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The KSA Bankruptcy Law

Overview and Practical Application

Introduction

The Saudi Arabian Bankruptcy Law was **introduced in 2018** to provide entities in financial distress with a legal platform to facilitate the implementation of insolvency proceedings, while ensuring creditors' rights are preserved and that they are treated equitably.

Many of the distressed businesses need **some form of relief on their debt obligations** in order to avoid triggering defaults and foreclosures, especially during periods of economic downturn, which may be the more commercially viable option to both the debtor and creditors.

In spite of the connotation of the name of the Bankruptcy Law, the law offers a platform to rescue insolvent businesses through **reorganisation and financial restructuring** where possible.

Based on our experience in dealing with bankruptcy cases under the Saudi Bankruptcy Law, we outline in this document the **major bankruptcy proceedings and key practical considerations** around adopting and implementing these procedures.

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Overview of the Bankruptcy Law

01 **18 August 2018**
The new Bankruptcy Law came into effect on 18 August 2018.

02 **Seven procedures across 231 articles**
The new insolvency law includes 17 chapters, 231 articles and covers seven procedures. Supporting regulations were also issued comprising 18 chapters and 98 articles.

03 **Inclusions**
The new Bankruptcy Law applies to:

- Individuals/corporations carrying on commercial, professional or for-profit businesses;
- Non-Saudi investors who have assets in Saudi Arabia; and
- Regulated entitles such as banks, insurance companies and telecom companies.

04 **Exceptions**
The new Bankruptcy Law preserves the rights of certain regulators such as SAMA and CMA to issue regulations for their own regulated entities covering bankruptcy issues.

Overview of the Bankruptcy Law procedures

Protective Settlement Chapters three and six 13-41	Protective Settlement Procedure Protective Settlement for Small Debtors Procedure*	A **Protective Settlement Procedure (PSP)** is a procedure that allows the debtor to reach an agreement with its creditors to settle its debts while management continues to manage the day-to-day operations of the company.
Financial Restructuring Chapters four and seven 42-91	Financial Restructuring Procedure Financial Restructuring for Small Debtors Procedure*	A **Financial Restructuring Procedure (FRP)** is a procedure that allows the debtor to reach an agreement with its creditors by reorganising its business under the supervision of a bankruptcy licensed Trustee to ensure fairness of the procedure and its execution.
Liquidation Chapters five, eight and nine 92-126	Liquidation Procedure Liquidation for Small Debtors Procedure* Administrative Liquidation Procedure	A **Liquidation Procedure** is a procedure in which the debtor's bankruptcy assets are sold and the proceeds of the sale are to be paid to the debtor's creditors the proceeds of the sale are to be distributed to the debtor's creditors. The procedure can be triggered by a creditor or the debtor. Chapter nine of the Bankruptcy Law also outlines the guidance in relation to the Administrative Liquidation Procedure. In essence similar to a Liquidation, primarily when it comes to selling the debtor's assets and using the proceeds of the sale to settle creditor dues. However, the Administrative Liquidation can only be adopted in the event where the proceeds from the disposal of the bankruptcy assets are insufficient to cover the expenses of the Liquidation Procedure. The procedure is usually undertaken by the Bankruptcy Commission as opposed to a registered Trustee.

*The Bankruptcy Law and/or Bankruptcy Commission in coordination with the General Authority for Small and Medium Entities have set the criteria defining small debtors. The Bankruptcy Law sets out a guidance for administering each of the PSP, FRP and Liquidation procedures for small debtors, with minor differences from the main procedures for debtors who do not qualify as small debtors.
Note: The Bankruptcy Law is available on the Bankruptcy Commission website and is downloadable in its entirety:
https://bankruptcy.gov.sa/ar/BankruptcyLaw/SystemAndRegulations/Pages/default.aspx

The remainder of this document highlights the key aspects of the law associated with the **three** main procedures for debtors that do not qualify as small debtors.

High-level comparison of the three main bankruptcy procedures

	Protective Settlement	Financial Restructuring	Liquidation
Purpose	Rescue	Rescue	Liquidate
Trustee involvement	Low	High	
Initiator	Debtor	Debtor or creditor	
Eligibility	If the debtor is suffering from financial distress that may lead to insolvency and/or is in default and/or is insolvent		If the debtor is Distressed[1] or insolvent.
Control of the business	Debtor	*Debtor under Trustee supervision	Trustee
New financing	Allowed under certain conditions		

Note: The voting process for each procedure is covered later in this publication.
Note: The trustee may take control of the operations in certain circumstances.

1. **Note:** The Bankruptcy Law defines Distressed as a debtor who defaults on a debt repayment when it falls due.

Typical roles and responsibilities of key stakeholders in a bankruptcy procedure

	Protective Settlement	Financial Restructuring	Liquidation
Debtor	• **Remains in charge of running the operations** of the company. • Responsible for the development of the business plan and restructuring proposal.	• **Remains in charge** of running the operations of the company **under the supervision of a bankruptcy Trustee**. • Business operations will be carried out under protection of the Bankruptcy Law **(creditor moratorium)** with the aim to restructure all of its existing liabilities. • Responsible for the development of the **business plan and restructuring proposal**.	• Upon appointment of a Trustee, **the debtor immediately ceases to manage the operations** and day-to-day business of the company.
Trustee	• They are appointed by the debtor. • Primary involvement is for **approving the proposal** before it is submitted to the court with little to no involvement afterwards. • Reviews **creditors' claim.**	• They are appointed by the court. • **Supervises and monitors the company's activities after procedure commencement** to ensure fairness and implement the plan in such ways as to provide the necessary protection of interests of all creditors. • Provides approval to the debtor to perform certain actions under article 70 of the Bankruptcy Law. • Reviews **creditors' claim**.	• They are appointed by the court. • **The Trustee's role is to manage the day-to-day operations of the company.** • The Trustee is responsible for **asset realisation and distributions to creditors**. • Reviews **creditors' claim.**

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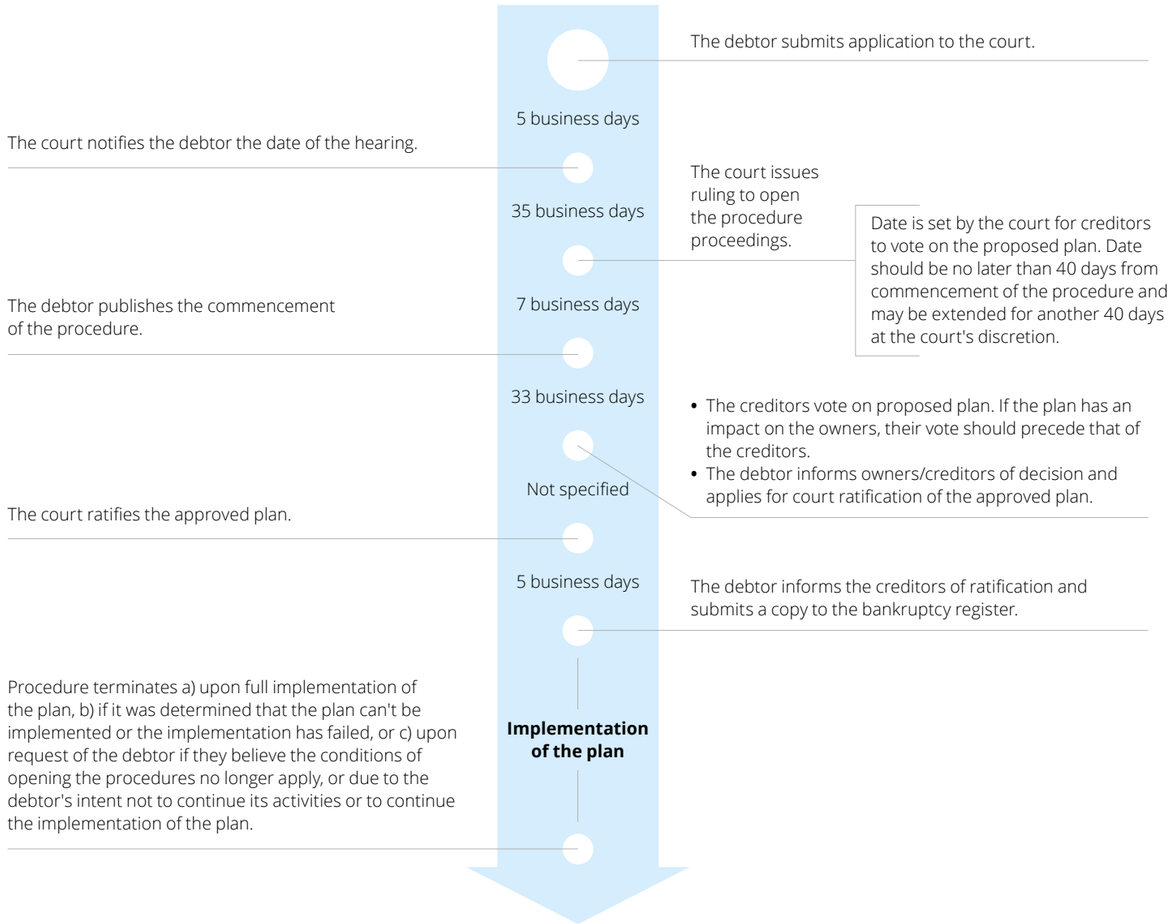
Typical roles and responsibilities of key stakeholders in a bankruptcy situation

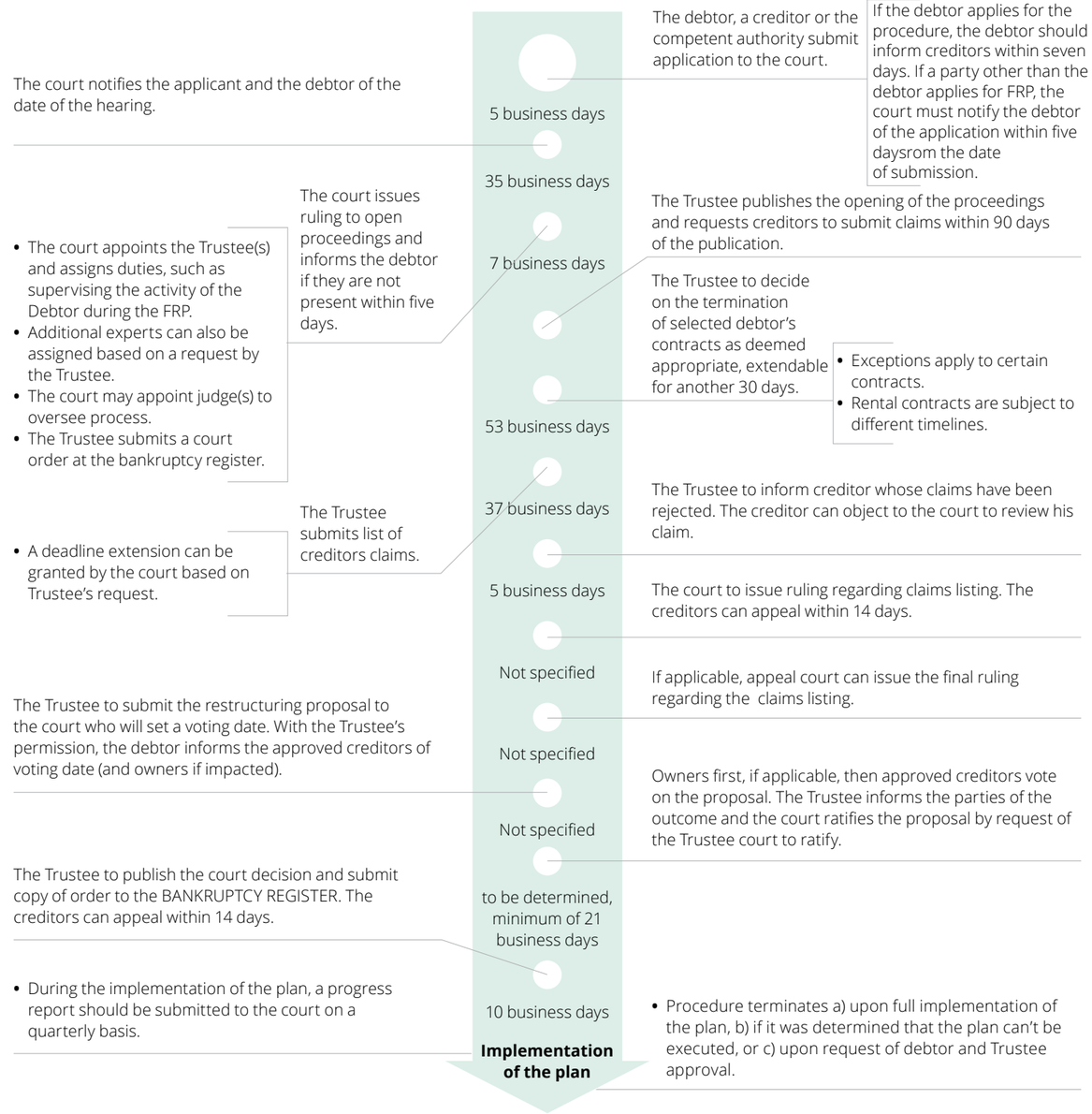
	Protective Settlement	Financial Restructuring	Liquidation
Restructuring advisor	• They can be **appointed by the company** or by the Trustee. • The creditors can also appoint their own restructuring advisor to advise the creditors' committee. • They assist in preparation of **a bankable business plan to support a robust proposal**, which ultimately has a high likelihood of being approved by the majority of creditors. • They advise the company on turnaround and restructuring-type activities, options assesment and also **play a key role in negotiating restructuring terms with creditors**.		• **Not required**, unless in exceptional cases where advice may be needed on specific transactions or options assessment.
Legal advisor	• They can be **appointed by the company** or by the Trustee. • **They assist with legal filings, relevant inquiries and provide assistance to the company, Trustee and restructuring advisor as and when needed**. • When required, the legal advisors ensure the company and the Trustee are in compliance with the requirement of the Bankruptcy Law and other applicable laws and regulations.		
Creditors' committee	• The committee can be formed at the discretion of the court and subject to court approval, upon request of the Trustee, or request of creditors whose claims represent at least 50% of the debtor's debts. • The committee represents the interest of the creditors and will assume a number of responsibilities including approving the sale of assets, opining on the proposal, opining on the provision of secured financing and other roles and responsibilities as outlined in the law and its regulations.		

Protective Settlement - illustrative process overview



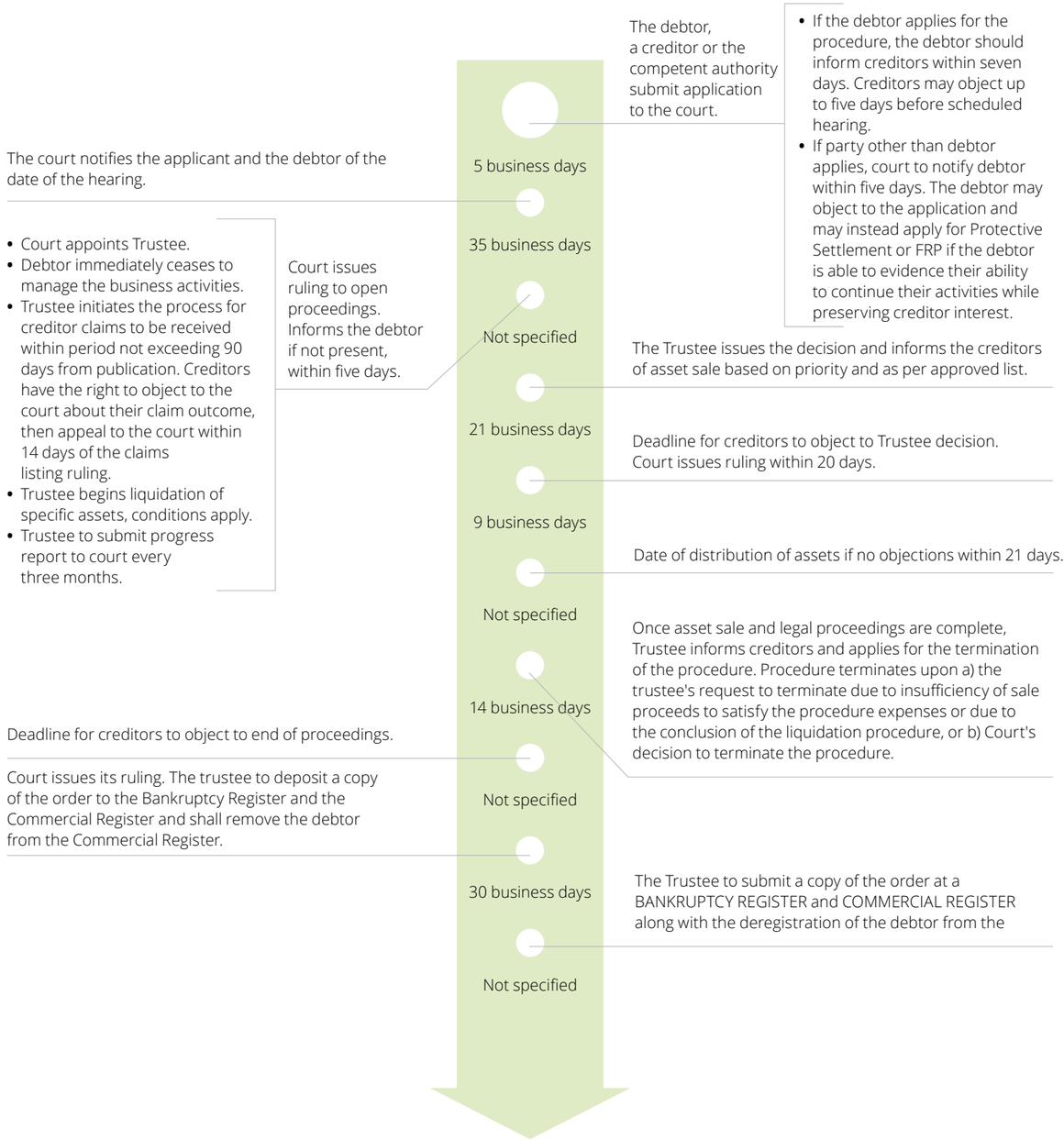
Note 1: The debtor may request the court to order a moratorium on the condition that a Trustee report is accompanied. The moratorium is valid for 90 days (extendable for an and is extendable for periods of 30 days, provided the total moratorium period does not exceed 180 days.
Note 2: This timeline is for illustrative purposes only and it is to be noted that timelines may change – subject to court discretion.

Financial Restructuring - illustrative process overview



Note 1: The claim moratorium is automatic and commences once the application for an FRP is filed – the moratorium is valid for 180 days and extendable for another 180 days.
Note 2: This timeline is for illustrative purposes only and may change at the court's discretion.

Liquidation - illustrative process overview



Note: This timelines is for illustrative purposes only and it is to be noted that this timeline may change – subject to court approval and discretion.

Key considerations and frequently asked questions

What is a more adequate restructuring route: in-court or out-of-court?

- Determining whether an 'in' or 'out of' court procedure is best suited for the debtor has to be considered on a case by case basis and will depend on a number of factors. These factors include:
  - Operational and financial considerations around the capabilities of the business to develop, put into effect and implement a turnaround and restructuring plan, assuming a turnaround is viable.
  - Relationship with financial and trade creditors as well as the extent to which the debtor has 'brought them on the journey' and their willingness to engage with and support a restructuring plan.
  - Reputational considerations – although in-court proceedings' main aim is to rescue the business, some debtors may still perceive a reputational damage from a bankruptcy filing, given the connotation of the name.
  - Various legal considerations depending on a number of factors including existing ownership or group structure, cash generating assets versus debt exposure and security profile, existing or potential legal claims, exiting contractual obligations and others.
- The above, among other considerations, will help determine whether some protection mechanisms granted under in-court proceedings i.e. claim moratorium are required to grant a durable and sustainable platform to execute the restructuring.
- In addition, an in-court financial restructuring plan has to be approved by the majority of the voters (as per the guidance stipulated in the law) whereas in an out-of-court settlement, a unanimous voting is likely needed for the proposal to be approved. Majority voting could be advantageous as getting a unanimous consensus on a restructuring plan from all creditors may not always be feasible.
- Determining which restructuring route to opt for and which procedure within the Bankruptcy Law would be more suitable should be assessed in light of legal and financial considerations. Seeking advice from legal and restructuring advisors is recommended.

Which is the best suited procedure under in-court settlement?

- In addition to the factors listed above, determining the best procedure to adopt under the Bankruptcy Law also depends on the stage of negotiations the debtor has reached with the creditors as well as the debtor's level of distress.
- If the debtor had already progressed creditors' negotiations around potential restructuring options and has a largely ready proposal outlining the turnaround plan, the debt service capacity of the business, as well as the proposed restructuring plan, then the protective settlement procedure may be the more suitable procedure.
- From Deloitte's experience, the FRP is best suited for situations where the debtor still did not initiate (or is not yet in advanced stages of) the restructuring process in terms of developing a business plan and a corporate turnaround roadmap, engaging in restructuring discussions with creditors and understanding what potential restructuring options the creditors may accept. The Bankruptcy Law will allow the debtor in this case to leverage the expert support (Trustee, legal and restructuring advisors) and the protection mechanisms, such as the claim moratorium granted upon entering the FRP, to facilitate the implementation of a successful restructuring.
- For debtors looking to wind up their operations or for situations where corporate turnarounds are not viable, a liquidation procedure may be the more adequate in-court procedure.
- It is critical for a business to conduct a restructuring options assessment in advance to ensure the most appropriate option is pursued.

Key considerations and frequently asked questions

What is a claim moratorium, when is it put into effect and for how long?

- A claim moratorium, or suspension of claims refers to when creditors are prohibited from taking any legal action against the debtor or its assets, or otherwise taking any action with respect to enforcing any security. The court may suspend the claim moratorium for specific claims, in respect to which an action has been taken prior to the claim moratorium, if it is found that such an action will be in the interest of the debtor and the majority of creditors.
- The period for the claim moratorium from the date of commencement of the respective procedure is as follows:
  - **Under a PSP** – the claim moratorium is not automatic, the debtor must formally request one and obtain approval of the Trustee beforehand. The moratorium is valid for 90 days, extendable for an additional 30 days and that can be done more than once, on the condition that the total number of days does not exceed 180.
  - **Under a FRP** – the claim moratorium is automatic and valid for 180 days (or until ratification of the proposal; or termination of the procedure) and is extendable for an additional 180 days.
  - **Under a Liquidation** – the claim moratorium is valid until the end of the procedure.
- We understand there are conflicting legal opinions on whether the moratorium applies to unfunded debt facilities, as well as the ability of bond holders to call on the bond from the bank when the underlying debtor is protected by the claim moratorium. However, the prevailing view at the moment from our practical experience dealing with bankruptcy situations and from discussions with legal advisors is that the suspension of claims extends to performance bonds and guarantees.

How are the Directors liable under a bankruptcy proceeding?

- Directors and managers of the debtor can be held liable for failing to announce and take appropriate action in response to insolvency situations, including insolvent trading.
- Directors and managers may be held accountable for trading while insolvent and failing to comply with such obligations potentially exposes directors and managers to both civil and criminal liabilities.
- As per articles 200 and 203, the Bankruptcy Law penalises directors for maintaining their activities while knowing there is no possibility of avoiding liquidation, as well as for adopting arbitrary or negligent methods to avoid or delay the commencement of the liquidation procedure – with the penalties having a ceiling of SAR5,000,000 and imprisonment for a period not exceeding five years, in addition to the possibility of barring from managing any other for-profit organisation or being a part of its board of directors.

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Key considerations and frequently asked questions

What should the FRP or PSP proposal include?

- The key output comprises a restructuring proposal outlining the proposed turnaround and debt repayment plan in line with the debtor's forecast debt service capacity. The proposal would also need to take into consideration the timeline for putting into effect and implementing the turnaround plan, based on the debtor's historical performance and latest financial position, as well as prevailing macro-economic condition and market outlook.
- As a result and based on our experience, the restructuring proposal needs to be underpinned by a robust business plan that highlights the debtor's forecast cash generative ability in order to add credibility to the restructuring proposal and in order for the proposal to withstand scrutiny by the creditor group and the court.
- The Bankruptcy Law regulations outline a checklist of requirements that the proposal should include based on Article 16 of the Regulations governing the Bankruptcy Law and it mainly covers:
  - Information about the debtor and its activities;
  - A statement of the debtor's financial position and the impact of the economic situation thereon;
  - Identification of the debtor's assets and evaluation of the aggregate value thereof;
  - Any security provided by third parties for debts owed by the debtor and a description of said security provided by a related party;
  - A list of the claims and lawsuits filed by and against the debtor or any claims that are likely to be made and the estimated value thereof;
  - A list of debts owed by the debtor;
  - Details of any proposed settlement, including the restructuring of the debtor's business, activities, capital or debt, whether due or not, reduction, deferral, installment or conversion into capital;
  - Detailed data on any new financing the debtor desires to obtain and the manner by which to meet the obligations arising therefrom;
  - Classification of creditors, taking into account any criterion affecting said classification; and
  - The timetable for plan implementation.
- It is worth noting that the repayment plan which should be outlined in the proposal can extend to a number of years, which varies on a case by case basis and depending on the cash generative ability of the business.

When should a creditor committee be formed?

- The creditor committee can be formed at the discretion of the court, upon the request of the Trustee, or at the request of creditors whose claims represent at least 50% of the debtor's debts (subject to court approval).
- The role of the committee is particularly critical in cases where the debtor has a diversified creditor base with large exposures. In that case, having a centralised platform to discuss potential restructuring solutions and terms can help accelerate the process.
- Creditors are eligible to take part in the creditor committee on the condition that they have an admissible claim in the statement of claims and that the value of claim is not fully secured.
- From our experience and given the length of the claim review process in addition to the time required to issue a final statement of claims, the Trustee and the debtor may want to have separate or bilateral discussions with the creditors in order to progress the restructuring process prior to establishing a creditors' committee.
- The need for establishing a creditors' committee would then need to be assessed when legally and practically possible to establish it. This will depend on the stage of the negotiations process with the creditors and the legal timeline of the respective bankruptcy procedure.

Key considerations and frequently asked questions

How is the Companies Law's accumulated losses to share capital ratio requirement addressed under the Bankruptcy Law?

- Article 150 of the Companies Law states that if the accumulated losses of a company at any time during the fiscal year exceed 50% of its share capital, the company would then need to convene a general assembly within 45 days to assess its recapitalisation options.
- In the case of joint stock companies, if the general assembly fails within 90 days to address the issue, the company will then be dissolved through a liquidation.
- Practically, it might be difficult for a company to devise and execute a restructuring plan within this timeline in order to address this requirement, unless a simple cash raise or capital reduction solution could help address those requirements.
- However, often the required solution requires more complex restructuring options, such as a debt write off, a debt conversion or other options that require careful analysis and agreement with stakeholders. In such situations, this will require an extensive business planning and restructuring options considerations which would likely take more than 90 days to complete.
- As such, the Bankruptcy Law allows companies undergoing a procedure under the law to be exempt from article 150 of the Companies Law, thus providing the company sufficient time to develop and implement a suitable solution under the protection of the Bankruptcy Law.

What are the rules governing the voting procedures?

- If there are multiple creditors and there is a difference in the nature of their debts or their rights, the debtor must classify them into classes.
- The approval for each category is granted if approved by creditors whose claims represent two thirds of the value ofthe debt in that category, including creditors whose claims represent more than half of the non-related parties' debt.
- The proposal is deemed approved if (subject to court discretion):
  - All classes of creditors and owners approve the proposal; or
  - If it is approved by at least one class of creditors and the proposal is approved by creditors whose claims represent at least 50% of the total value of the claims of the creditors voting in all classes (applicable only to FRP).
  - Only creditors whose rights are affected by the proposal are allowed to vote.
- Under the FRP, only creditors who were approved by the Trustee and the court are allowed to vote (refer to creditor claims review process outlined in the below question).
- Creditors will vote in proportion to their total approved claim amounts, subsequent to which they will be classified within a certain creditor class. The claim reimbursement amount may then vary from the approved claim amount depending on what the claims of the creditor class has been categorized into dictates in terms of repayment terms.
- In a Liquidation however, any matter where a vote is deemed necessary by the Trustee, the approval of the majority of approved creditors is needed. There is no restructuring proposal to be voted upon, as opposed to FRP and PSP where a proposal should be submitted for voting.

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Key considerations and frequently asked questions

What are some of the key steps and requirements around creditor claims review?

- The Trustee will, within seven days of his appointment, publish the decision to commence the FRP and invite the creditors to submit their claims for review within a period not to exceed 90 days from the date of the announcement.
- All claims submitted by the creditors within this period are reviewed by the Trustee who would then issue a recommendation around the proportion of each claim that is either accepted, rejected, or referred to an expert.
- According to article 68 of the Bankruptcy Law, this review and approval/rejection decision is only for the purpose of voting on the proposal. However, based on our experience, we believe that the proposal should propose a plan to address all claims known to the debtor regardless of whether or not they were submitted within this period.
- The Trustee will submit the final list of claims to the court within 14 days (can be extended subject to court approval) of the expiration of the legal period previously announced and shall notify the creditors within five days of submitting the list.
- Claimants can object to the court against the decision of the Trustee. The court will then review the list submitted by the Trustee and any other objections made by the creditors and would issue a court order on the list of claims accepted for voting purposes.
- Following the issuance of the court order, creditors can still appeal the court decision within 14 days of court order issuance. Finally, if applicable, the appeal court will issue the final ruling with the list of claims which will be adopted as a basis on the voting day.
- It is worth noting that the final creditor claims list is issued for voting purposes only. It appears that creditors who disagree with the court's decision can subsequently legally pursue their claim value with the respective judiciary authorities, once the moratorium is lifted.

Who qualifies as a related party under the law and how do they impact the voting process?

- The definition of a Related Party should follow that outlined in the Bankruptcy Law as opposed to the financial reporting definition. Related Party is defined in the Bankruptcy Law as follows:
  - Debtor's manager, a member of its board of directors or the like, debtor's partner and owner, the relatives of the foregoing persons and of the debtor's up to the third degree;
  - Whoever has an employment relationship with the debtor;
  - A person who along with the debtor is controlled directly or indirectly by another person or persons holding over fifty percent of the capital of each of them;
  - The person directly or indirectly controlling the debtor and holding over fifty percent of the debtor's capital; and
  - The person directly or indirectly controlled by the debtor and holding over fifty percent of its capital.
- As such, the debtor and Trustee should consider if the related party classification is in compliance with the above criteria.
- Related Parties, like any other creditor, should submit their claims through the procedures outlined in the law and if their claims are approved by the Trustee and subsequently by the court, then they can be allowed to vote. However, as outlined in our answer to the rules of voting, the law specifies certain criteria for approving the proposal, whereby related parties will have a lower voting weight in each creditors' class.

Key considerations and frequently asked questions

Are shareholders/owners allowed to vote on the proposal?

- If the owners' rights are affected by any of the proposal terms, then the debtor is required to notify and invite the owners to a meeting to vote on the proposal.
- Such meeting is different from a typical general assembly meeting and is governed by the rules and regulations as outlined in the Bankruptcy Law.
- It is important to note that owners' meetings shall be quorate only when attended by owners representing at least one quarter of the company's capital.
- That being said, the creditors will vote on the proposal at their scheduled date, even if the owners voted against or were unable to vote on the proposal due to lack of required quorum.

Note: The above voting rules apply for Protective Settlement and FRP only.

Can a creditor enforcement any action over a secured asset?

- As per Article 20, during a moratorium, it is not permitted to take or complete any enforcement procedure over any bankruptcy assets provided as security interest, except with the consent of the court.

Key contacts

Our team has extensive practical experience in the Saudi Arabian Bankruptcy Law and is currently advising on a number of live bankruptcy cases acting as a Trustee and/or restructuring advisor. For any questions around this document or if you are seeking advice of any sort, on the back of a practical restructuring experience within the Bankruptcy Law, please feel free to reach out to any of the following key Deloitte contacts.

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