Global Restructuring and Insolvency Guide - United Arab Emirates

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

*This content was last reviewed around October 2021.*

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Schemes of arrangement**

Yes, security can be taken over all types of assets, including accounts receivables, under the law on the pledge of movables and the recently issued factoring law. Such security requires perfection either by registering it at the Emirates Integrated Registry or by control.

**Insolvency and liquidation**

There are three types of processes under the UAE insolvency law:

A preventative composition that takes place before the actual cessation of payments

A scheme of arrangement that could take place after the cessation of payment

A liquidation and sale of assets if there is no buy-in from the debtor or the company cannot be restructured

## What is the nature of the insolvency process?

**Schemes of arrangement**

It is an in-court process overseen by the insolvency judge with the assistance of an insolvency trustee appointed by the judge upon the debtor's suggestion.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Schemes of arrangement**

A debtor must evidence that it could emerge out of insolvency as a result of the scheme by putting a plan in place. For the preventative scheme to be actionable, the debtor must be in a dire financial situation but not yet in default of payment for more than 30 days. While waiting for the restructuring scheme to be actionable, the debtor must be in default of payment for more than 30 days or in a state of over-indebtedness (i.e., insolvent).

The plan must allow the debtor to emerge out of insolvency within six years if in preventative composition or eight years if in a restructuring phase.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Schemes of arrangement**

Yes, as the competent court will be the court where the main center of business is located, as defined in the Code of Civil Procedures as the location of the insolvent.

While under the old insolvency law, which was embedded in the Code of Commercial Transactions, an article Even if the parent was not insolvent in its home jurisdiction, such a provision was removed from the new insolvency law and the issue of cross-border insolvencies is not provided for.

**Insolvency and liquidation**

Our view is that the situation should remain the same under the current insolvency law, despite the lack of legal provisions and that a branch of a foreign company could attract the insolvency of its parent in the UAE. If the parent is solvent, it could easily dismiss the action by either providing some guarantees or paying off the creditors.

## Is restructuring of both secured and unsecured claims possible?

**Schemes of arrangement**

A vote on either the preventative composition plan or the restructuring plan requires an affirmative vote by a majority of the creditors holding two-thirds of the value of the insolvent's debt.

In principle, secured creditors are not allowed to vote on the plan unless they waived their security.

An amendment to the law was introduced in December 2019 to allow secured creditors to vote on the plan while retaining their security if the plan affected their security.

The court is also at liberty to move security if it is in the best interest of the creditors and for the purpose of implementing the plan and continuing the business.

The court may also allow superpriority of new financing if sought by the trustee and approved by the court, thus displacing first ranking security.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Schemes of arrangement**

The law provides for several committees of creditors to be formed to discuss the schemes. However, the overall creditors make the vote on the plan.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Schemes of arrangement**

Yes, depending on the articles of association of the company and the powers of the Board of Directors or the shareholders. A resolution is required to be submitted to the court upon launching an insolvency procedure.

Shareholders are not entitled to vote on the plan unless they are themselves, creditors.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Schemes of arrangement**

Yes, once the plan is voted on at the required majority, which is a majority of the creditors holding two-thirds of the debt, then it would be binding on all.

# Commencing the Process

## Is shareholder's consent required to commence proceeding?

**Schemes of arrangement**

Only the debtor can apply for a preventative composition if it defaults on its debts for less than 30 days or is in a difficult financial situation.

The debtor or creditors for the restructuring plan, provided:

For the debtor, that it is in default of payment for more than 30 days or it is in a state of over-indebtedness

For the creditors holding more than AED 100,000 in debt provided that they have served a notice upon the debtor requesting them to cure the default within 30 days

A secured creditor that has seen a fall in the value of its security and it does not secure a loan anymore

**Insolvency and liquidation**

The debtor or creditors may file for insolvency or public prosecution if it is in the public's interest at large.

Creditors must hold more than AED 100,000 of debt and have served a notice on the debtor requesting them to cure the default within 30 days.

## Is there an ability to consolidate group estates?

**Schemes of arrangement**

No, while the concept of a holding company was recently introduced in the Commercial Companies Law, each company must have its own insolvency procedure in matters of insolvency.

There are some exceptions, for example, when there is financial or managerial and administrative confusion between the various group companies, so it is somehow impossible to distinguish them.

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## Is there any court involvement?

**Schemes of arrangement**

Yes, the law only envisages an in-court process and the court is heavily involved in the process. Approval from the court is required at each stage of the process, which makes it procedurally heavy.

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## Who manages the debtor?

**Schemes of arrangement**

A trustee appointed by the court upon the suggestion of the debtor. The court may act upon such a suggestion or may appoint another trustee.

**Insolvency and liquidation**

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## What is level of disclosure of process to voting creditors?

**Schemes of arrangement**

Once the process is engaged, the trustee will call upon the creditors to come forward with their loans and any substantiation thereto within 20 days from the date of publication of its notice in widely circulated newspapers.

An expert will be appointed to assess the debtor's debtor's situation and whether a plan could be viable.

Once a plan has been put in place and approved by the court, such a plan will be put to the creditors for discussion (such creditors being divided into a class of creditors, i.e., secured, unsecured, bondholders, etc.).

Once the plan has been discussed with the creditors and a final form has been reached, it will again be submitted to the court, which will decide to put it to a creditors' vote.

**Insolvency and liquidation**

In insolvency, the trustee will call upon the creditors to come forward with their loans and any substantiation thereto within ten days from the date of publication of its notice in widely circulated newspapers.

The trustee will assess such loans and decide which ones to accept, reject or amend, and the best way to settle such loans.

The assets of the debtor will be sold; the preferred way of a sale is by way of public auction.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Schemes of arrangement**

Government-related entities; individuals that are not traders

A trader is any person who performs commercial activities as defined in Article 5 of the Code of Commercial Transactions, which include, among others, purchase and sale for profit of:

Commodities, any movable or immovable assets

Banking business, investment business, funds, financing companies, brokerage

Commercial papers

Maritime or airfreight

Restaurants, theaters, cinemas

Public auction outfits

Any commercial company is de jure considered a trader.

Financial free zone entities: Financial free zones are zones created by a constitutional amendment, where the federal UAE civil and commercial laws do not apply in favor of laws that apply in such zones and that have opted for the application of English law.

These zones have their own laws (including their own insolvency laws), courts and financial regulator.

For government-related entities, this would be their decree of incorporation.

Personal bankruptcy law is for individuals who are not traders.

**Insolvency and liquidation**

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These zones have their own laws (including their own insolvency laws), courts and financial regulator.

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## How long does it generally take for a creditor to commence the procedure?

**Schemes of arrangement**

For creditors holding more than AED 100,000 in loans, the debtor must have defaulted on their loans, and they must have been served with a notice to cure the default within 30 days before commencing proceedings.

Under an amendment introduced in December 2019, secured creditors may now commence proceedings if the value of their security no longer covers the outstanding loan.

**Insolvency and liquidation**

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# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Schemes of arrangement**

Under the schemes of arrangement, yes, the debtor remains in possession and management remains in control, with the assistance of the trustee and supervision of the court

**Insolvency and liquidation**

Under the insolvency and liquidation process, the trustee replaces management.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Schemes of arrangement**

There is a moratorium between the application period and the vote on the plan, which could extend to 75 days.

**Insolvency and liquidation**

If put into insolvency, there would be no moratorium; the court could allow a secured creditor to enforce its security within ten days from the date of the application, after ensuring that there is no collusion between the debt and the secured creditor.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Schemes of arrangement**

Yes, under a preventative composition or a restructuring plan, it would be possible for the court to allow for new financing, which would take superiority over unsecured creditors or would be secured on an unsecured asset of the debtor, or take superiority over an already existing security, however, with the approval of the secured creditors.

**Insolvency and liquidation**

N/A

## Can procedure be used to implement a debt-to-equity swap?

**Schemes of arrangement**

Yes, but only to government and financial institutions, banks, and financial institutions regulated by the UAE Central Bank.

**Insolvency and liquidation**

N/A

## Are third party releases available?

**Schemes of arrangement**

Yes.

**Insolvency and liquidation**

Yes.

## Are the proceedings recognised abroad?

**Schemes of arrangement**

No.

**Insolvency and liquidation**

No.

## Has the UNCITRAL Model Law been adopted?

**Schemes of arrangement**

No, while the UAE legislator is working very closely with the World Bank and the IFC on the law and any amendments thereto.

**Insolvency and liquidation**

No, while the UAE legislator is working very closely with the World Bank and the IFC on the law and any amendments thereto.

## Can a debtor continue to carry on business during insolvency proceedings?

**Schemes of arrangement**

Yes, for purposes of fulfilling the plan.

**Insolvency and liquidation**

Yes, during the sale process.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Schemes of arrangement**

There are very harsh penalties for fraudulent and negligent bankruptcies, which could be up to five years in jail and/or a fine of AED 1 million.

Directors would be liable if it is proven their actions led to an inability of the company to cover at least 20% of its debts.

**Insolvency and liquidation**

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Directors would be liable if it is proven their actions led to an inability of the company to cover at least 20% of its debts.

## What is the order of priority of claims?

**Schemes of arrangement**

Government and Treasury debt

Employees for up to three months' salaries

Secured creditors

Unsecured creditors

Shareholders

**Insolvency and liquidation**

Government and Treasury debt

Employees for up to three months salaries

Secured creditors

Unsecured creditors

Shareholders

## Do pension liabilities have any priority over other unsecured claims?

**Schemes of arrangement**

No.

**Insolvency and liquidation**

No.

## Is it possible to challenge prior transactions?

**Schemes of arrangement**

Yes, for transactions conducted two years before insolvency.

There are some transactions that would be considered de jure null and void if conducted up to two years before insolvency, these are:

Donations, gifts or gratuitous transactions

Any transactions that would be remarkably onerous for the debtor in comparison with the counterparty

Settling any loan before its maturity date

Settling any loans in means other than the means that were agreed upon

Offering any new security for a previous loan

In addition to the above, the court may invalidate any transaction that would be harmful to the creditors and if the counterparty acted in bad faith (i.e., cognizant of the dire situation of the debtor).

**Insolvency and liquidation**

Yes, transactions were conducted two years before insolvency.

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