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Distinction between bankruptcy and insolvency in UAE legislation “Comparative analytical Study”

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Abstract

This research aims to study and analyze bankruptcy and insolvency under the UAE legislation as well as compare both of them in terms of definition and conditions to be followed in each, as well as effects of each; the researcher has relied on the analytical approach in order to analyze the legal texts and discuss them and the comparative approach by comparing the available laws creditor and debtor, via legislation strong protection of the rights of the former, and clear and transparent legal texts open the opportunity for the latter to regulate its financial affairs, and schedule its debts, providing an investment environment that investors do not hesitate to enter, and considered as one of the safe areas for investment without risk.

Introduction

Commercial transactions are based on trust and credit which distinguish them from civil transactions. Therefore, commercial law is keen to support credit by increasing guarantees of the commercial creditor and imposing strict penalties on those who violate such guarantees ⁽¹⁾ with the approval of bankruptcy as a system based on the liquidation of the money of the merchant who has stopped paying the collective liquidation and distributing the proceeds of this liquidation to the creditors, each in the proportion to his debt which in turn is different from civil transactions, because the general principles in the civil law require that when the debtor fails to pay his debts; creditors have nothing but to seize his money and offering it at public auction. The actions taken by the creditors are individual, as

1) Saadani, Noura (2015), What is the collective harm resulting from the bankruptcy of the debtor, *Al-Bahith Journal for Academic Studies*, Issue Six, Algeria, p. 133.

each one of them is free to take these measures and to choose which of the debtor's funds to be executed on; each person who took these measures pays his debts away from the rest of the creditors, because individuality is the principle in civil law by recognizing insolvency as a system aimed at preserving the general guarantee of the creditors and maintaining the debtor's financial liability. On the other hand, merchant of commercial life who stops paying one of his debts threatens the interests of all his creditors because the failure of the creditor merchant to obtain his debt on time leads to his inability to pay his debts to others, and thus causes a series of confusion for the rest of the merchants which will affect the safety of commercial transactions ⁽¹⁾.

The idea of bankruptcy appeared since ancient times, as it dates back to the Roman system which did not distinguish between commercial bankruptcy and civil insolvency. This system was known for its severity, torture to death, and cruelty upon treating debtor who stopped paying his due debts and looked to him as a criminal as if he had committed a crime that must be punished ⁽²⁾.

The legislation in organizing bankruptcy has differed according to different directions, and whatever the difference in the legislation, it is clear that they all agree in the main lines that clarify the features of bankruptcy; the most important of these features is the comprehensive seizure of the bankrupt's money and preventing him from disposing of it to the detriment of his creditors as well as liquidating his money collectively with the intention of dividing the resulting amounts between creditors by rivals ⁽³⁾

These legislations have organized bankruptcy in a precise and detailed way unlike civil insolvency which does not need regulation because trade is based on credit; so it must have strong guarantees and because these considerations do not exist in civil transactions with the power that it has in commercial dealings. Insolvent debtor is in a dire need for regulation of his insolvency in order to protect him and his creditors alike which in turn led with these legislations to separate the civil insolvency system from the commercial bankruptcy system and takes what is compatible with civil transactions. Thus, civil insolvency agrees with commercial bankruptcy in two matters ⁽⁴⁾; the two systems are two means of forcing the debtor to repay his debts as they aim to liquidate debtor's funds for distributing it to

1 Hatem, Baligh Abdel Nour (2011), The concept of stopping payment in the bankruptcy system, Damascus University Journal of Economics and Legal Sciences, Vol. 27, No. 1, p. 515.

2 Shboul, Omar Musa Ahmed (2015), The Effects of Bankruptcy Declaration on Creditors' Rights, Thesis submitted to complete master's degree in Private Law, Middle East University, College of Law, Department of Private Law, Jordan, p. 15.

3 Fahim, Rashid (2000), bankruptcy and its safeguards, Technical Office for Legal Publications, first edition, p. 84.

4 Saeed, Fahd Saeed Falah (2013-2014), Legal Regulation of Civil Insolvency, Thesis submitted as a supplement to obtaining a master's degree in Private Law, Middle East University, College of Law, Department of Private Law, Jordan, p. 31

creditors. Thus, we find that the insolvency system ensures protective protection for debtor and his creditors and makes the due equality between them as a reality. Therefore, UAE has been keen to adopt best practices and standards that attract investment, explaining that bankruptcy does not necessarily result from financial or administrative failure or corruption in the company as most cases of bankruptcy result from; market factors, supply and demand factors, high cost of production as well as imbalance in competition factors (Viktorovich & Dmitrievna, 2021).

Bankruptcy law, issued pursuant to Federal Decree No. (9) of 2016, is based on the best international practices as well as modern advanced legal and economic principles which distinguish it from the rest of the equivalent laws at the regional and global levels which in turn compatible with the state's legislative system. Importance of the law lies in meeting the government's ambitions to achieve the "UAE Vision 2021", and in being a necessity for the national economy due to its significant contribution in protecting the rights of all parties - creditors and debtors - and helping to provide good opportunities for the continuation of the businesses of companies that go through difficult financial conditions. The law also works to raise the level of credit and financial security by enhancing investor confidence and moving the wheel of the state's economy as well as encouraging capital owners who are looking for a safe investment climate by directing their investments to the country (Vasina, 2022).

On the same hand, insolvency law promulgated by Federal Decree No. (19) of 2019 came to confirm the leading position of the state, as there is scarcely independent legislation that addresses the issue of the insolvency of a natural person through specialized independent legislation ^(.1)

Problem statement and objectives

Research problem is to understand relationship between bankruptcy and insolvency in the UAE legislation and how to distinguish between them as well as to show the effects of each on the debtor and creditors alike. Therefore, the research aims as follows.

- 1- Showing general provisions related to bankruptcy and insolvency in UAE legislation.
- 2- Reviewing legal texts related to bankruptcy and insolvency as well as analyzing and comparing them in addition to studying their effects on creditors through practical application of these texts.
- 3- Clarify granted powers and supervisory role that creditors can exercise over debtor's business and funds.

Importance of study

1 Amal Al-Minshawi and Omar Al-Ezaby (2019), UAE enters 2020 with two laws protecting investors and individuals, an article published on Emirates Today website on December 22, 2019; <https://www.emaratayoum.com/business/local/2019-12-22-1.1286978>. Last visit date is 11/17/2021.

Importance of this study stems from importance of its new and vital topic which is distinguishing bankruptcy from insolvency in the UAE legislation. Importance of the study can be divided into theoretical and practical importance, as follows:

- 1) Theoretical importance:** importance of the research lies in texts importance included in bankruptcy and insolvency laws that carry comprehensive protection for creditors and help provide good opportunities for the continuation of the businesses of companies that are going through difficult financial conditions. It also works to raise the level of credit and financial security by enhancing investor confidence, moving the wheel of the state's economy, and encouraging capital owners who are looking for safe investment climate by directing their investments to the state.
- 2) Applied importance,** which will be represented into the final results of the study in addition to the suggested recommendations that can be used to educate individuals and traders about advantages of these laws which would protect them from the collapse of their businesses.

Boundaries of the study

1. **Spatial boundary:** the study is limited to the spatial boundary of UAE and laws related to insolvency and bankruptcy in UAE law.
2. **Time boundary:** the study was conducted in 2021 but it discussed the legislative conditions prior to that data as well as jurisprudence related to the issue of distinguishing bankruptcy from insolvency in the UAE legislation.
 - a. **Terminologies**
3. **Insolvency;** facing current or expected financial difficulties that make the debtor unable to settle his debts ⁽¹⁾.
4. **Legal insolvency;** legal situation arising from debtor's outstanding debts exceeding his rights and it must be declared under court rulings that render debtor in state of insolvency ⁽²⁾.
5. **Actual insolvency;** legal situation arising from exceeding or equalizing debtor's due and non-due debts. In other words, actual insolvency has a civil law concept of excess or equality ⁽³⁾.
6. **Bankruptcy:** legal system that applies only to merchants, where every merchant stops paying his commercial debts - in case of bankruptcy - and every merchant does not support financial confidence in him except by means that clearly appear to be illegal ⁽⁴⁾.

1 See article 1 of the UAE Insolvency Law No. (19) of 2019

2 Al-Sanhoury, Abdel-Razzaq (no publication). AL Waseet in Explaining the New Civil Law (2), Commitment Theory in General. Evidence, Effects of Commitment, Arab Heritage Revival House, Beirut, p. 1130

3 Al-Sanhoury, Abdel-Razzaq. Previous reference, 1130.

4 Rizk, Tariq Abdel-Raouf (2012). Kuwaiti Trade Law No. (68) for the year 1980 and its amendments,

7. **Interdiction;** legal system refers that insolvent debtor shall be restrained from disposing of his money by court ruling when his due debts exceed his money based on request submitted by the debtor or by the creditor (.¹)

Methodology

Two of scientific research methodologies will be applied along this study, namely.

1. Analytical method in order to analyze and discuss legal texts.
2. Comparative approach in order to comparing available laws as well as the jurisprudential opinions on the subject of the research as well as identifying the strengths and weaknesses in addition to providing available recommendations regarding them.

Outline

In order to understand the topic of the research, it was divided into two sections as follows:

1. **First topic;** distinguishing bankruptcy from insolvency in terms of general provisions.
 - 1.1 **First section;** distinguish bankruptcy from insolvency in terms of definition.
 - 1.2 **Second section;** distinguish bankruptcy from insolvency in terms of conditions.
2. **Second topic;** distinguishing bankruptcy from insolvency in terms of effects.
 - 1.1 **First section;** effects of bankruptcy on debtor and creditors.
 - 1.2 **Second section;** effects of insolvency on debtor and creditors.

First topic: Distinguishing bankruptcy from insolvency in terms of general provisions.

Preamble

Civil transactions are subject to the insolvency declaration system which is consistent with the system of these transactions, where the debtor may be declared insolvent if his funds are not sufficient to pay his due debts. The debtor who defaulted on payment was alerted to a final judgment according to which he takes enforcement measures on the debtor's funds as specified by law. In addition to this system, there is a system for merchants who have stopped paying their commercial debts which is called the bankruptcy declaration system where the merchant who stops paying his commercial debts is subject to the bankruptcy declaration system.

Book Foundation House, Kuwait, first edition, p. 83.

1 Al-Jubouri, Yassin Muhammad (2003), Al-Wajeez in Explanation of the Jordanian Civil Law, Part Two, Provisions of Commitment, Scientific House for Publishing and Distribution, Amman, Jordan, first edition, p. 366.

Debtor is treated harshly and keeps his hand from managing his money; also, agent is appointed by the judicial administrator to manage the money as a representative of the bankrupt and the creditors. Despite the difference between bankruptcy and insolvency, both systems seek to compel the debtor to pay and aim to liquidate the debtor's money for distribution to creditors.

Addressing the subject of bankruptcy and insolvency requires that we cover these two systems from all sides and address the distinction between them in terms of general provisions of definition and characteristics as well as in terms of conditions, through two requirements as follows.

- **First section;** distinguish bankruptcy from insolvency in terms of definition.
- **Second section;** distinguish bankruptcy from insolvency in terms of conditions.

1.1 First section; distinguish bankruptcy from insolvency in terms of definition

Preamble

Credit is the essence and pillar of commercial life; the basis of commercial transactions is trust which requires provision of legal means and rules that strengthen and maintain them in the best position. The best strengthening of commercial credit is the bankruptcy system ⁽¹⁾ while the best means is the insolvency system for civil transactions. We have dedicated this section to distinguish between bankruptcy and insolvency in terms of definition through two sections; we have dedicated the first one to define bankruptcy while the second one to define insolvency.

Section one: bankruptcy definition

The bankruptcy system is one of the old emerging systems and is unique from other systems in several areas. To clarify the meaning of bankruptcy, it is necessary to address the linguistic and legal meanings of bankruptcy.

1) Linguistic meaning of bankruptcy

Bankruptcy in the language is from the verb bankrupt, which means that the person became bankrupt with no money left ⁽²⁾, and this means that he has become in a state where it is said that he does not have any money ⁽³⁾.

The word bankruptcy in the language also means moving from ease to hardship as is derived from the word bankrupt - being without money ⁽⁴⁾ -, so he is

1 Hammo, Nusaiba Ibrahim (2008), Protection of Trade Credit between Civil Insolvency and Commercial Bankruptcy, Al-Rafidain Journal of Law, College of Law, University of Mosul, Iraq, No. 37, pp. 1-2.

2 Al-Bustani, Fouad Avram (1974), Upholstered Students, 17th Edition Dar Al-Mashreq, Lebanon, pp. 560-561.

3) Abadi, Majd al-Din al-Fayrouz (2008), The Ocean Dictionary, Dar al-Hadith, Cairo, p. 1263.

4 Al-Amin, Samir (2005), Encyclopedia of bankruptcy according to the new commercial law, Fifth Edition, Dar Al-Kitab Al-Dhahabi, Egypt, p. 9.

bankrupt which is derived from the Greek language, meaning monetary currency⁽¹⁾. This linguistic meaning of bankruptcy means that bankruptcy is a condition that results in merchant's inability for paying his debts⁽²⁾.

2) Idiomatic meaning of bankruptcy

General definition of bankruptcy in commercial law refers to disorder in financial conditions of the merchant, where he is not able to meet his financial obligations towards his creditors⁽³⁾ and stops paying his debts. Bankruptcy may happen to individual merchant as well as commercial company at the same time due to the legal personality of such companies who are legally considered in commercial dealings and subject to what applies to merchant in business⁽⁴⁾.

In companies, bankruptcy occurs by borrowing due to the lack of sufficient liquidity with the possibility of paying these obligations on time when the stage of reaping the returns begins, but when the expected return is not sufficient to cover the company's obligations, the company is forced to liquidate some of its properties to pay those obligations. In case that these properties are not enough, the company then declares its bankruptcy, liquidating the bankrupt's funds collectively, selling it and distributing its proceeds to his creditors according to the percentage of the debt; the bankrupt's money is divided among creditors⁽⁵⁾.

The bankruptcy in the system is divided into three types: real bankruptcy, default bankruptcy and fraudulent bankruptcy.

1) **Real bankruptcy:** a case of commercial bankruptcy that is related to economic condition of the merchant because of a group of factors that affect it negatively, especially those related to the economic situation in the market in which it is located. Examples of these factors are; economic depression which leads to accumulation of goods, and merchant's inability to sell goods which results in a percentage decrease of profits; such inability to pay debts to creditors, results in creating bankruptcy, liquidate his accounts, and his property in order to pay off his debts⁽⁶⁾.

2) **Dereliction bankruptcy;** it's bankruptcy that results from a set of mistakes committed by the merchant, such as; increase in personal and family spending rates at the expense of other obligations or using that money in possession of stock exchange or buy bonds thus shortening to return that money to its owners due to his loss in the stock exchange or bonds; this behavior is legally

1 Manzlaoui, Abbas Helmy (1999), bankruptcy and judicial settlement, Diwan of University Press, Algeria, p. 6.

2 Iskandar, Ait Elias; Shaaban Abdel-Aty Mohsen Ahmed Abdel-Rahman (1999), Dictionary of Law, General Authority for Amiri Press Affairs, Cairo, p. 54

3 MARGARET Tanger, la faillite en droit fédéral des état- unis, ECONOMICA, Paris, 2002, p.1.

4 bankrupt", Cambridge, Retrieved 8-9-2018.

5 Bahnasawy, Safwat (2003), bankruptcy according to the provisions of the new trade law, Arab Renaissance House, Egypt, p. 1.

6 Jacob Silverman, Ed Grabianowski, "How Bankruptcy Works" How Stuff Works, Retrieved 8-9-2018

classified as a legal misdemeanor punishable by law.

3) Fraudulent bankruptcy; the merchant does not consider as bankrupt in this type because he distributes his assets to others which in turn consider him as a fraud as he uses various tricks and intrigues in his capital or enters extra debts on him in the name of someone else in a false way within his books or issues bonds to others by way of transferring the property or concealing something of his money as well as engaging in trade by means of camouflaging, fraud, negligence of merchants in any way whatsoever. Whether this merchant was a wasteful or not or he had no books; he demolish the rights of other people in that way, so he is a fraud.

Section two: insolvency definition

The general principles of civil law are limited to the fact that when the debtor fails to pay his debts; the creditor has to seize his money and fulfill the due rights; these actions taken by creditors are characterized by individuality and take place under an independent and existing insolvency system.

1. Linguistic meaning of insolvency

It came in the definition of insolvency, which is hardship and its opposite is ease referring to the matter of difficulty and hard-earned ⁽¹⁾. Thus, the linguistic meaning of insolvency means the condition of the debtor other than the merchant who cannot meet his debts ⁽²⁾

2. Legal meaning of insolvency

UAE legislator defined insolvency in Article 1 of the Insolvency Law No 9 of 2019 as; "facing current or expected financial difficulties that leave the debtor unable to settle his debts".

Dr. Abdul Razzaq Al-Sanhouri divided insolvency into; a) legal insolvency which is organized civil insolvency and b) actual insolvency. He defined actual insolvency as realistic situation that arises from increase in debtor's debts even if it's not due for payment on his debts. While legal insolvency refers to the legal situation that arises from the debtor's outstanding debts exceeding his debts and it must be declared by a court ruling that leaves the debtor in a state of insolvency ⁽³⁾.

Second section; distinguish bankruptcy from insolvency in terms of conditions

1) Al-Razi, Muhammad bin Abi Bakr bin Abdul Qadir (2005), Mukhtar Al-Sahah, 9th edition, Dar Ammar, Amman, p. 21.

2) Iskandar, Ait Elias; Shaaban Abdel Atti Mohsen Ahmed Abdel Rahman, previous reference, p. 52.

3) Al-Sanhoury, Abdel Razek (1997), Sources of Truth in Islamic Jurisprudence - A Comparative Study in Western Jurisprudence, Arab Heritage Revival House, Fifth Edition, p. 27.

Preamble

Declaration of both bankruptcy and insolvency requires a set of conditions which will be addressed in this section using two branches; first branch is for the terms of bankruptcy and second branch is for the conditions of insolvency.

First branch: terms of bankruptcy

Bankruptcy system verifies several conditions that are divided into; 1) objective conditions including fulfills status of merchant and stops paying debts and 2) formal conditions including issuance of bankruptcy ruling by competent judicial authority. All these conditions will be discussed in detail as follows.

1) Bankruptcy objective conditions

Article 2 of UAE bankruptcy Law No. 9 of 2016 ⁽¹⁾ states that: "provisions of this law shall apply to any person who enjoys status of merchant in accordance with provisions of this law". Also, article 68 of the same law states that: "debtor must submit a request for the court to open procedures in accordance with the provisions of this chapter, if he stops paying debts on their due dates for a period exceeding 30 consecutive working days as a result of his financial position disorder or if he is in a state of debt liability ⁽²⁾.

Proceeding from the texts of these articles; it's clear that the objective conditions for bankruptcy are realization of the merchant character and the condition of stopping the payment of debts.

1. Realization of merchant character

Bankruptcy in ancient times -especially in Roman era- was applied to every person who stopped paying his debts whether he was a merchant or not. However, over time this idea was abandoned, and bankruptcy was applied only to a certain group of society referring to merchants specifically whether they were natural or moral people who engage in various commercial businesses; thus, everyone who conducts business in a professional manner acquires the status of a merchant ⁽³⁾.

UAE legislator defined character of merchant in the 2nd chapter of the UAE commercial transactions law (Commercial Law) of Law No. 18 of 1993 ⁽⁴⁾ as; "everyone who works in his name and for his own account in commercial business upon possession of due eligibility when he takes this business as his trade as well as every company that conducts commercial activity or take one of the forms stipulated in the commercial companies law even if that activity is a civil activity.

1) 4th paragraph of article 2 of UAE bankruptcy Law No. (9) of 2016

2) 1st paragraph of article 68 of UAE bankruptcy Law No. (9) of 2016

3) Faudel, Nadia (1999), Algerian commercial law: business, merchant, commercial shop, 3rd edition, Diwan of University Publications, Algeria, p. 122

4) Article 11 of the UAE Commercial Transactions Law (Commercial Law) No. 18 of 1993

Also, legislator described the merchant in articles 12 and 13 of the same law as: "whoever announces to the public in any way about his place of commercial foundation is considered a trader, even if he does not take trade as his usual profession; UAE legislator added that the character of the merchant is established for anyone who trades under a pseudonym or was hidden behind another person, in addition to establishing it for the apparent person ⁽¹⁾.

2. Stopping the payment of debts

According to the traditional theory, the ease or difficulty of the debtor has nothing to do with the issue of stopping payment. Once the debts are not paid on time, the debtor will be in a state of stopping payment. This theory was based on the general principles underlying commercial transactions, especially credit and speed ⁽²⁾. Every delay in paying debts leads to a weakening of credit as well as emergence of serial cases of nonpayment resulting from the original situation, and this negatively affects the economy.

2) Bankruptcy formal conditions

It refers to issuance of bankruptcy ruling by competent judicial authority, where UAE legislator stipulated the ruling on bankruptcy and liquidation in article 124 of chapter 12 of UAE commercial transactions law referring that: "the court issues a ruling declaring the debtor's bankrupt and liquidating his money in any of the following cases.

- 1- If the court decides to terminate protective composition procedures in accordance with provisions of Article 64 of this law.
- 2- If the debtor is the applicant and acted in bad faith or if that application was intended to delay or evade financial obligations ⁽³⁾.

Second branch: terms of insolvency

The declaration of insolvency is one of the means authorized by the civil law for the creditor to ensure the debtor's implementation of his commitments and be able to avoid his harmful actions because it takes the interests of the debtor into account, so he does not declare his insolvency as soon as he stops paying his debts - as he need to have negative financial liability -. He is no longer attached to the insolvency description just because he has increased his debt over his money, rather it is required that his money is not sufficient to meet the due debts in addition to submitting an insolvency request to the competent court. In order to clarify the

1) Articles 12 and 13 of the UAE Commercial Transactions Law (Commercial Law) No. 18 of 1993

2) Saad, Sherif Makram Awad (no date), the concept of stopping payment and its impact on the rights of bankrupt creditors, comparative study between Egyptian and English laws (thesis for obtaining doctorate in law), Cairo University, Faculty of Law, p. 9

3) Article 124 of the UAE Commercial Transactions Law (Commercial Law) No. 18 of 1993

conditions of insolvency, we will deal with the substantive and formal conditions as follows.

1) Substantive conditions

Commercial transactions are based on removing merchants who have stopped paying their debts from the commercial environment for making them conduct honestly so that confidence prevails in the commercial transactions and creditors are assured of their rights. As for civil transactions, a moderate system is established that achieves some of the advantages of commercial bankruptcy system without reaching its severity which was justified by the conditions of trade and the necessity of providing complete confidence among merchants ⁽¹⁾.

Declaration of insolvency requires some specific substantive conditions to be available as conditions that must be met in the category of non-trading persons to reach the state of civil insolvency. Among those conditions are the following.

1) Debtor's funds are insufficient to pay his outstanding debts

Message behind this condition is the payable debts -without deferred debts- as it's not required to increase positive side but it's sufficient that amount of his money is less than certain part of his total debts which are the payable debts. When debtor's debts become due for payment ⁽²⁾ and is more than all his money; he will be insolvent and will be subject to insolvency. It's not enough that his money is not sufficient to pay his due and unearned debts, but his money is not sufficient to pay his due debts only; then the creditor has the right to apply to the court for insolvency declaration when other conditions are met.

Insolvency is a condition for creditor to use rights of his debtor through the indirect lawsuit and whose basic idea is determined by the existence of a legitimate interest for the creditor and the existence of a right for him ⁽³⁾. The indirect lawsuit is considered one of the lawsuits that prove to the creditor aiming to maintain the general guarantee. According to that, creditor has the right to use the rights of debtor that he did not use; debtor may abandon and neglect his rights deliberately rather than preserve them if he feels that his financial situation has deteriorated and that his creditors will enforce his money. Therefore, the law authorized creditor to use the rights that the debtor failed to use.

The use of the indirect lawsuit requires some conditions, including what is related to the right of the creditor as it is required that his right to be fixed, verified, and undisputed because if it is disputed, the creditor may not file an indirect action and its use is not required to be due for payment. Also, the right of the creditor is

1) Al-Sanhoury, Abdel-Razzaq Ahmed (1998), *Al Waseet in Explanation of the New Civil Law*, 3rd Edition, Al-Halabi Publications, Lebanon, p. 73.

2) Faraj, Tawfiq Hassan (2008), *Mustafa Al-Jammal, Sources and Provisions of Commitment*, Al-Halabi Human Rights Publications, Lebanon, p. 81.

3) Al-Sanhoury, Abdel-Razzaq Ahmed (1998), previous reference, p. 75.

not required to be of a known amount. On the other hand, there are some other conditions that belong to the debtor which must be met in order for the creditor to have an interest in filing the indirect action which is that the debtor does not use his rights and that failure to use them causes insolvency or increases insolvency⁽¹⁾.

Thus, the general guarantee will be weakened, and the creditors may be harmed so that they have an interest in filing lawsuit as well as creditor's inclusion of the debtor in the indirect lawsuit and considering him as a litigant in it. There are other conditions that refer to the right that the creditor uses in the name of his debtor which is that the debtor's right is not related to his person as it is not permissible for the creditor to use the debtor's right as well as the debtor's financial rights related to his person. The right of the debtor must also be subject to attachment because the goal of the indirect lawsuit is to maintain the general guarantee and also the creditor - who uses the rights of his debtor - does not acquire any right to advance or privilege over the money he obtains on behalf of his debtor but rather it is included in the debtor's financial liability. Also, insolvency is a condition for the creditor to challenge the actions of a debtor that he performs to detriment him in the policy case which is the lawsuit brought by the creditor to challenge the actions of his debtor so that they do not apply to him because the debtor may take some actions that would harm his creditors so as to affect the general guarantee due to his poor conditions as he sells his apparent money to hide its real price from creditors or harm them by selling his money or donating it to one of his relatives or friends or he prefers one of his creditors and pays his full debts and takes him out of the division of the creditors⁽²⁾ which he must share with all other creditors. In such cases, the law provided protection for the creditors from the harmful actions of their debtor by enabling them to file a policy claim requesting the non-enforcement of the actions issued by the debtor that harm them.

In this regard, UAE legislator approved article 12 of UAE insolvency law No. 19 of 2019 which states that: "the court shall decide not to complete procedures for settling financial obligations and reject the settlement request of financial obligations in the following cases":

- If it's proven to the court that the debtor has taken or refrained from taking any action with intent of concealing or destroying his money.
- If debtor submits false statements about his debts, rights or money.
- If debtor has stopped paying any of his debts on their due dates for period exceeding 50 consecutive working days as a result of his inability to meet these debts.

2) Obligation to file insolvency application to competent court

1) Saeed, Fahd Saeed (2013-2014), *The Legal Regulation of Civil Insolvency*, previous reference, pp. 56-75.

2) Faraj, Tawfiq Hassan (2008), *Sources and provisions of obligation*, previous source, p. 82.

To declare insolvency; the debtor or one of his creditors shall request the insolvency declaration of the debtor from the court and the court shall not declare the insolvency on its own. Also, public prosecution office may not require insolvency as in commercial bankruptcy because the debtor may have an interest in requesting the declaration of his insolvency in order to benefit from the advantages provided by that insolvency system, such as the easy outlook of performance for current debts, the extension of the term of non-performing debts as well as obtaining some expense deducted from his revenues. However, it's common for one of debtor's creditors to request declaring his insolvency and creditor's interest is achieved in that if the debtor fears that he will resort to squandering and concealing funds ⁽¹⁾.

2) Formal conditions

In order to establish insolvency, a lawsuit must be filed in this regard and a judgment is decided to declare insolvency. The judgment of insolvency is issued at the request of one of the creditors or at the request of the debtor himself. The court -before declaring debtor's insolvency- must take all surrounding circumstances into consideration upon assessment whether they are public or private circumstances; it looks at his future resources, personal ability, responsibility for causes that led to his insolvency, and interests of his creditors as well as every circumstance that would affect his financial condition.

1. Responsibility to file insolvency lawsuit

Insolvency is a method that creditors may resort to obtain protection whether in relation to debtor's disposal of his money or by preventing creditors from competing to gain advantages of their rights. Declaration of insolvency must be requested by debtor or one of creditors, but the court may not declare insolvency on its own or even public prosecution as in the case of commercial bankruptcy in which public prosecution may request bankruptcy of merchant debtor and the court may declare merchant bankrupt on its own. This isn't permissible for civil insolvency, provided that declaration of insolvency is at the request of debtor himself or one of his creditors ⁽²⁾.

Insolvency declaration upon the request of debtor

The debtor has some interests in declaring his insolvency as he is the only person who knows about his real financial condition and appreciates the disturbance that has befallen him. Hence, he may request to declare himself insolvency in order to benefit from the advantages that the insolvency system provides him with, such as the judge's assessment of all the circumstances

1) Khalil, Ahmed Mahmoud (no date), commercial bankruptcy and civil insolvency, Mansha'at al-Maaref, Alexandria, p. 1

2) Khalil, Ahmed Mahmoud (previous reference), p. 17

surrounding him, whether public or private circumstances ⁽¹⁾.

The UAE legislator stipulated this condition in article 28 of the insolvency law, where its first paragraph states that: "the debtor shall submit to the court a request to open his insolvency procedures and liquidate his money in case he stops paying any of his debts on their due dates for a period exceeding 50 consecutive working days as a result of his inability to meet these debts." ⁽²⁾.

a) Insolvency declaration upon the request of one of the creditors

The request for insolvency declaration is most often submitted by the creditor as he may fear that the debtor will squander his money or dispose of it in recognition of the creditors' rights, so he will turn away from such actions.

UAE legislator has clearly clarified this condition in article 29 of the UAE insolvency law, where its first paragraph states that: "any debtor's creditor or group of creditors for an amount of no less than 200,000 AED shall apply to the court to open the debtor's insolvency procedures and liquidate his money". According to provisions of this article, if the creditor had previously excused the debtor to pay due debt and that debtor didn't take any initiative to pay it within 50 consecutive working days from the date of being notified." ⁽³⁾

2. Competent court for insolvency declaration

Insolvency declaration request is submitted to the court to issue a judgment declaring debtor's insolvency whether that request is from one of the creditors or from the debtor himself. In order to know the competent court of insolvency, specific and regional jurisdiction must be addressed as follows:

▪ **Specific jurisdiction**

It means jurisdiction of the judicial authority to consider a specific type of case. Referring to the first article of the UAE insolvency law, we find that it referred to the competent court in accordance with the rules of jurisdiction contained in Federal Law No. 11 of 1992. Also, by reviewing article 25 of the same law, we find that it states that; "courts of first instance shall have jurisdiction over civil, commercial, administrative, labor and personal status disputes with the exception of disputes in which the Federation is a party because the federal courts are the competent to hear them" ⁽⁴⁾.

From the text of the previous article, we can conclude that the court of First Instance is competent to consider all individual and commercial cases and the UAE

1) Maher, Mahmoud Saad (1996), Claims for the Protection of the General Security of Creditors, 1st Edition, Egypt, pp. 229-230

2) Article 28 of the UAE insolvency law, previous reference

3) Article 29 of the UAE insolvency law, previous reference

4) Article 25 of the Federal Law No. 11 of 1992 regarding the issuance of Civil Procedures Law, the last amendment to the text of the article was on 11-30-2014

legislator did not address the designation of a court with jurisdiction over insolvency issues.

- **Regional jurisdiction**

The court with regional jurisdiction for insolvency is the court to which the debtor's domicile belongs ⁽¹⁾ which is the same thing that came in article 31 of Federal Law No. 11 of 1992, where it stated that: "jurisdiction shall be with the court in which the defendant's domicile is located, unless the law provides otherwise. If the defendant does not have a domicile in the state, the jurisdiction shall be with the court in whose his residence or place of work is located."

Second topic; distinguishing bankruptcy from insolvency in terms of effects

Preamble

The judgment to bankruptcy declaration has some consequences for the bankrupt and for the creditors at the same time. The same is true with regard to insolvency declaration, as it produces some effects that are reflected on the debtor and others on creditors. In addition to such effects, bankruptcy and insolvency have different expiration methods. As for bankruptcy, we find that it ends either through judicial composition or through the merger of creditors while insolvency ends with two different methods either by court order or by force of law. This is what will be address during the following two sections as follows.

- **First section;** effects of bankruptcy on debtor and creditors.
- **Second section;** effects of insolvency on debtor and creditors.

First section; effects of bankruptcy on debtor and creditors.

The issuance of bankruptcy judgment has several consequences for the bankrupt whether on his responsibility or on his person before and after the issuance of the judgment. It also has other implications for the creditors by forming the merger of creditors as they are unable to practice unilateral procedures as well as the terms of debts are also forfeited in addition to mortgaging the debtor's funds for the benefit of the group of creditors.

1- Bankruptcy effects for the debtor

In addition to the effects that fall on the debtor after the bankruptcy declaration judgment, there are effects related to it before the judgment is issued.

- **Bankruptcy effects for debtor before the judgment**

The period between the date set by the court for the debtor inability to pay his debts and the date of the issuance of the bankruptcy judgment. This period is called the period of uncertainty because the debtor's business is turbulent and his

1) Khalil, Ahmed Mahmoud, previous reference, pp. 17-18.

actions may also prejudice the rights of the group of creditors ⁽¹⁾; these effects are represented in: the non-obligatory enforcement and non-permissibility enforcement of the bankrupt's actions on the group of creditors.

- **Non-obligatory enforcement:** it means the judgment that the court must pass when its conditions are met without the court having a discretionary authority in that.

Dispositions subject to non-obligatory enforcement are provided expressly in article 168 of the UAE bankruptcy law in its first paragraph where it states that: "it is not permissible to hold to the following actions against creditors if the debtor performs them during a period of two years prior to the date of opening the procedures, this is unless the court agrees to enforce these actions in consideration of the public interest or third parties in good faith as the following;

1. Donations, gifts, or transactions which are free of charge except for small gifts according to custom.
2. Any transactions in which debtor's obligations significantly exceed counterparty's obligations whether obligations are in cash or goods.
3. Pay off debts before they become due regardless payment method.
4. Paying payable debts in some-way other than what has been agreed upon between debtor and creditor or in different way from that which is usually followed for payment of this type of debt. Fulfillment is by way of commercial paper or bank transfer as a payment method.
5. Arranging any kind of new guarantee on his money to ensure payment of previous debt.
6. **Non-permissibility enforcement:** it means the judgment in which the court has the discretionary power to rule on it or reject it even if its conditions are met.

Article 168 in its second paragraph states that: "the court may rule that any of the dispositions not mentioned in first paragraph of this article shall not be enforceable, if such disposition is harmful to the creditors and the contracting party was aware or should have known upon acting that the debtor is in a state of non-payment or in a debtor state.

▪ **Bankruptcy effects for debtor after the judgment**

Bankruptcy system aims to collectively implement the money of the bankrupt debtor and prevent him from harming the rights of his creditors. Therefore, the legislator has arranged some effects for the issuance of the bankruptcy publicity ruling whether these effects are related to the debtor's liability from preventing his hand from managing his money or disposing of it or what is related to his person from the loss of some of his political and civil rights.

1) Bahnasawy, Safwat (2003), bankruptcy according to the provisions of the new trade law, previous reference, p. 154.

1. Restraining the bankrupt debtor

Restriction of debtor's hand from managing and disposing of his funds is done as soon as the bankruptcy declaration ruling is issued, as this restriction is enforced by the force of law ⁽¹⁾. Article 157 of the UAE bankruptcy law stipulates in its first paragraph that: "debtor is prohibited - from the date of the decision to open the procedures - to do any of the following actions; a) managing his money or paying any claims that arose prior to the issuance of the opening decision with the exception of any clearing payments made in accordance with the provisions of chapter five of this decree, b) dispose any of his funds, pay, or borrow any amounts unless this is in accordance with the provisions of this law because any actions on the day of the procedures decision shall be considered as taken after its issuance, c) if the disposition is not implemented against third parties except by registration or other procedures; it shall not apply to creditors unless the procedure was carried out before issuance of the decision to open procedures, d) disposition of company's shares or change in ownership or legal form if the debtor is a legal person.

It appears from this that legislator intended to restrain bankrupt debtor from both management and disposal aiming to protect creditors from debtor's tampering as well as establishing equality between them.

Also, money and rights -considered as assets- include all debtor's present and future money as guarantor for the payment of his debts ⁽²⁾ so that he cannot harm the group of creditors ⁽³⁾.

It appears that the restraint of debtor's hand includes all funds of any nature - whether transferable money or real estate - as there is no difference in the transferable of being tangible or intangible such as commercial store or trademark ⁽⁴⁾. Also, restricting debtor's hand include all the money that goes to the bankrupt after declaring his bankruptcy through inheritance or will because it is included in the bankruptcy funds on the basis that there is no legacy until after the debts are paid ⁽⁵⁾. However, an exception was made where there are funds and rights that are not covered by restraining because they are not owned by the bankrupt himself or due to the nature of the bankruptcy system which is comprehensive seizure of the bankrupt's money or to preserve the alimony resource for the bankrupt and his family ⁽⁶⁾.

1) Barbari, Mahmoud Mukhtar Ahmed (2008), Commercial Transactions Law and bankruptcy, Arab Renaissance House, Egypt, p. 128.

2) Al-Baroudi Ali: Fiqh, Muhammad Al-Sayed (2006), Commercial Law, (Business, Merchants, Commercial Funds, Commercial Companies, Bank Operations and Commercial Papers), University Press, Alexandria, p. 84.

3) Mahrez, Ahmed (2001), Commercial Contracts and bankruptcy, Cairo, p. 77

4) Al-Qalyubi, Samiha (2003), Summary in the Judgments of Bankruptcy, 1st Edition, Dar Al-Nahda Al-Arabiya, Cairo, p. 100.

5) Taha, Mustafa Kamal (2006), The origins of commercial law, commercial papers and bankruptcy, 1st edition, Al-Halabi Legal Publications, Lebanon, p. 597.

6) Naim, Fayez Radwan (1999), commercial bankruptcy, 2nd edition, Dar Al-Nahda Al-Arabiya, Egypt,

2. Loss of some political and civil rights

The legislator was not satisfied with punishing the bankrupt who had gone bankrupt by negligence or fraud, but also decided the forfeiture of some political and civil rights. If the bankrupt person is well-meaning and unlucky at the same time; legislator decides to forfeit these rights as soon as bankruptcy is declared even if it is not limited to fraud ⁽¹⁾.

2- Bankruptcy effects for creditors

Effects of bankruptcy do not remain confined to the debtor only, but they are extending to the creditors by forming a group of creditors where they are forbidden to initiate unilateral lawsuits and procedures as well as the termination of debts and the mortgage of the debtor's funds for the benefit of the group of creditors.

▪ Definition of the group of creditors

It's the group that is established by force of law as soon as a judgment declaring the debtor's bankruptcy is issued which is supervised by the judicial agent ⁽²⁾. It also means the total creditors who trusted the person of debtor and not his money and joined a group to achieve equality between them by liquidating the money of the bankrupt collectively as well as distribute that money to the creditors each according to his share of debt ⁽³⁾.

3. Cessation of unilateral lawsuits and actions

Legislator's goal in setting this rule is to regulate the liquidation of the debtor's funds and achieve the principle of equality in the treatment of creditors as well as the distribution of assets among them without competition ⁽⁴⁾. Also, the legislator wanted to put the bankruptcy operations in the hands of the judicial managing agent so that creditors would not race towards implementation over the money of the bankrupt debtor which make some of them take precedence over others unjustly. With the issuance of bankruptcy ruling, there is no way for the creditors to obtain their rights except to advance them in bankruptcy ⁽⁵⁾.

p. 128.

1) Saeed Youssef Al-Bustani, Provisions of bankruptcy and protective peace, Al-Halabi legal Publications, Lebanon, 2007, p. 150.

2) Belloula. Tayeb, Droit des société, 2eme Edition BERTI, Alger, 2009, P.27

3) Bou Siraj, Zahra (2010), the effects of bankruptcy declaration on the group of creditors, 1st ed., d. Dr. N, Algeria, p. 4

4) Ma'achi, Samira (2004/2005), the effects of bankruptcy ruling for creditors, memorandum for obtaining a master's degree in law and political science, Colonel Hajj Lakhdar University, Batna, p. 3

5) Mahrez, Ahmed (2001), Commercial Contracts, previous reference, p. 82.

4. Forfeiture of debt

It's the effect that results from the loss of confidence in non-payment, due to the absence of what was the condition of fulfillment which in turn is done by the force of the law without a claim or procedures for that ⁽¹⁾. Legislator's purpose of issuing bankruptcy ruling is mainly aimed at a collective liquidation of the debtor's debts; this liquidation does not take place unless all of the debts owed by the bankrupt debtor, whether current or future, are known. For this reason, the legislator decided to drop all debt terms of all kinds and to achieve the principle of equality among all creditors. Payment situation becomes until everyone presents the documents of their debts and includes them in the list of debts to achieve and enter into the bankruptcy ⁽²⁾.

Also, the forfeiture of the term includes all cash debts of the bankrupt, whether they are ordinary debts or secured debts by general or special lien as soon as the bankruptcy judgment is issued, this rule applies absolutely for all creditors in the face of the bankrupt debtor ⁽³⁾.

The UAE legislator has stipulated this in the first paragraph of article 135 of the UAE bankruptcy law, where: "the terms of all debts owed by the bankrupt debtor, whether ordinary or secured by privilege, shall lapse with the issuance of declaration for the debtor's bankruptcy and liquidating his money."

Second section; effects of insolvency on debtor and creditors.

The declaration of the debtor's insolvency entails two types of effects: effects for the debtor and effects for creditors.

- **Insolvency effects for the debtor**

- 1- **Preventing debtor from harming creditors' rights**

The goal that the legislator wanted when he approved the rule of restricting the debtor's hand from disposing of his money is that any act of the debtor against his creditors will not be enforceable whether this act was for compensation or by way of donation or if it would reduce the rights of the debtor such as a gift or sale or increase in his obligations such as a loan or work ⁽⁴⁾.

The legislator also decided to restrict the debtor's hand to any payment that occurs from him, even if it was the fulfillment of an existing debt, as he did not leave this trace until the issuance of the insolvency declaration. Rather, it returns to the time of recording the petition for opening the case in order to protect the

1) Bin Daoud Ibrahim, *The bankruptcy system and judicial settlement in comparative commercial law*, Dar Al-Kitab Al-Hadith, Cairo, 2008, p. 145.

2) Al-Qalyubi, Samiha (2003), summarized in the provisions of bankruptcy, *op. cit.*, p. 173.

3) Bassiouni, Abd al-Awwal Abdeen (2008), *Effects of bankruptcy on the creditors' fulfillment of their rights from bankruptcy*, Dar al-Fikr al-Jami'i, Alexandria, p. 151.

4) Maher, Mahmoud Saad (1996), *Creditors' General Security Protection Claims*, previous reference, p. 241.

creditors. As for the debtor's actions prior to the registration of the insolvency lawsuit, the aforementioned effect does not apply to it and it's implemented in the right of his creditors provided that its date is established before the registration, otherwise it's considered subsequent to it and does not apply to the creditors ⁽¹⁾. The debtor is prevented from harming the rights of the creditors by way of indirect action and policy action.

2- Expense report for insolvent debtor

An insolvent debtor is entitled some alimony if the creditors place a lien on all his revenues and he becomes without a resource to live on; this expense is deducted from the retained revenue and here one of the insolvency benefits of the insolvent debtor itself. If he has not declared his insolvency, it is permissible for his creditors to seize all of his money with the exception of money that may not be seized ⁽²⁾.

Non-seizable funds stipulated in article 39 of the UAE insolvency law, where the article states: "The following shall not be included in the debtor's funds subject to insolvency or liquidation procedures:

- 1- Retirement pension or social benefit provided to the debtor.
- 2- Debtor's necessary funds decided by the court to meet the necessary needs for the livelihood of the debtor and his dependents. The court's decision may be objected within 5 working days from the date of its issuance; the court shall decide within 5 working days, and its decision is not subject to appeal in any appeal methods.

3- Grant deadlines to fulfill

In contrast to bankruptcy, the legislator has permitted granting a term for payment, given the court's wide authority to arrange these effects in the event of insolvency, so it is permitted to rule upon the debtor's request in the face of creditors to maintain the terms of the debts and extend these terms, and even to grant a new term in relation to the existing debts when it becomes clear to the court This procedure is justified by the circumstances and has an interest that guarantees at the same time the interests of the debtor and all creditors ⁽³⁾.

This is in accordance with the provisions of article 36 of the UAE Insolvency Law in the fourth and fifth paragraphs referring that; "The trustee may authorize debtor to complete any of his business or activities with the aim of selling his money at best possible price provided that the period of this permission does not exceed 6 months. The trustee may extend it for a period not exceeding 2 months, if this continuation serves the interests of the creditors. The court, at the request of the

1) El-Shahawi, Qadri Abdel-Fattah (2002), *The Theory of Right to Imprisonment and the Civil Insolvency Case*, Mansha'at Al-Maaref, Alexandria, p. 157.

2) Maher, Mahmoud Saad (1996), previous reference, p. 246.

3) Maher, Mahmoud Saad (1996), previous reference, p. 271.

debtor or trustee, authorizes the debtor to keep any of his money if the court considers that these funds are necessary to enable the debtor to continue his job or profession. or his craft.

▪ **Insolvency effects for the creditors**

1- Achieving effective equality between creditors

This is shown by the deferred debt solutions and the non-expiration of jurisdiction rights.

UAE legislator stipulated in the insolvency law in article 50 in the first and second paragraphs on these rights that; "The court's decision to open the debtor's insolvency procedures and liquidate his money results in the following reactions.

- Debt term solutions.
- Non-enforceability of debtor's actions in his money whether with or without compensation unless the court decides otherwise. The court may order third party to return any money to debtor or any other matter it deems appropriate to preserve creditors' rights. Also, the court in all cases must hear parties' statements to act before deciding invalidity or validity of that act.

2- Exclusion of mass liquidation

Liquidation in an insolvency system is not a collective action and this is the essential feature that distinguishes legal insolvency system from commercial bankruptcy system because commercial insolvency system leads to mass liquidation of bankrupt funds. The debtor who is insolvent is not tied to his hand from his money, but rather disposes of it and takes over its management, and this is in contrast to the bankrupt merchant. Liquidation in insolvency does not appoint any agent to manage debtor's money and dispose of it, and the creditors do not meet in a union, but each one of them remains independent of the other and no collective measures are taken for implementation ⁽¹⁾.

Conclusion

Through the study of distinguishing bankruptcy from insolvency, we reached a set of results as follows.

- It's not permissible to declare the insolvency of the debtor except upon a request from one of the creditors or the bankrupt debtor. However, the court may declare the merchant bankrupt on its own or by the public prosecution or by one of the creditors, or by the debtor himself.
1. Bankruptcy affects the political and professional rights of the debtor and may limit his personal freedom. However, insolvency declaration does not

1) El-Shahawi, Qadri Abdel-Fattah (2002), The Theory of Right to Imprisonment and the Civil Insolvency Case, previous reference, p. 163.

- affect the political and professional rights of the debtor as well as his personal freedom.
2. Insolvency system did not permit a conciliation with the approval of the majority of the creditors, all of whom are bound by its provisions. However, the bankruptcy system authorized the termination of the bankruptcy by such composition.
 3. Insolvency is subject to civil law while bankruptcy is subject to commercial law. On the other hand, insolvency is a special case of a non-trading debtor in which the debtor's rights are less than his outstanding debts. Bankruptcy is a case of a merchant debtor who has not paid his debts.
 4. The court has a discretion authority in declaration of debtor's insolvency, as it has the right to refuse to declare the debtor's insolvency even if its conditions are available in the event that the court considers that the circumstances permit this. However, bankruptcy is not declared except on the basis of a court ruling that the competent court issues if its conditions are met.
 5. In case of insolvency, forward debts are dissolved but the court has the discretion authority through some legislation to maintain or extend the terms. While in bankruptcy, the term debts are obligatory immediately upon the issuance of a judgment declaring the merchant's bankruptcy.
 6. In the event of insolvency judgment, this does not stop the interest on the debts while the issuance of a bankruptcy judgment results in the suspension of the interest on the debts.
 7. The debtor in insolvency may dispose of his money even without creditors permission - if he obtains permission from the court - but it is stipulated that the disposal be for the same price and the buyer deposited the price in the court treasury. However, as soon as the bankruptcy ruling is issued, debtor-merchant's hand is stopped from disposing of his money and controlling it by the force of law.

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