dismissed. Once submitted to the court, an automatic moratorium on creditor claims applies until such time as the application is rejected or the liquidation is complete. Distributions are made to creditors in accordance with their priority ranking.	**Liquidation** Two liquidation procedures: • Voluntary liquidation (both solvent and insolvent). • Compulsory liquidation. Aim is to maximise value for creditors received from the disposal of the debtor's assets. Debtor is prohibited from managing and operating the business; a liquidator will be appointed to take control. May be commenced by the directors or the creditors: • For compulsory liquidation, applying to court for a winding-up order. • For voluntary liquidation, by shareholder resolution. No automatic moratorium for a voluntary liquidation, but an automatic moratorium on proceedings for compulsory liquidation. Distributions are made to creditors in accordance with their priority ranking.	**Chapter 7 Business Liquidation** A Chapter 7 proceeding immediately ceases debtor operations and all assets and control of the business are turned over to a court-appointed trustee for liquidation. It is irrelevant whether a debtor is insolvent. The Chapter 7 trustee is responsible for collecting assets of the estate, liquidating those assets, and distributing the proceeds to creditors. Chapter 7 liquidation can be completed within a few months, although litigation and other complicating factors usually extend the completion of larger Chapter 7 proceedings. Chapter 7 may be initiated by a voluntary or involuntary petition and is supervised by the court.

Authors

Monika Lorenzo-Perez
Partner, London
T +44 20 7655 1609
E monika.lorenzo-perez@squirepb.com

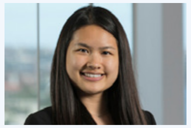
Rebecca Terrace
Senior Associate, London
T +44 20 7655 1256
E rebecca.terrace@squirepb.com

Nima Fath
Partner, Dubai
T +971 4 447 8762
E nima.fath@squirepb.com

Looaye Al-Akkas
Managing Partner
T +966 11 250 0888
E lalakkas@alakkaslaw.com

Murad Al-Toukhi
Partner
M +966 58 333 8544
E maltoukhi@alakkaslaw.com

Peter Morrison
Partner, Cleveland
T +1 216 479 8712
E peter.morrison@squirepb.com



Tara Peramatukorn
Associate, New York
T +1 212 872 9825
E tara.peramatukorn@squirepb.com