

Restructuring of Distressed Debtor: Concept and Personal Scope in the UAE and Egyptian Legislations

Prof. Amin Dawwas

Professor of Private Law
KILAW

Dr. Tareq Kameel

Associate Professor of Commercial
Law, Al-Ain University for Science
and Technology, UAE

Abstract

This paper discusses the issue of restructuring in terms of concept and personal scope in both United Arab Emirates and Egyptian legislations. The paper addresses the purpose of the restructuring, as well as the legal and juristic definitions of such concept. It also tackles the similarities and differences between restructuring and similar procedures (i.e. financial reorganization and preventive composition), the scope of application of restructuring in terms of the persons (natural and legal) to whom such procedures apply, as well as those who are entitled to file a restructuring petition. It concludes with some recommendations to reform the related UAE and Egyptian Laws.

Keywords: financial reorganization, preventive reconciliation, restructuring procedure, distressed debtor, personal scope.

1. Introduction

Bankruptcy is a legal institution applicable to traders (or merchants) that ceased to make payment of their due debts⁽¹⁾. UAE Federal Law on Commercial Transactions No.18/1993 (hereafter UAE-CTL) as well as the Egyptian Trade Law No. 17/1999 (hereafter ETL) regulated bankruptcy as a collection tool. As a creditor-friendly scheme, bankruptcy was deemed as an effective means to save confidence and credit as well as stability and integrity of business transactions. However, the systematic crises, like the 2008 global economic crisis led to substantial changes in this regard. The traditional strict legal rules of bankruptcy in many countries have to be reformed. Instead, new systems to rescue the trader have been introduced, such as restructuring.

In principle, bankruptcy aims at liquidating the debtor's assets for the benefit of creditors, while the rescue means aim to protect the viable debtor. Thus, bankruptcy is commensurate with troubled non-viable businesses that could not continue to exist. But it is not compatible with the potentially viable businesses that can be assisted to face difficulties. Bankruptcy in its traditional form does not take into account the possibility of overcoming such difficulties. Rescue means, in contrast, enable troubled debtor to survive what would otherwise be a bankruptcy situation.

Arabic legislations were influenced by those changes affecting bankruptcy system. The UAE adopted a new Bankruptcy Law, i.e. the Federal Law on Bankruptcy No. 9/2016 (hereafter UAE-Bankruptcy Law)⁽²⁾. Egypt adopted the Law on Restructuring, Preventive Composition and Bankruptcy No. 11/2018 (hereafter Egyptian Bankruptcy Law)⁽³⁾. Under both laws, the new concept

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- (1) In addition to the bankruptcy system applicable to traders, there is also a civil system (i.e. insolvency system) in both UAE and Egypt applicable to non-traders, i.e. individuals who fall outside of the scope of the definition of «trader». A non-trader debtor may not be declared bankrupt under UAE or Egyptian Bankruptcy Laws. Rather, it may be declared insolvent if its matured debts exceed its assets. Such non-trader debtor will be subject to certain administrative restrictions under Articles 401-413 UAE Federal Law No. 5/1985 on Civil Transactions and Articles 249-246 Egyptian Civil Law No. 131/1948. In contrast, a trader debtor may be declared bankrupt if it stops making payments, irrespective of whether or not its matured debts exceed its assets. Contrary to bankruptcy, insolvency judgment may not prohibit the non-trader debtor from managing its assets nor does it precludes creditors from individual procedures to enforce their rights. Cf. Latham & Watkins, «Restructuring and Insolvency in the United Arab Emirates», 2011, p. 1 online at: https://www.lw.com/upload/pubContent/_pdf/pub2881_1.pdf accessed 3 April 2019. H. Ragab, «Commercial Enforcement and Insolvency System – Egypt», The World Bank Global Judges Forum 19-23 May 2003 (California, 2003), p. 3 online at: <http://siteresources.worldbank.org/GILD/ConferenceMaterial/20156096/Egypt%20-%20CR2.pdf> accessed 1 April 2019. Taha, «Egypt's New Bankruptcy Law: A Step Forward in the Business Legislative Reform Process», *Emerging Markets Restructuring Journal* 7 (2018), p. 1.
- (2) It replaces and repeals the provisions of Chapter 5 UAE-CTL on Bankruptcy.
- (3) It replaces and repeals the provisions of Chapter 5 ETL on Bankruptcy.

of bankruptcy aims to protect not only the creditors' interests but also the national economy and the public interest. Indeed, when some establishments are declared bankrupt and thus liquidated, economic and social life would be negatively affected, e.g. creditors' rights would not be fulfilled; and layoffs result in unemployment.

Although UAE and Egyptian Bankruptcy Laws keep some rules of the old bankruptcy regime (like conservation measures, stay of individual claims, suspension of interests, suspect period and investigation of debts), they regulate several means to assist the distressed debtor to face difficulties. Restructuring (an informal out-of-court procedure), for instance, is often preferable to the formal procedure of bankruptcy and liquidation. It allows for protection and restructuring of troubled, but viable debtor. Once restructuring is successful, it 'will likely produce better results, preserve job opportunities, achieve social equality, and help stimulate economic growth'⁽⁴⁾. Thus, the new Bankruptcy Laws 'change the emphasis away from a creditor-friendly system towards a more debtor-friendly one'⁽⁵⁾, or 'towards a more business-friendly approach'⁽⁶⁾. Such laws aim, to the extent possible, to save the debtor's business and its running as a going concern.

Given the novelty of this new rescue means (restructuring) in the UAE and Egypt, this paper will define the concept of restructuring, state the reasons that justify the application of restructuring and distinguish it from other similar means. In addition, this paper will address the scope of restructuring in terms of persons. In other words, the paper will define whether the restructuring procedures apply exclusively to traders or also to other classes of troubled debtors.

This paper follows the descriptive, analytical and comparative approach. Legal provisions governing restructuring in the UAE and Egyptian legislations will be analyzed and compared. The paper will focus on the concept of restructuring and its scope of application in terms of persons only. Accordingly, part two discusses the concept of restructuring. Part three tackles the personal scope of restructuring. The paper ends up with a conclusion of the main research findings and recommendations.

(4) O. Helmy, 'The Efficiency of the Bankruptcy System in Egypt', The Egyptian Center for Economic Studies, Working Paper No. 100, March 2005, p. 15 online at: <http://www.eces.org/Publication.aspx?Id=79> accessed 5 April 2019.

(5) J. Farn, 'Brave New World: The New Federal Bankruptcy Regime in the UAE', *Insolvency & Restructuring Int'l* 11 (2017), p. 18.

(6) Taha, *supra* note 1 at 4.

2. Concept of Restructuring

UAE and Egyptian Bankruptcy Laws introduce new mechanisms, including restructuring to assist the debtor facing financial difficulties. The aim is to help the debtor to continue its business and avoid bankruptcy that ends with the liquidation of the debtor's assets⁽⁷⁾. In the following, the paper will define restructuring and will distinguish it from other close mechanisms.

2.1 Definition of Restructuring

This paper addresses how restructuring is defined by the laws at issue and how it is defined in legal doctrine.

2.1.1 Legal Definition of Restructuring

It should be noted that Article 1 UAE-Bankruptcy Law on definitions does not mention restructuring. Under the title 'Bankruptcy', Chapter Four of this law regulates bankruptcy and restructuring together. As for restructuring, Article 67 (the first in this chapter) states that: 'The procedures in this Chapter shall regulate: 1. The restructuring of the debtor, if possible, by assisting the debtor to implement a plan to restructure the debtor's business.'

This provision does not define restructuring, either. Instead, it states the purpose of this mechanism. Such mechanism can be used to assist the debtor to overcome financial difficulties, by implementing a plan for restructuring its activities⁽⁸⁾.

(7) This means that the debtor's assets must be sold and the proceeds distributed among creditors ... [where] secured creditors are paid first, followed by general creditors, and then shareholders if any residuals remain.' Helmy, *supra* note 4 at 3.

(8) The trustee appointed by the court shall, with the assistance of the debtor, prepare, develop and submit a draft restructuring plan to the court within three (3) months from the date of his appointment. The court may extend this term upon the request of the trustee one or more times, provided that the total extensions shall not exceed three (3) additional months (Article 99 UAE-Bankruptcy Law). The trustee shall deposit with the court a copy of the draft restructuring plan, accompanied by a summary thereof that shows the likelihood of such draft plan being accepted by the debtor's creditors and the feasibility of inviting the creditors for a meeting to consider the draft plan (Article 101(1) UAE-Bankruptcy Law). The draft restructuring plan shall include information about the extent to which the debtor's business is likely to become profitable again; the activities of the debtor which must be suspended or terminated; the terms and conditions of the settlement of any liabilities; any security or performance bond for proper execution of the plan that may be required to be submitted by the debtor, if any; any offer for the purchase of all or part of the debtor's business; grace periods and discounts on payment; the possibility of conversion of the debt into shares in the capital of any enterprise; the possibility of consolidation, construction, release, sale or replacement of any guarantees, if necessary, for implementation of the draft plan; and a proposal for the terms of payment of the entirety of the debtor's debts (Article 101(2) UAE-Bankruptcy Law). The court shall within five (5) business days from the date of submission of the draft plan to the court instruct the trustee to issue within five (5) business days, invitations to the creditors to attend a meeting to discuss and vote on the draft restructuring plan. The trustee shall provide the creditors whose debts are accepted

Nevertheless, restructuring is defined in the UAE Law No. 6/2007 on Establishment of the Insurance Authority and Organization of its Operations (hereafter UAE-3 Authority Law). Article 77(1)(b) thereof states:

The process of restructuring shall include for this purpose, managing the company and organizing the staggering financial affairs through negotiations with all its creditors in order to determine means to settle debts of the company by approving a restructuring plan.

This provision is more expressive about the concept of this mechanism. According to Article 77(1)(b) UAE-Insurance Authority Law, restructuring clearly includes reorganization of the company's administrative organs and financial situation, in order to assist the company to face difficulties by following a plan prepared for this purpose.

On the other hand, Egyptian Bankruptcy Law includes an express definition of restructuring. Article 2 thereof states that restructuring includes 'the procedures that assist the trader to overcome the financial and administrative distress phase.' The phrase 'financial and administrative distress' makes clear the difficulties that may cause the turmoil of the trader's business. Such difficulties may be financial or administrative in nature.

In contrast, Article 68(1) UAE-Bankruptcy Law speaks about the debtor's financial difficulties only as a ground for restructuring⁽⁹⁾. It says that:

The debtor shall apply to the court to commence the procedures pursuant to the provisions of this Chapter, if the debtor has ceased to make payment of the debtor's debts on their respective due dates for more than thirty (30) consecutive business days due to the debtor's distressed financial condition, or if the debtor is in a state of over-indebtedness.

with a copy of the draft restructuring plan (Article 103(2) UAE-Bankruptcy Law). The draft restructuring plan shall be approved by a majority vote of the creditors whose debts are finally accepted or provisionally accepted and permitted to vote, provided that such majority holds in the aggregate at least two thirds of the accepted value of the total ordinary debts (Article 107(1) UAE-Bankruptcy Law). Cf Articles 19-29 Egyptian Bankruptcy Law. For more details on restructuring procedures: H. Al-Msafri, 'The Means of Protection of Commercial Projects in the UAE's new Bankruptcy Law', *Journal of Kuwait International Law School* 6(2) (2018) (in Arabic), p. 707.

- (9) Article 18 Egyptian Bankruptcy Law states the purpose of restructuring. It says that: Restructuring aims to develop a plan to reorganize the financial and administrative work of the trader that includes how the trader overcomes the stage of the administrative and financial distress, payment of its debts and a statement of the proposed sources of funding, including revaluation of assets, restructuring of debts, including state debts, increasing capital, increasing internal cash flows, decreasing external cash flows and external restructuring.

Truly, this provision adds a new ‘balance sheet’ alternative test to bankruptcy, including restructuring (i.e. the debtor’s assets do not cover liabilities) and complements the already existing ‘cash-flow’ test (i.e. the debtor has stopped making payment of its due commercial debts). However, it does not state that administrative distress is also a relevant trigger for restructuring. The UAE legislator should reform this provision to include administrative turmoil as a ground for restructuring. Like financial distress, administrative distress could lead to a destabilization of the financial position of the debtor, particularly of companies.

In order to commence the restructuring proceedings, it would be necessary to know the reasons that led to the difficulties facing the debtor. Examples of such reasons would be the improper financial decisions by board members, non-compliance with the rules of governance, non-prediction of the company’s potential difficulties, and failure to take precautions to avoid these difficulties. Similarly, a board member or general manager may exploit his powers to make an illegal benefit for himself or others. There can be also fraud, forgery, dishonesty, incompetence or gross mismanagement that led to prejudice the rights of the company, its shareholders or others⁽¹⁰⁾.

In such cases, remedial measures should be taken to reorganize the administrative position of the company. Administrative restructuring, like removal and replacement of some or all of the company’s management would be the best means to ensure the survival of the company. This will help the company to keep exercising its activity and avoid liquidation of its assets.

The debtor may also face some financial problems, whether internal or external. He may suffer heavy losses that affect the creditors’ interests. He may also stop making payment of its debts. Thus, financial restructuring will help the debtor to overcome financial difficulties. Negotiations between the debtor and the creditors could be commenced to make a payment plan and avoid liquidation⁽¹¹⁾. Such mechanism often prompts a debtor to take responsibility

(10) A. Al-Khasawneh, ‘Protection of the Rights of Creditors and Debtors in the Financial Reorganization and Restructuring of Troubled Companies - A Study in 2016 UAE Bankruptcy Law, French Law and American law’, *Journal of Sharia and Law* 76 (2018) (in Arabic), p. 60. B. Malkawi, ‘Rescue of Troubled Establishments according to Draft Law of Financial Restructuring and Bankruptcy’, *Ajman Journal of Studies and Research* 14(1) (2014) (in Arabic), p. 2. M. Al-Kharabsha, *Legal Regulation of Public Shareholding Companies Restructuring - A Comparative Study* (Amman: Dar Al-Thaqafa Publishing, 2008) (in Arabic), p. 39.

(11) Al-Khasawneh, *supra* note 10 at 161. Al-Kharabsha, *supra* note 10 at 41. F. Al-Talafih, *Legal Regulation of the Restructuring of Public Shareholding Company*, Master Thesis, University of the Middle East, Amman, 2012 (in Arabic), p. 36.

for its case. Knowing that it will remain in charge of its business, the debtor will more likely apply for bankruptcy early, as soon as the need becomes apparent. This would eventually allow the debtor time to prepare a restructuring plan before financial distress becomes unmanageable⁽¹²⁾.

2.1.2 Doctrinal Definition of Restructuring

Scholars define restructuring in different ways. From purely legal point of view, some scholars define restructuring as:

The addressing by an administrative entity of the managerial, legal, financial, or economic troubled affairs of the company through procedural and substantive means to maintain the continuity of the company, overcome its distress and avoid liquidation, whether voluntary or mandatory⁽¹³⁾.

This definition limits restructuring procedure to companies only. This conflicts with the trend of legislators in many countries⁽¹⁴⁾, including UAE to extend the personal scope of restructuring. UAE-Bankruptcy Law does not limit the application of restructuring to commercial companies; rather, individual traders and civil companies conducting professional activities can also apply for a restructuring procedure (infra, 3.1).

Others define restructuring as:

a legal financial procedure taken by the public shareholding company through changing authorized capital as well as subscribed capital at the same time, by increasing or decreasing the authorized capital with the subscribed capital increase or reduce at one time, provided that the decrease procedure is taken first, then the increasing of subscribed or authorized capital, with the aim of assisting the company to overcome difficulties and to continue business activity⁽¹⁵⁾.

(12) Helmy, supra note 4 at 16.

(13) Al-Kharabsha, supra note 10 at 22.

(14) In France, for instance, Law No 85-98 of 25 January 1985 and Decree 85-1388 on December 17, 1985, aiming at the precaution and amicable settlement of distressed establishments, applies not only to establishments but also to persons engaged professionally in independent activities. Also, the Decree of 12 March 2014 expands the circle of persons covered by preventive measures. According to Article 2-611, such procedures apply to private legal persons and to individuals exercising agricultural activity or a profession governed by legislation or regulation. A. Al-Siba'i, Mediator in the Preventive Rules facing Muqawala and Rulers of Handling (Ribat: Nashr Al-Ma'rifah Publishing, 2000) (in Arabic), p. 28. Al-Khasawneh, supra note 10 at 167. S. Al-Qalyoubi, Rules of the Bankruptcy, (Cairo: Al-Nahda Al-Arabiya Publishing, 2008) (in Arabic), p. 18.

(15) Cited in: Al-Talafih, supra note 11 at 22.

This cannot be deemed as a definition of restructuring in the legal sense; rather, it is a description of a means of restructuring the public shareholding company facing financial difficulties, that is to say decrease or increase of company's capital. Indeed, there are other means that can be used to restructure the company, like merger, change of the legal form of the company, convert debt into shares in the company (debt capitalization), or find a new financing or get a strategic partner in the company⁽¹⁶⁾. Thus, any definition of restructuring should include all means which would help the troubled trader debtor, whether a company or not, to overcome financial difficulties.

Other scholars define restructuring from an administrative science perspective. One argues that restructuring is:

a review of all work processes in the organization and in all activities through study and analysis for an evaluation consistent with current circumstances and conditions, or facing the challenges and problems arising from local and global developments, that is to say rearranging powers, relationships, and current and future conditions that eventually lead to raise efficiency to realize the mission of the organization⁽¹⁷⁾.

Another says that restructuring is:

a scientific and analytical methodology to reach an efficient organization capable of delivering services effectively and to develop clear, simple and transparent organizational structures that make the functions and purposes of the organization fit with available specialties, considering the size of financial and human resources and the ability to perform tasks efficiently and effectively⁽¹⁸⁾.

These definitions clearly focus on the administrative side of restructuring only and do not consider the financial side of restructuring.

Obviously, all aforementioned definitions of restructuring confirm that it is a means designed to assist the troubled debtor to overcome the financial difficulties facing him to maintain the continuity of its business rather than liquidation of assets and close of business. Accordingly, restructuring may be defined under the laws at issue as:

(16) Al-Kharabsha, *supra* note 10 at 105-171. Al-Talafih, *supra* note 11 at 35-77.

(17) K. Al-Dweni, *Restructuring of the Arab Banking Sector* (Cairo: Dar Al-Arabi for Publishing and Distribution, 2017) (in Arabic), p. 32.

(18) A. Al-Ba'li, *Toward Distinguish through Restructuring of Islamic Financial Institutions* (Kuwait: Higher Advisory Committee in Diwan, ND) (in Arabic), p. 6.

a legal procedure by which an application to the competent court should be submitted to assist the distressed debtor to face financial and administrative difficulties, through a plan developed by an expert or more appointed by the court for this purpose and implemented by the debtor to continue its business activity.

Such a definition emphasizes that public interest, as well as creditors' interest, shall be taken into account. It admits that restructuring means may differ from one case to another, according to the developer of the restructuring plan. The developer may *inter alia* choose to reevaluate the (corporate) debtor's assets, restructure its debts, increase its capital, increase its cash flow, minimize its cash outflows, or apply managerial restructuring⁽¹⁹⁾.

2.2 Distinction between Restructuring and Similar Means

In addition to restructuring, UAE and Egyptian Bankruptcy Laws regulate other mechanisms that can be used to assist the debtor to face difficulties. On one hand, they keep the preventive composition regime known in the old laws. On the other, they introduce another new mechanism; namely, the settlement. In the following, similarities and differences between restructuring and other two means shall be identified⁽²⁰⁾.

2.2.1 Comparison between Restructuring and Settlement

Settlement is regulated by UAE-Bankruptcy Law to help the troubled debtor to avoid bankruptcy and liquidation. Under the title of Chapter Two 'Financial Reorganization', Articles 3 and 4 UAE-Bankruptcy Law regulate the out-of-court settlement. Financial reorganization refers to:

financial restructuring of a financially distressed firm. Claimants exchange their old claims against the firm for new ones, which because the firm has been unable to pay its debts, will necessarily be less than the face value of their old claims. ... Reorganization is functionally equivalent to a "going-concern" liquidation in which the existing claimants are the purchasers⁽²¹⁾.

According to Article 3(1) of this law, a permanent committee called the 'Financial Reorganization Committee' shall be formed by a Cabinet resolution.

(19) Taha, *supra* note 1 at 1.

(20) Given the different goals of restructuring and bankruptcy, no comparison is made in this paper between them. Restructuring measures are intended to assist the debtor to face difficulties; bankruptcy aims to liquidate the assets of the debtor and close its business.

(21) Helmy, *supra* note 4 at 1, fn 2.

Article 4(1) thereof states that such committee shall:

supervise the administration of the financial reorganization of financial establishments licensed by the competent supervisory authority, in order to facilitate amicable agreements between the debtor and its creditors with the assistance of one or more expert(s) appointed by the committee for this purpose in accordance with the procedures stipulated in the Resolution.

Indeed, the Cabinet Resolution No. 4/2018 on the Formation of Financial Reorganization Committee, dated 28 February 2018 (hereafter UAE Cabinet Resolution No. 4/2018), states the manner of the workings of this committee to exercise its powers⁽²²⁾. Under Article 4(1) UAE Bankruptcy Law, such committee shall supervise the consent agreement entered between the debtor and the creditors under which the latter agrees, for instance, to grant the former a partial payment in full satisfaction of the former's debts or extension or both.

In contrast, the Egyptian legislator does not regulate 'financial reorganization'. Instead, it states a court-supervised mediation system. According to Article 2 Egyptian Bankruptcy Law, a new 'administration' called 'the bankruptcy administration' is established and shall be present in every economic court⁽²³⁾. The bankruptcy administration functions as a mediator to make a friendly settlement on applications for restructuring, preventive composition and bankruptcy (Article 4(a) Egyptian Bankruptcy Law). Such administration works to narrow the differences between the parties in order to reach a binding settlement agreement (Article 9 Egyptian Bankruptcy Law). Such settlement shall be reached within thirty (30) days from the date of the submission of the application with the department head right to extend this period for thirty (30) days only (Article 5 Egyptian Bankruptcy Law). Once authorized by the competent judge, the settlement shall be binding and judicially enforceable (Article 9 Egyptian Bankruptcy Law). On the other hand, if no settlement

(22) According to this Cabinet resolution no. 4/2018, this Committee shall have the following functions:

1. Administering the administration of out of court rebuilding of money related establishments.
2. Approving and managing the role of experts and trustees who will oversee bankruptcy processes.
3. Maintaining the registers of disqualified directors and bankrupt companies inspected under the UAE-Bankruptcy Law.
4. Detailing back to the Minister of Finance on the work of the Committee.
5. Raising voice of open consciousness of the UAE-Bankruptcy Law.

<http://www.mondaq.com/x/700566/Insolvency+Bankruptcy/Federal+Cabinet+Resolution+No4+of+2018>

(23) According to Article 3 Egyptian Bankruptcy Law, the bankruptcy administration shall be headed by appeals court judge with sufficient membership of appeals court judges (bankruptcy judges).

between the parties is reached; the application will be referred to the competent court to commence the bankruptcy procedures (Article 10 Egyptian Bankruptcy Law).

Beside restructuring and preventive composition, the Egyptian legislator provides the troubled trader with another mechanism, i.e. the judicial settlement to avoid liquidation of its assets (Article 178 Egyptian Bankruptcy Law). While the preventive composition works only prior to the declaration by the court of the debtor's bankruptcy in order to avoid it, the judicial settlement works after the bankruptcy judgment and prior to liquidation⁽²⁴⁾.

UAE-Bankruptcy Law abolished this mechanism (the judicial settlement) stipulated by Articles 764-784 of the UAE-CTL. Indeed, 'financial reorganization' regulated by the UAE legislator is an out-of-court settlement. It aims at facilitating the formation of a friendly agreement between the financial institution facing financial difficulties with its creditors. An expert (or more) appointed by the 'Financial Reorganization Committee' shall assist in making such an agreement.

Notably, UAE-Bankruptcy Law limits the powers of the committee to supervise financial reorganization of financial institutions licensed by the competent supervisory authority (such as Securities and Commodities Authority, and Central Bank). This is contrary to its provision in Article 2, which extends the scope of this law in terms of persons involved (infra, 3.1). Accordingly, Chapter Two of UAE-Bankruptcy Law should be reformed to be in line with Article 2 thereof.⁽²⁵⁾ Financial reorganization should apply to all persons enumerated in Article 2 UAE-Bankruptcy Law, including not only commercial companies but also individual traders, sole establishments and civil companies conducting professional business. In this regard, Article 178 Egyptian Bankruptcy Law allows any interested person to request a judicial

(24) Ragab, supra note 1 at 13.

(25) It says:

The provisions of this Law shall apply to:

1. Companies governed by the Commercial Company Law,
2. Companies not established under the Commercial Company Law and which are wholly or partly owned by the federal or local government, and which have enabling legislation, or memoranda or articles of association stipulating that this Law applies.
3. Companies and Establishments in the Free Zones that are subject to the provisions of Federal Law No. (8) of 2004 on Financial Free Zones which are not governed by particular provisions regulating protective composition procedures, financial restructuring and/or bankruptcy.
4. Any individual who is a "trader" as defined under the Commercial Transactions Law.
5. Licensed Civil Companies carrying out professional activities.

settlement, i.e. the court-supervised mediation between the distressed trader and its creditors.

In all events, financial reorganization seeks to achieve the same objective of restructuring, i.e. to assist the debtor to face financial difficulties without closing its business. However, these mechanisms differ from each other. In addition to the personal scope of application, they also differ in other aspects. Firstly, restructuring must be applied for when the debtor has ceased to make payment of its debts in their respective due dates for more than thirty (30) consecutive business days due to the debtor's distressed financial condition, or when the debtor is in a state of over-indebtedness (Article 68(1) UAE-Bankruptcy Law). In contrast, financial reorganization applies to a debtor that is not yet at the stage of cessation to make payment of its debts or in a state of over-indebtedness. Financial reorganization aims to face the current or expected financial difficulties of the debtor (Article 6(2)(1) UAE Cabinet Resolution no. 4/2018); that is to say to avoid the debtor cease payment of its due debts or being in a state of over-indebtedness.

Under Egyptian law, the court-supervised mediation mechanism aims to try to reach an amicable agreement between the parties when submitting the restructuring application for the 'bankruptcy administration' in the economic court as a result of the debtor's financial and administrative difficulties (Articles 4 & 5 Egyptian Bankruptcy Law). Indeed, in order to apply for the judicial settlement, the debtor shall not cease to pay its due debts.

Secondly, restructuring is made by an order of the competent court and under its supervision. The restructuring plan approved by the creditors⁽²⁶⁾ shall be formally ratified by the court (Article 108 Emirati UAE-Bankruptcy Law). In contrast, the financial reorganization is an out-of-court mechanism. It aims to reach an amicable agreement between the debtor and its creditors under the supervision of the 'Financial Reorganization Committee'. This encourages troubled financial institutions to apply for financial reorganization. Disputes between the parties will be settled through mediation; no need for legal proceedings that might negatively impact on the reputation of financial institutions.

(26) Under Article 107(1) UAE-Bankruptcy Law, (The draft restructuring plan shall be approved by a majority vote of the creditors whose debts are finally accepted or provisionally accepted and permitted to vote, provided that such majority holds in the aggregate at least two thirds of the accepted value of the total ordinary debts.)

2.2.2 Comparison between Restructuring and Preventive Composition

The distress of trader's business may be due to unexpected and unavoidable cause. Therefore, the legislator makes provisions to protect such trader by enabling that trader reach a compromise with its creditors without having to proceed to liquidation proceedings. The so-called 'preventive composition' aims to assist the troubled debtor to reach a settlement with its creditors, by means of a protective composition plan pursuant to which the debtor will pay all or part of its outstanding debts, under the supervision of the court and with the assistance of a composition trustee.

This mechanism is governed by Articles 5-66 UAE-Bankruptcy Law⁽²⁷⁾ and Articles 30-74 Egyptian Bankruptcy Law⁽²⁸⁾. How is the preventive composition different from restructuring?

According to Articles 6 UAE-Bankruptcy Law, only the (troubled) debtor has the right to request the court to commence the protective composition procedure. As for restructuring, in contrast, the debtor⁽²⁹⁾, the creditors⁽³⁰⁾ and the competent supervisory authority⁽³¹⁾ may file the application.

Under Articles 15 Egyptian Bankruptcy Law, the right to apply for restructuring is given to the troubled debtor only provided that,

- a. he carried on business continuously for at least two years prior to the filing of the application;
- b. respected the traders' commitments, such as entry in the commercial register and bookkeeping;
- c. did not commit fraud or gross misconduct; and
- d. has a minimum capital of one million pounds.

Except for the latter requirement (i.e. a capital of at least one million pounds), Articles 30 & 31 Egyptian Bankruptcy Law state the same requirements for filing an application of preventive composition. Besides, in case of corporate debtor, it must not be in liquidation. The Company's general assembly or the majority of partners in partnerships, as the case may be, must approve the application of preventive composition.

(27) These new provisions replace the old provisions of Articles 831-877 UAE-CTL.

(28) These new provisions replace the old provisions of Articles 725-767 ETL.

(29) Article 68(1) UAE-Bankruptcy Law.

(30) Article 69(1) UAE-Bankruptcy Law.

(31) Article 71 UAE-Bankruptcy Law.

Also, in order to apply for the preventive composition, Article 6(2) UAE-Bankruptcy Law stipulates that the debtor shall not be over-indebted or in default for more than (30) thirty consecutive business days. Otherwise, the court shall not accept the application of protective composition. In Egypt, if the debtor has already stopped making payment of its debts, the application of preventive composition must be filed within fifteen (15) days from the date of the cessation of payment (Article 30 Egyptian Bankruptcy Law).

Under Emirati law, the commencement of restructuring procedures results in restriction of the debtor's management and the disposition of rights to its assets (Article 157 UAE-Bankruptcy Law). For instance, the debtor cannot dispose any property, stocks or shares, borrow funds, or (if a company) change ownership or corporate legal form whilst it is undergoing restructuring⁽³²⁾. Such restriction applies to the debtor's assets as of the date of the decision to commence the procedures and the assets which devolve to him thereafter (Article 158(1) UAE-Bankruptcy Law). Article 158 UAE-Bankruptcy Law stipulates some exceptions⁽³³⁾.

In contrast, the Egyptian legislator in principle permits the trader to continue managing its assets during the period of implementation of the restructuring plan. However, he shall be responsible for any act done contrary to the restructuring plan (Article 24 Egyptian Bankruptcy Law). The debtor will be prohibited from making any transaction or taking any action that harms the creditors' interests or infringe the restructuring plan, like selling its assets, giving loans or imposing a pledge or any encumbrance over its assets (Article 25 Egyptian Bankruptcy Law).

As for preventive composition, the UAE and Egyptian legislators allow the debtor to manage its assets under the supervision of the court-appointed bankruptcy trustee (Article 26 UAE-Bankruptcy Law; Article 46(1) Egyptian Bankruptcy Law). Thus, the debtor should assume the identity of a 'debtor-in

(32) Article 31(1) UAE-Bankruptcy Law.

(33) It says that:

2. As an exception to the provisions of Paragraph 1 of this Article, the restriction of management and disposition shall not include the following:
 - The assets which may not be the subject of attachment by operation of law and the assets required to support the debtor and the debtor's dependents.
 - The assets owned by persons other than the debtor.
 - The rights relating to the debtor's personal affairs.
3. The restriction of management and disposition referred to in Paragraph 1 of this Article shall not include the rights relating to the debtor personally or to the debtor in the capacity as a sponsor of a family or the rights that relate to pure non-monetary interest.

possession⁽³⁴⁾. This term refers to a debtor that keeps possession and control of its assets while undergoing the preventive composition procedure⁽³⁵⁾. The debtor may therefore use, sell, or lease property of the estate in the ordinary course of its business, without prior approval⁽³⁶⁾.

However, the bankruptcy trustee may submit to the court an urgent request to stop any act of the debtor that would harm the preventive composition plan⁽³⁷⁾. With the permission of court or upon the debtor's consent, the trustee may also conduct a business or do an act on behalf of the debtor to realize the goal of preventive composition⁽³⁸⁾.

Under Article 41 UAE Bankruptcy Law, the preventive composition plan must be implemented within a period of up to three years of court approval, with the possibility to extend it for an additional three years if two third majority of the unpaid creditors consent to the extension. The restructuring plan can run for a longer period of five to eight years: Under Article 102 UAE Bankruptcy Law, the maximum period of the plan is five years⁽³⁹⁾; however, this can be extended for additional three years if two third majority of the unpaid creditors consent to such extension.

(34) Helmy, supra note 4 at 15. Farn, supra note 5 at 19.

(35) Helmy, supra note 4 at 15.

(36) Ibid. Latham & Watkins, supra note 1 at 2.

(37) Article 27 UAE-Bankruptcy Law says that:

1. The court may order the suspension of any part of the debtor's business, upon an urgent application by the trustee.
2. The court shall finally determine the suspension order, based on the trustee's report, after a period not exceeding the term approved by the court for the draft protective composition plan, in accordance with the provisions of Section Ten of this Chapter.

(38) Article 26(3) UAE-Bankruptcy Law says that:

Upon the debtor's consent or with the court's approval, the trustee may take the following actions on behalf of the debtor, as long as such actions serve the purpose of the protective composition procedure:

- a. Take possession of any of the debtor's assets.
- b. Request verification and proof of the debtor's title to any assets.
- c. Carry out an evaluation of the debtor's assets and submit a report to the court on the same.
- d. Collect any funds or entitlements on behalf of the debtor.
- e. Enter into or maintain any insurance policies necessary to carry on the debtor's business.
- f. Pay any amounts or settle any claims to implement the protective composition plan.
- g. Rent out any properties of the debtor or terminate any of its lease agreements, and to lease any property as necessary.
- h. Enter into any arrangement, settlement or compromise on behalf of the debtor with one or more of its creditors.
- i. Procure any security the debtor may have neglected to secure or renew.
- j. Take any other actions to achieve the objectives of the protective composition procedure, as may be approved by the court.

(39) Under Article 20 Egyptian Bankruptcy Law, too, the restructuring plan shall be for a maximum period of five years.

Therefore, it can be concluded that restructuring is per se a legal mechanism. It stands next to financial reorganization and preventive composition as preventive and curative means that assist the distressed debtor to avoid bankruptcy and liquidation.

3. Personal Scope of Restructuring

UAE and Egyptian Bankruptcy Laws identify the persons involved in the restructuring procedures. This section will examine the entities that can enter into restructuring proceedings and the persons authorized to file a restructuring application.

3.1 Entities Subject to Restructuring

The scope of UAE-Bankruptcy Law is stipulated in Article 2 of this law. This Article defines the persons to whom the provisions of this law apply, including the provisions on restructuring. It states:

The provisions of this Law shall apply to:

1. Companies governed by the Commercial Company Law.
2. Companies not established under the Commercial Company Law and which are wholly or partly owned by the federal or local government, and which have enabling legislation, or memoranda or articles of association stipulating that this Law applies.
3. Companies and Establishments in the Free Zones that are subject to the provisions of Federal Law No. (8) of 2004 on Financial Free Zones which are not governed by particular provisions regulating protective composition procedures, financial restructuring and/or bankruptcy.
4. Any individual who is a “trader” as defined under the Commercial Transactions Law.
5. Licensed Civil Companies carrying out professional activities.

In this regard, Article 1 Egyptian Bankruptcy Law says:

The provisions of the attached law concerning restructuring, bankruptcy and preventive composition shall be applied. Its rules apply to the trader in accordance with the definition stipulated by Article 10 of Trade Law No. 17 of 1999, except for undisclosed partnership, public sector companies and public business sector companies.

Obviously, the scope of the UAE Bankruptcy Law is broader than the Egyptian one. Article 2 UAE Bankruptcy Law exclusively defines the entities that can enter into restructuring proceedings. It covers three categories of private sector companies, one category of public sector companies and one category of individuals, i.e. the natural-persons traders.

The Egyptian legislator subjects only traders to restructuring. This is one of the effects of the traditional bankruptcy system under which only traders, natural or legal (i.e. companies), subject to bankruptcy. Article 1 Egyptian Bankruptcy Law makes an exception for certain companies, i.e. undisclosed partnership (almahash) that does not have corporate personality⁽⁴⁰⁾, as well as the state-owned companies that shall be subject to the Public Companies Law No. 203/1991.

Accordingly, the entities that are subject to restructuring can be categorized as follows:

1- Companies Governed by Commercial Company Law: According to the UAE-CTL, a company shall be a commercial one when it aims to undertake a commercial activity (objective criterion), or when it takes one of the forms stipulated by this law (formal criterion)⁽⁴¹⁾. If the company has a commercial form in accordance with UAE Commercial Company Law No. 2/2015 (hereafter UAE Commercial Company Law), it does not matter whether it undertakes a commercial or civil activity (Article 11(2) UAE-CTL).

However, UAE Commercial Company Law adopts the formal criterion only. Article 9(1) thereof says that:

The company shall take one of the following forms:

- a- Joint Liability Company.
- b- Simple Commandite Company.
- c- Limited Liability Company.
- d- Public Joint Stock Company.
- e- Private Joint Stock Company⁽⁴²⁾.

(40) This partnership exists between the partners only. The partner acts with others in his / her own name; others are not aware of the existence of such a partnership. Notably, the UAE Commercial Company Law does not regulate this partnership.

(41) Latham & Watkins, supra note 1 at 1.

(42) As for the one-person company that takes the form of a limited liability company, or a private joint stock company, it shall be deemed as a commercial one. Similarly, foreign companies that carry on their activities or have their principal management in UAE are subject to the provisions of UAE Commercial

Under this formal criterion, a company may not take a different form⁽⁴³⁾. This legislative approach should be appraised as it adopts one criterion to consider the company as commercial company, i.e. the formal criterion.

In order to apply for restructuring, the company shall have a corporate personality. Under Article 21(1) UAE Commercial Company Law, ‘the company shall, from the date of entry in the commercial register with the competent authority, acquire a corporate personality’.

During the period of liquidation, the company shall maintain its corporate personality to the extent required for the liquidation process; the words ‘under liquidation’ shall be added to its name (Article 21(3) UAE Commercial Company Law). Chapter Four of UAE-Bankruptcy Law regulates restructuring and bankruptcy jointly. According to Article 75 of this law, if the debtor is a company, the application may be submitted even if the company is in liquidation. Under Article 67 thereof, such application could be for restructuring or adjudication of bankruptcy. So, can the company under liquidation really apply for restructuring?

Liquidation aims to settle the company’s debts during the company’s life⁽⁴⁴⁾. Assets and liabilities of the company shall be inventoried by the liquidator; debts of the company shall be collected from third parties; the debts payable by the company, which become immediately outstanding upon its dissolution, shall be repaid; the assets of the company resulting from liquidation shall be divided among all the partners upon payment of the debts (Articles 312, 314, 317 & 325 UAE Commercial Company Law). The company’s corporate personality ends upon the completion of the liquidation procedures and removal of the company from commercial register.

Restructuring, in contrast, aims to preserve the company’s continuity and assist the company to face difficulties. Therefore, the company under liquidation,

Company Law except the provisions on incorporation. Thus, if such company has a branch, local agent or any other establishment in the UAE (or Egypt), it may be declared bankrupt regardless of whether or not it is also declared bankrupt abroad. Latham & Watkins, *supra* note 1 at 2. M. Abo Sadah, *The UAE Commercial Company Law in accordance with the Provisions of the Federal Law No. 2/2015 on Commercial Company (UAE: Brighter Horizon Printing Press, 2017) (in Arabic)*, p. 58. S. Ghannam, & A. Al-Tayer, *Explanation of the Provisions of Bankruptcy According to Law by Decree 9/2016, (Sharjah: University Library, 2016) (in Arabic)*, p. 33.

(43) Abo Sadah, *supra* note 42 at 62.

(44) Helmy, *supra* note 4 at 1, fn 3: ‘Liquidation refers simply to the conversion into cash, through sale, of a firm’s assets. The sale of assets can be either on a “going concern” basis, which involves a sale of the entire business including goodwill and other intangibles, or on a “break-up” basis, whereby the assets are sold piecemeal.’

i.e. on the way to exit the market should not apply for restructuring. In order to make things clearer, the UAE legislator is advised to regulate restructuring and bankruptcy separately. The Egyptian law may be a good model to follow in this regard. In addition to the separate regulation of restructuring and bankruptcy, Article 15 Egyptian Bankruptcy Law expressly states that the company under liquidation may not apply for restructuring.

A holding company⁽⁴⁵⁾ and subsidiaries ⁽⁴⁶⁾ shall be subject to restructuring procedures. Nevertheless, restructuring of one subsidiary does not necessarily result in the restructuring of the holding company or other subsidiaries because each has its own independent corporate personality and financial liability. However, the share of the holding company in the subsidiary is part of the latter's assets that subject to restructuring ⁽⁴⁷⁾.

Restructuring also applies to company's branches and agencies. Those branches and agencies do not have independent corporate personality and financial liability. Rather, the assets of those branches and agencies are part of the company's assets⁽⁴⁸⁾.

2- Companies Wholly or Partly Owned by the Federal or Local Government:

In order to subject to restructuring under UAE-Bankruptcy Law, such companies shall meet two conditions:

- a. They shall not have been established under UAE Commercial Company Law.
- b. The enabling legislation, memoranda or articles of association of such companies stipulate that UAE-Bankruptcy Law applies to them.

Thus, public sector companies should amend their enabling legislation,

(45) According to Article 266(1) UAE Commercial Company Law,

A holding company is a joint stock company or a limited liability company that establishes subsidiaries inside the state or abroad or has control on existing companies, by holding shares or stocks enabling such company to control the management of the subsidiary and to have influence on the decisions of the subsidiary.

For more details on holding company: M. Al-Ebedi, *The Responsibility of Holding Companies for the Subsidiary - A Comparative Study (Egypt – UAE)*: Dar Al-Kutob Al-Qanouniyya and Shatat for Publishing, 2016) (in Arabic), p. 25. A. Ahmad, *Companies (Mansoura)*: Dar Al-Fikr Al-Qanini, 2011) (in Arabic), p. 35.

(46) According to Article 269(1) UAE Commercial Company Law,

A company shall be considered as a subsidiary of a holding company in any of the following events:
a. If the holding company holds dominating and controlling shares in the capital of the company and controls the formation of its board of directors; or b. If the company is a subsidiary of a subsidiary.

(47) Al-Ebedi, supra note 45 at 278.

(48) Al-Siba'i, supra note 14 at 155. Ahmad, supra note 45 at 33.

memoranda or articles of association so as to make them subject to UAE-Bankruptcy Law. Until then, they are exempted from UAE Bankruptcy Law.

3- Companies and Establishments in the Free Zones: There are a number of designated 'free zones' within the UAE. Article 10 UAE Commercial Company Law regulates rate on national contribution⁽⁴⁹⁾. However, a company operating in a free zone can be wholly owned by foreigners regardless of the sector in which it invests. UAE-Bankruptcy Law applies to companies established in free zones that lack specific bankruptcy regimes.

In the UAE, the financial free zones are governed by specific bankruptcy laws and regulations⁽⁵⁰⁾. For instance, companies operating in the Dubai International Financial Center (DIFC) are subject to the DIFC Insolvency Law No. 3/2009⁽⁵¹⁾. Likewise, companies operating in the Abu Dhabi Global Market (ADGM) are subject to the ADGM's Bankruptcy and Insolvency Laws and Regulations⁽⁵²⁾. Accordingly, such companies shall not be subject to restructuring procedures under UAE-Bankruptcy Law.

4- Licensed Civil Companies Carrying out Professional Activities: The old UAE Bankruptcy Law excluded this category. The rules of that law applied to traders only; civil companies were deemed as falling outside the scope of application of that law.

Civil companies licensed to conduct professional activities are now subject to restructuring. UAE-Bankruptcy Law is now in line with the new trend already adopted by some comparative legislation⁽⁵³⁾. This view should be appraised as such civil companies, like commercial companies deserve the application of rescue mechanisms due to their important role in relevant professional sectors. Once they face some financial difficulties, it is worthy to assist them to continue carrying out their activities, if possible.

A civil company conducting a professional activity is defined as 'an entity

(49) It says: <With the exception of Joint Liability Companies and Simple Commandite Companies where all the joint partners of any of such companies shall be UAE nationals, any company established in the state shall have one or more UAE partners holding at least 51% of the share capital of the company.>

(50) Under Article 1 UAE Federal Law No. 8/2004 on Financial Free Zones, a financial free zone is defined as <the free zone established in any of the Emirates of the state in which financial activities are carried out.>

(51) For more details on restructuring under this law: Edwards, Bryant B. & Ross, Timothy N. & Adams, Christian, *Restructuring and Insolvency in the Dubai International Financial Center*, 6 *Pratt's J. Bankr. L.* 195, 2010, available at: HeinOnline.

(52) http://adgm.complinet.com/en/display/display_main.html?rbid=4503&element_id=5681

(53) For instance, French law, *supra* note 14.

established by agreement between two or more natural persons exercising a liberal profession⁽⁵⁴⁾. It is also defined as ‘a civil company by which two or more persons of one profession agree to work together in the performance of their service to customers and sharing profit resulting from this activity’⁽⁵⁵⁾. For example, two or more lawyers, doctors or engineers can establish a civil company to provide their services together. Thus, such a company may only be established by natural persons of the same profession⁽⁵⁶⁾.

It goes without saying that natural persons carrying out professional activities by their own may not be subject to restructuring. Such persons are advised to establish a civil company to practice their common profession. A person alone is unable sometimes to provide the service needed by the customers. Working with colleagues will help professionals to override those practical difficulties⁽⁵⁷⁾.

5- Individual Trader: Like the old law, UAE-Bankruptcy Law subjects the individual trader to restructuring procedures. In accordance with Article 11(1) UAE-CTL, ‘every person who works in his own name and for his own account in commercial activities and has the proper qualification when taking on such activities as his occupation’ shall be deemed as a trader. Accordingly, traders who are engaged in business as sole proprietorships are covered by the rules of UAE-Bankruptcy Law, including restructuring procedures.

A natural person may also acquire the capacity of a trader even if its occupation is not to practice business. For example, the joint partner in joint liability companies and simple commandite companies has the capacity of a trader by the operation of law (Article 62 UAE Commercial Company Law)⁽⁵⁸⁾. So, can the restructuring procedures apply to joint liability companies or simple commandite companies be extended to apply to joint partners, too?

The answer should be in the affirmative. Joint partners have the capacity of a

(54) J. Abd-ALRashid, *The Legal System of Professional Civil Companies - A Comparative Study* (Amman, Dar Al-Thaqafa Publishing, 2015) (in Arabic), p. 109.

(55) Ghannam & Al-Tayer, *supra* note 42 at 67.

(56) Needless to say, other basic requirements for the establishment of a company shall also be satisfied. For more details on such requirements: E. Nasif, *Treatise in Trade Law - Commercial Companies* (Beirut: Mediterranean Publications and Uwaydat Publications, 1982) (in Arabic), p. 57. F. Sami, *Commercial Companies in the UAE Law* (Sharjah: University Library, 2010) (in Arabic), p. 43. S. Hasan, *Commercial Companies in the UAE* (Sharjah: University Library, 2015) (in Arabic), p. 61.

(57) Ghannam & Al-Tayer, *supra* note 42 at 32.

(58) This is due to the fact that joint partners are liable, severally and jointly, for the obligations of the company. This is contrary to shareholders in public and joint stock companies who are not liable for the obligations of the company other than to the extent of their respective shares in the capital.

trader. Such partners are also liable, separately and jointly, for the obligations of the company. Both partnership's assets and joint partner's properties shall be the public security for the partnership's creditors⁽⁵⁹⁾. Thus, cessation to make payment by the partnership necessarily means that the joint partners stop to do so, as well. Accordingly, restructuring procedures may apply to any joint partner of the partnership under restructuring⁽⁶⁰⁾.

Nevertheless, if the joint partner acquired the capacity of a trader before establishing the joint liability company or the simple commandite company, and if he ceases to make payment of its debts arising from its own business, the application of restructuring procedures to the joint partner shall not result in the application thereof to the partnership. That the partnership and its joint partners are liable, separately and jointly, for the obligations of the partnership is in the interest of the partnership's creditors, not the partner's creditors.

In Egypt, Article 15 Bankruptcy Law stipulates that, in order the trader benefits from restructuring, he shall meet certain conditions. They are as follows:

a. The trader's capital should be at least one million pounds: It is assumed that, if the trader's capital is less than this amount, he would not be able to bear the costs of restructuring. Small businesses, such as a small shop or a car wash, could barely meet the trader's basic needs⁽⁶¹⁾. As the contribution of such businesses in state's economy is not crucial, the application of restructuring procedures is limited to huge businesses, i.e. businesses with a capital of one million pounds or above.

b. The trader should have conducted business continuously for at least two years at the time of applying for restructuring: During this period, the trader should also have complied with the requirements of all applicable laws⁽⁶²⁾, such as entry in the commercial register, commercial bookkeeping and subscription to chamber of commerce. Data in the documents issued by those actors would help the restructuring committee to understand the reasons of the trader's

(59) Nasif, supra note 56 at 87. Sami, supra note 56 at 77. Hasan, supra note 56 at 58. Abo Sadah, supra note 42 at 65.

(60) This is reinforced by Article 80(2) UAE-Bankruptcy Law. It says that:

Where the assets of a natural or a juridical person are integrated with the debtor's assets in a manner that makes them difficult to separate, or if the court considers that it would not be practical or feasible, from a cost standpoint, to open separate procedures concerning such persons, the court may decide to join any natural or juridical person in the procedures provided for in this Chapter, in accordance with conditions that provide proper and sufficient protection for the creditors.

(61) Article 16 ETL excludes the application of this law to persons practicing small free professions who rely on their work to derive some form of profit to secure their living more than their reliance on cash capital.

(62) Latham & Watkins, supra note 1 at 2.

financial and administrative turmoil⁽⁶³⁾. Therefore, a person who practices his business intermittently cannot apply for restructuring procedure. Since such person does not possess sufficient experience, he does not deserve a second chance to carry on a business activity. The right to apply for restructuring is limited to traders who proved presence in the market during the said time.

c. The trader shall not have committed fraudulent act or gross misconduct: If the trader, for example, keeps irregular and improper accounts or behaves against the creditors' interests by disposition of its properties to discriminate against them, it may not apply for restructuring. Such a trader is not worthy of rescue and assistance through restructuring. Restructuring is limited to the goodwill trader who faces financial and administrative difficulties due to circumstances beyond its control⁽⁶⁴⁾.

3.2 Persons Authorized to File a Restructuring Application

Before embarking on the persons allowed to petition restructuring, it is important to highlight the entity to which restructuring application shall be submitted. In UAE, such entity shall be the competent court having jurisdiction pursuant to the civil procedure law (Article 1 UAE-Bankruptcy Law)⁽⁶⁵⁾. Unlike the Egyptian legislator, the UAE legislator did not create specialized commercial courts (i.e. economic courts) to decide on commercial disputes, including bankruptcy⁽⁶⁶⁾. In order to keep up with developments in the business world, the UAE legislator is advised to establish such specialized courts. To support investment, it is vital to have judges trained in the complexities of

(63) According to Article 19 Egyptian Bankruptcy Law, the application of restructuring shall be attached by the following documents: a certificate from the commercial register stating that the trader complied with the rules of commercial register for two years; a certificate from the chamber of commerce stating that the trader continuously practiced business for two years; and a copy of the balance sheet and the profit and loss account for the previous two years.

(64) Al-Qalyoubi, *supra* note 14 at 98. A. Al-Masri, *Commercial Law, Bankruptcy, and Commercial Papers in Accordance with the Provisions of the New Trade Law No. 17/1999* (Cairo: Al-Nahda Al-Arabiya Publishing, 2000) (in Arabic), p. 172.

(65) Under Articles 30(2), 33 and 35 UAE Law No. 11/1992 on Civil Procedure, the court that has jurisdiction over bankruptcy (including restructuring) is the court of first instance, i.e. the major circuit formed of three judges, in which circuit the bankrupted commercial store exists, and in case it had many commercial stores, the court of the store which was used as a main center to its commercial activities should have the jurisdiction. As for companies, the competent court shall be the one in which circuit the company's administration center exists, and it is possible to take legal action to the court in which circuit the branch of the company exists and that is concerning matters related to such branch.

(66) The Egyptian law No. 120/2008 establishes economic courts in each court of appeal circuit. According to Article 1 thereof, the economic courts consist of courts of first instance and courts of appeal. These courts have jurisdiction over cases related to economic and commercial matters, including restructuring. Article 1 Egyptian Bankruptcy Law defines the competent court as (the economic court of first instance that has jurisdiction over cases and disputes arising from the application of this law.)

bankruptcy and rescue requests, including requests for restructuring⁽⁶⁷⁾.

It should also be mentioned that the application of restructuring does not mean opening of the procedures; the application per se is an introductory procedure. The court shall determine the application based on a comprehensive assessment of the financial position of the debtor and viability of its business. The court may accept the application and order the commencement of the restructuring or bankruptcy procedures⁽⁶⁸⁾.

Under the title ‘Bankruptcy’, Chapter Four of UAE-Bankruptcy Law regulates bankruptcy and restructuring together⁽⁶⁹⁾. Article 67 thereof (the first in Chapter Four) sets out that:

The procedures in this Chapter shall regulate:

1. The restructuring of the debtor, if possible, by assisting the debtor to implement a plan to restructure the debtor’s business.
2. The declaration of the debtor’s bankruptcy and carrying out a fair liquidation of the debtor’s assets to cover the debtor’s liabilities.

Section One of Chapter Four regulates the application for opening the procedures of either bankruptcy or restructuring. Therefore, the title of this Section ‘Application for Opening Bankruptcy Procedures’ is not precise. The UAE legislator should make a clear distinction between bankruptcy provisions and restructuring provisions because these are in fact different legal regimes.

(67) M. Skeker, *The Law Establishing Economic Courts and its Impact on Development of Economy and Investment in Light of the Legislation, Doctrine and Jurisprudence* (Egypt: Dar Al-Jami’een for Printing and Binding, 2009) (in Arabic), pp. 17-22. Al-Khasawneh, *supra* note 10 at 175. Al-Msafri, *supra* note 8 at 711.

(68) The application, enclosed with all papers and documents (Article 73 UAE-Bankruptcy Law; Article 19 Egyptian Bankruptcy Law), may be referred to an expert or more appointed by the court. The expert shall prepare a report on the debtor’s financial position, including a statement about the possibility of restructuring the debtor and whether the debtor’s assets are sufficient or insufficient to cover the restructuring costs (Article 77 UAE-Bankruptcy Law). Based on that, the court may accept the application and order the commencement of the restructuring procedures (if the debtor’s business is potentially viable) or bankruptcy procedures (if the debtor’s business is potentially non-viable) (Article 78 UAE-Bankruptcy Law; Article 27 Egyptian Bankruptcy Law).

(69) Chapter four includes 15 sections: Section 1-6 contain the rules common for bankruptcy and restructuring, including the application for opening the bankruptcy or restructuring procedures, determination of application, appointment of the trustee and the controller, preparation of the list of creditors, trustee’s report, and determination of the report. Sections 7-11 contain the rules of restructuring procedures, including creditors’ committees, approval of the restructuring plan, publication and implementation of the approved restructuring plan, and nullification and termination. Sections 12-14 contain rules of bankruptcy, including judgment on declaration of bankruptcy and liquidation, provisions relating to bankruptcy of companies, and bankruptcy of the deceased debtor, the retired debtor and the ineligible debtor. Section 15 includes common provisions on the effects of bankruptcy and restructuring.

Bankruptcy ends with the liquidation of the debtor's assets; restructuring aims to assist the debtor to preserve its business. The Egyptian model can be followed: Section One of Chapter Two of Egyptian Bankruptcy Law regulates restructuring; Chapter Four thereof regulates company's bankruptcy.

According to UAE-Bankruptcy Law, the application of restructuring must be filed by the debtor (whether natural or legal person), irrespective of being distressed on a cash-flow or balance sheet test⁽⁷⁰⁾. It may also be filed by the debtor's creditors or the competent supervisory authority governing the debtor. In Egypt, only the debtor (and the successor of a deceased debtor) can apply for restructuring⁽⁷¹⁾. The persons entitled to file the application of restructuring will be discussed in more details:

1- Restructuring Application by the Debtor: Under Article 68 UAE-Bankruptcy Law, the debtor must apply to the court to commence the restructuring procedure⁽⁷²⁾. If the debtor is a corporate one, i.e. a commercial company or a civil company conducting a professional activity, the person representing the company (e.g. general director or chairman of the board) shall file such an application. Besides, the restructuring application shall be accompanied with evidence demonstrating the approval of the owners of the corporate entity.⁽⁷³⁾

If the debtor dies before filing the application of restructuring, could the heirs file such an application? Article 16 Egyptian Bankruptcy Law expressly permits the successors of a deceased debtor to file the application of restructuring; all heirs shall agree to do so within one year following the death of the debtor. In contrast, the UAE legislator does not give any direct answer. With regard to bankruptcy, however, Article 150(2) UAE-Bankruptcy Law states that:

The heirs of the deceased debtor may apply to declare the deceased

(70) Farn, supra note 5 at 19.

(71) Taha, supra note 1 at 1.

(72) Under Article 76 UAE-Bankruptcy Law, the debtor (whether an individual trader or a company) shall deposit with the Court's treasury monies or a bank guarantee in an amount not exceeding twenty thousand UAE dirhams (AED 20,000) in the manner and on the date decided by the court, to cover the initial expenses and costs for the determination of the application. However, the court may defer the deposit or the bank guarantee, if the debtor does not have the necessary cash to make such deposit at the date of filing the application.

(73) Under Article 172 UAE-Bankruptcy Law, such approval shall be in the form of a resolution by the majority of partners in joint liability companies and simple commandite companies, and by «the general assembly at an extraordinary meeting» in other forms of companies. It should be noted that (new) UAE Commercial Company Law speaks about «special resolution», i.e. the resolution issued by the majority votes of shareholders holding at least 75% of the shares represented at the general assembly of the joint stock company. Thus, such a special resolution shall be issued in all matters used to be within the powers of «the general assembly at an extraordinary meeting».

debtor bankrupt and to liquidate the deceased debtor's assets within the period provided for in Article (149) of this law⁽⁷⁴⁾. If certain heirs object to a declaration of bankruptcy, the court must hear their statements and then determine the application on an urgent basis, in the interest of the deceased debtor's creditors and the heirs.

In order to protect the interests of the deceased debtor's creditors and the heirs, the UAE legislator should also permit the successor of a deceased debtor to submit the application of restructuring within a year from the debtor's death.

- 2- Restructuring Application by the Competent Supervisory Authority:
It should be noted that, where the debtor is governed by a competent supervisory authority, the debtor shall notify such authority in writing of the debtor's intention to file the application of restructuring, at least fifteen (15) business days prior to the date of filing⁽⁷⁵⁾. This competent supervisory authority is also entitled to file any documents or pleadings with the court concerning the debtor's application of restructuring (Article 68(2) UAE-Bankruptcy Law).

Furthermore, such competent supervisory authority may by its own file the application of the debtor's restructuring. In this case, the authority must submit evidence proving that the debtor is in a state of over-indebtedness (Articles 71 & 73 UAE-Bankruptcy Law).

- 3- Restructuring Application by the Creditor: According to Article 69(1) UAE-Bankruptcy Law⁽⁷⁶⁾, the creditor or creditors holding an ordinary debt may apply for restructuring of the debtor's business, whether severally or jointly; the secured creditors may not. In order to do so, some conditions shall be met:

- a. The applicant's debt shall be due. Article 1 UAE-Bankruptcy Law defines the debtor's debts as

(74) According to this provision, this period is one (1) year from the date of debtor's death.

(75) The competent supervisory authority shall be the federal or local governmental supervisory authority designated by Cabinet resolution (Article 1 UAE-Bankruptcy Law), including the Securities and Commodities Authority (SCA) that monitors companies listed in the Securities Exchange, Ministry of Economy that monitors other companies, Central Bank that monitors banks, and Insurance Authority that monitors insurance companies.

(76) It says that:

A creditor, or creditors, holding an ordinary debt in an amount of not less than one hundred thousand UAE dirhams (AED 100,000) may apply to the court to commence the procedures pursuant to this chapter, if the creditor has previously given the debtor a notice in writing demanding payment of the due debt and the debtor failed to pay the same within (30) thirty successive business days from the date of such notice.

the debts payable by the debtor as of the date the court issues an order to commence proceedings in accordance with the provisions of chapter three or four of this law, or liabilities assumed by the debtor prior to such order.

- b. The amount of the debt shall meet the stated minimum threshold, i.e. not less than one hundred thousand UAE dirhams (AED 100,000)⁽⁷⁷⁾. Given the creditor, under the old UAE bankruptcy regime, could apply for bankruptcy procedures against the debtor for any amount owing (provided that the creditor could establish that the debtor had ceased to make payments when they fell due), it shall be clear how the new law is more debtor-friendly.
- c. The applicant shall have adequately notified the debtor in writing of such debt and the debtor has still failed to pay the same within (30) thirty successive business days of notice. If the debtor pays during this period of time, he will not be considered in a situation of cessation. If not, there will be a good reason to commence the restructuring procedures⁽⁷⁸⁾.

Finally, it is worthy emphasizing the difference between the laws examined in terms of persons authorized to file the application of restructuring. This difference is based on two reasons: Firstly, the trigger for restructuring varies under both laws: Egyptian Bankruptcy Law generally speaks about ‘financial and administrative distress’; there is no requirement that the debtor ceases to make payment of its due debts. In contrast, UAE-Bankruptcy Law expressly states two grounds for restructuring; namely, the debtor is over-indebted or in default for more than (30) thirty consecutive business days. This explains why the creditor has right to file the application of restructuring under UAE law.

Secondly, the approach of the regulation of restructuring differs under both laws. UAE-Bankruptcy Law regulates restructuring and bankruptcy jointly in one chapter. On the other hand, Egyptian Bankruptcy Law regulates restructuring and bankruptcy separately. Thus, under UAE-Bankruptcy Law, the competent supervisory authority governing the debtor may apply for restructuring or bankruptcy procedures⁽⁷⁹⁾.

(77) According to Article 69(2) UAE-Bankruptcy Law, <the Cabinet may, upon recommendation of the Minister, issue a decision amending the amount of the debt threshold referred to in Paragraph 1 of this Article.>

(78) Under Article 76 UAE-Bankruptcy Law, the creditor shall also deposit with the Court’s treasury monies or a bank guarantee in an amount not exceeding twenty thousand UAE dirhams (AED 20,000) in the manner and on the date decided by the court, to cover the initial expenses and costs for the determination of the application.

(79) As for bankruptcy, the debtor, the creditor, the public prosecutor and the competent court may apply for bankruptcy procedure under Egyptian law. Under UAE-Bankruptcy Law, the

4. Conclusion

Having discussed this new mechanism to rescue the distressed debtor, namely restructuring, the authors reach the following findings:

- 1- Under UAE and Egyptian Bankruptcy Laws, restructuring makes a balance between the debtor's interest and the state's economic and social considerations. Restructuring aims to encourage investment, boost economy, and help the debtor to reorganize its financial and administrative affairs without disrupting production.
- 2- Under Egyptian Bankruptcy Law the relevant trigger for restructuring procedure relates to 'financial and administrative distress'. In contrast, UAE-Bankruptcy Law only speaks about financial reasons for restructuring.
- 3- Beside the financial reorganization (and the counterpart court-supervised mediation system in Egyptian law) and preventive composition, restructuring is a good mechanism to assist the debtor to face difficulties. However, restructuring differs from these other means in terms of definition.
- 4- UAE-Bankruptcy Law is more flexible than Egyptian Bankruptcy Law in terms of the personal scope of restructuring. The former subjects five categories, including the licensed civil companies conducting professional activities to restructuring. The latter regulates only restructuring of traders (whether natural or legal persons).
- 5- UAE and Egyptian Bankruptcy Laws differ in terms of entities authorized to file the application of restructuring. UAE-Bankruptcy Law permits not only the debtor but also the competent supervisory authority governing the debtor, as well as the creditor to apply for restructuring. Egyptian Bankruptcy Law allows only the debtor (and heirs in case of debtor's death) to do so.

Therefore, the authors make the following recommendations:

- 1- As provided by Egyptian Bankruptcy Law, UAE-Bankruptcy Law should define restructuring to make it clear that it involves not only situations of financial distress but also cases of administrative distress.
- 2- As provided by Egyptian Bankruptcy Law, UAE-Bankruptcy Law should

debtor, the creditor, the competent supervisory authority and the public prosecutor may apply for bankruptcy procedure.

regulate bankruptcy and restructuring separately. UAE-Bankruptcy Law should also make it clear who can apply for restructuring and who can apply for bankruptcy.

- 3- UAE-Bankruptcy Law should make the financial reorganization mechanism available not only to the financial institutions licensed by the competent supervisory authorities but also to other entities enumerated in Article 2 of the same law.
- 4- As provided by UAE-Bankruptcy Law, Egyptian Bankruptcy Law should be reformed to make the circle of entities subject to restructuring wider. In particular, the restructuring procedure should apply to civil companies licensed to conduct professional activities.
- 5- As provided by Egyptian law, UAE law should be reformed to establish new specialized courts to decide on bankruptcy and restructuring disputes.
- 6- As provided by Egyptian Bankruptcy Law, UAE-Bankruptcy Law should be reformed to entitle the heirs of a deceased debtor to file an application of restructuring.

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