

The consequences of the “Emergency Financial Crisis”

Tammam Jazmati

t.jazmati@tamimi.com - DIFC, Dubai, UAE

Zane Anani

z.anani@tamimi.com - DIFC, Dubai, UAE

Introduction

The UAE Bankruptcy Law (Federal Decree – Law 9 of 2016, as amended) regulates insolvency and bankruptcy proceedings before the UAE courts. In order to address the fall-out of the COVID-19 pandemic, the UAE Government made a number of amendments to the UAE Bankruptcy Law to provide relief from its application during an “Emergency Financial Crisis”. Cabinet Resolution 5 of 2021 concerning the Emergency Financial Crisis, was published in Federal Gazette 695 dated 31 January 2021 announced the “*period between 1 April 2020 until 31 July 2021 shall be considered an “Emergency Financial Crisis”* in accordance with the provisions of Federal Decree – Law 9 of 2016 concerning Bankruptcy and its amendments thereof” as a result of the pandemic. This Resolution was recently applied by the Dubai Court of First Instance (‘CFI’) (in judgment 15 of 2020 issued on the 18 February 2021). Drawing on the CFI judgment, this article provides guidance for a creditor who intends to present a creditor’s bankruptcy petition against an insolvent company in the current pandemic, as well as discussing the potential far reaching consequences of the Resolution.

Background

In 2018, the Claimant (creditor) obtained a final judgment against a company which could not be enforced as the Defendant (debtor) had dissipated its assets. In December 2020, the Claimant brought an application before the CFI (presenting a bankruptcy petition) to declare the company and shareholders bankrupt. The court referred to Article 170 Bis 3, Section 1 of Decree-Law No. 9 of 2016 on Bankruptcy, as amended by Law 21 of 2020 regarding “*applications filed by the creditor during an emergency financial crisis*” and Cabinet Decision 5 of 2021 on the emergency crisis. Since the creditor filed the application (and not the debtor), the bankruptcy proceedings were suspended until the emergency financial crisis subsided.

Conditions for presenting a creditor’s bankruptcy petition

Before presenting a bankruptcy petition against a debtor in the UAE, a creditor must ensure that:

- it only initiates bankruptcy proceedings where it holds unsecured debts of at least AED100,000 (approximately US\$27,000) and it has issued a written demand for repayment which has not been satisfied within 30 consecutive business days (a creditor with secured debt may submit an application in certain circumstances);
- its debt is for a fixed sum; and

- the UAE courts have jurisdiction to hear the bankruptcy proceedings for the debtor.

In view of Cabinet Resolution 5 of 2021 and the CFI judgment, the courts will suspend a bankruptcy application filed by a creditor or group of creditors against a debtor during the Emergency Financial Crisis even if the debt arose before the pandemic (which was the case for the Claimant in this case). Furthermore, precautionary measures will not be granted by the UAE courts against the debtor's assets where they are necessary for the operation of the debtor's business during the Emergency Financial Crisis.

It is important to note that the suspension of bankruptcy proceedings applies to creditors' applications only. This is not the case with debtors' applications. Pursuant to Article 170 Bis 1 (1) of Federal Decree - Law No. (21) of 2020, an application by a debtor during the "Emergency Financial Crisis" may be accepted without the requirement of an expert (which is usually required in applications filed by debtors during normal circumstances). In the event a debtor files an application during the "Emergency Financial Crisis, *"the court may accept the application and take the actions it deems fit including initiating the proceedings without the appointment of an expert or a trustee provided that the Debtor proves that its financial turmoil or debt has resulted from the emergency financial crisis."* (Article 170 Bis 1 of Federal Decree- Law No. (21) of 2020).

Practical lessons for creditors filing for bankruptcy

Bankruptcy proceedings filed and accepted by the court prior to the declaration of the Emergency Financial Crisis will continue. It is important to note that the court is also entitled to extend the time periods applicable to the stages of a bankruptcy process set out under the UAE Bankruptcy Law if bankruptcy proceedings were commenced before the 1 April 2020. However, as mentioned above, creditors must wait until after 31 July 2021 to file new bankruptcy proceedings.

The wider consequences of Cabinet Resolution 5 of 2021

Although Cabinet Resolution 5 of 2021 concerns bankruptcy proceedings, it is arguable that it could be used in court proceedings to plead *force majeure* relying upon the Cabinet Resolution during the specified period for which the "Emergency Financial Crisis" endures. However, this will of course be subject to the court's discretion as to whether to extend the impact of the "Emergency Financial Crisis" (as defined in the Cabinet Resolution) as a basis for other claims other than those arising in the context of bankruptcy proceedings.

Article 249 of the UAE Civil Code provides that if after a contract is made but before it has been performed, supervening exceptional events of a public nature occur and the exceptional event could not have been foreseen when the contract was concluded and the occurrence of which results in the performance of the contractual obligation(s) arising out of the contract becoming, if not impossible, oppressive on the obligor, such as to threaten him or her with grave loss, then it is open to the judge after weighing up the interests of the parties to reduce the oppressive obligation to a reasonable level, either by restricting the extent of it, or by increasing the consideration for it.

Cabinet Resolution 5 of 2021 may, on a case by case basis, enable a party in a case to demonstrate that the pandemic was an unforeseeable event that did not render performance impossible but which rendered it onerous and the deeming of the period between 1 April 2020 and 1 July 2021 as a period of "Emergency Financial Crisis" is clear evidence of the same.

For further information, please contact Tammam Jazmati (t.jazmati@tamimi.com).