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الدراسات والبحوث

تقييم كفاءة إجراءات التفليسة وفقاً
للقانون العماني

**Assessing the Efficiency of the Current
Bankruptcy Procedures in Oman:
A Comparative Study**

Done By

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Abstract:

The aim of this paper is to assess the efficiency of the current bankruptcy procedures in Oman. This paper will focus on bankruptcy procedures by approaching the following issues: who can request the initiation of such procedures; the nature of debts; declaration of bankruptcy and its effects on debtors, on creditors and on pre-existing contracts; the liability of directors of bankrupt companies and setting-off arrangement on bankruptcy. It is worth noting that a reference will be made to the UK and the US, UAE, Qatar, Egyptian and Bahraini insolvency/ bankruptcy laws.

المخلص:

تهدف هذه الورقة إلى تقييم مدى كفاءة إجراءات التفليسة في القانون العماني. لتحقيق هذا الهدف سيتم تسليط الضوء على بعضاً من الإشكالات المتعلقة بالآتي: الأشخاص المخولين بتقديم طلب الإفلاس، طبيعة الدين الموجب لشهر الإفلاس، شهر الإفلاس والآثار المترتبة على ذلك بالنسبة للتاجر المفلس، وبالنسبة للدائنين، وعلى العقود التي تم إبرامها من قبل التاجر قبل شهر إفلاسه، وإلى أي مدى يمكن عمل مقاصة بين ما للمفلس من حقوق وما عليه من التزامات. من ضمن الجزئيات التي ستتناولها الورقة أيضاً بيان مسؤولية المدراء فيما لو تم شهر إفلاس الشركة. الورقة ستتضمن الإشارة إلى الوضع في كل من بريطانيا أمريكا والإمارات وقطر ومصر والبحرين متى استلزم الأمر.

Introduction

Whether having a separate bankruptcy/ insolvency law or not, each country has some rules designed to deal with the insolvency of traders.⁽¹⁾

However, the types of bankruptcy procedures available differ from country to country.⁽²⁾ While some countries have limited insolvency proceedings,

(1) Some countries have a separate bankruptcy/ insolvency law to regulate the insolvency and liquidation of traders. Examples of such laws are the US Bankruptcy Act of 1978, the UK Insolvency Act 1986 & the UK Enterprise Act of 2002, French Business Safeguard Act of 2006, German Company Restructuring Facilitation Act of 2012 and Enterprise Insolvency Law of the People's Republic of China of 2007. However, countries such as: Oman, UAE, Egypt and Jordan, do not have a separate bankruptcy law. Rather, their Commercial Codes and Commercial Companies Laws provide a framework for the bankruptcy of traders and liquidation of companies: see, for example, Oman's Commercial Code of 1990 (Articles 579-786), Oman's Commercial Companies Law of 1974 (Articles 14-45), UAE Commercial Transaction Law of 1993 (Articles 645-900), UAE Commercial Companies Law of 2015 (Articles 306-326), Egyptian Commercial Act of 1999 (Articles 550-772), Egyptian Joint Stock Companies, Partnerships Limited by Shares & Limited Liability Companies Law of 1998 (Articles 137-154), Qatari Commercial Code of 2006 (Articles 606-846), Qatari Commercial Companies Law of 2015.

(2) In Germany there are two insolvency procedures namely: insolvency proceedings leading to liquidation and insolvency proceedings leading to an insolvency plan. The procedures currently available in France for companies in financial distress are liquidation proceedings, mandate and hoc proceedings, conciliation proceedings, safeguard proceedings and redressement judiciaire: for more description of various insolvency proceedings in these jurisdictions: see D. O'kane & P. Bawlf, Global Guide to Corporate Bankruptcy: A Comprehensive Guide to Corporate Bankruptcy and a Survey of Global Corporate Bankruptcy Regimes (Nomura International, July 2010), pp. 45-79, available at:

others have various insolvency proceedings.⁽³⁾ For instance, in England there are five insolvency proceedings: administration, administrative receivership, CVA, scheme of arrangement and liquidation proceedings,⁽⁴⁾ whereas in the US there are two bankruptcy proceedings, Chapter 11 reorganisation and Chapter 7 liquidation. However, the features of each of these proceedings differ from the others.⁽⁵⁾ For instance, whereas under the US Chapter 11 directors retain their position, they are displaced during administration procedures in England. Also, whereas the purpose of the receivership proceeding in England is to protect the interests of a floating charge holder by appointing a receiver, the purpose of both the administration regime and the US Chapter 11 are, generally speaking, to rehabilitate the business of the company in order to protect the interest of all creditors.

At present, Oman does not have a separate bankruptcy law and in dealing with the bankruptcy of traders⁽⁶⁾ both the Omani Commercial Code of 1990 and Omani Commercial Companies Law of 1974 incorporate some articles.⁽⁷⁾ However, the Commercial Code of 1990 contains one chapter on the bankruptcy of traders and the Commercial Companies Law of 1974 governs companies' liquidation procedures.

Further, although Oman is an Islamic country, Sharia law applies only in the absence of specific legislative provisions and of local or general bankruptcy customs.⁽⁸⁾ However, it is worth mentioning that before the issuance of the Commercial Law of 1990, reliance was on the principles of Sharia Law.⁽⁹⁾ Thus,

<http://www.scribd.com/doc/59845050/Bankruptcy-Guide>. (last viewed February 2017); In Oman, UAE, Egypt and Jordan there are three types of bankruptcy proceedings: bankruptcy proceedings, liquidation procedures for companies and preventive composition procedures; for discussion of common features of some Arab countries' bankruptcy laws: see M. Uttamchandani, 'No Way Out: The Lack of Efficient Insolvency Regimes in the MENA Region' (March 2011), Policy Research Working Paper 5609, The World Bank, available at:

<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-5609>. (last viewed February 2017); also, R. McNally, 'Insolvency Regimes in the MENA Region', available at:

http://www.menacitylawyers.com/uploaded/publication_5feb3dd1-39ef-47bc-ad7d-4716d880dce5_.pdf. (last viewed March 2017).

(3) Ibid.

(4) See J. Armour & R. Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' (2005) 1 LMCLQ 28; F. Fletcher, 'UK Corporate Rescue: Recent Development- Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements- the Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002' (2004) 5 (1) EBOLR 120.

(5) G. McCormack, 'Apples & Oranges? Corporate Rescue and Functional Convergence in the US and UK' (2009) 18 (2) IIR 109; G. McCormack, 'Control and Corporate Rescue: An Anglo- American Evaluation' (2007) 56 (3) ICLQ 505; J. Franks, K. Nyborg & W. Torous, 'A Comparison of US, UK and German Insolvency Codes' (1996) 25 (3) FMJ 86.

(6) This term refers to individual merchants and companies: see Article 16 of the Omani Commercial Code of 1990; Article 11 of the UAE Commercial Transaction Law; Article 12 of the Qatari Commercial Code; Article 10 of Egyptian Commercial Act.

(7) Articles 579-786 of the Commercial Code & Articles 14-45 of the Commercial Companies Law of 1974.

(8) Article 5 of the Commercial Code states that "If no legislative provisions exist, the rules of custom shall apply and local custom take precedence over general custom. In the absence of custom, the provisions of the noble Islamic Sharia shall apply and thereafter the rules of justice"; see article 2 of UAE Commercial Transaction Law, Qatari Commercial Code and Egyptian Commercial Act.

(9) S. Nabil, *The General Principles of Saudi Arabian and Oman Company Laws: Statutes and Sharia* (Namara Publications, 1981), p. 108.

bankruptcy declaration of trader was based on the concepts of Sharia.⁽¹⁰⁾ Under Sharia rules, once the debtor ceases paying his debts, he is normally given respite as recommended by the Holy Quran: "If the debtor is in difficulty grant him a time till it is easy for him to repay".⁽¹¹⁾ Nonetheless, if the debtor refuses to pay, despite his solvency, the judge may order to put him in jail until he changes his attitude and the judge may order the sale of the debtor's properties to the extent of the debts which have already fallen due.⁽¹²⁾

However, it is important to note that bankruptcy provisions in the Commercial Code may not apply to companies that are incorporated or shared by the government or other public bodies and institutions,⁽¹³⁾ even though they engage in commercial activities.⁽¹⁴⁾ Article 19 of the Commercial Code of 1990 states that "companies incorporated or shared by the government or other public bodies and institutions and which are essentially engaged in commercial activity are, apart from bankruptcy, governed by the provisions related to a trader under this Act". It is argued that the reason for such exclusion is that the bankruptcy of these companies would diminish the esteem of the public authority.⁽¹⁵⁾ In addition, it is claimed that usually the reason for setting up government companies is not to gain profits, but rather the implementation of national development plans might lead to the establishment of such companies.⁽¹⁶⁾ For instance, in partnership with private sectors, the involvement of the public sector in Oman is mainly in infrastructure projects, such as communications, power, transportation and water supply.⁽¹⁷⁾ Hence, even though these companies carry out commercial activities, they are excluded from bankruptcy provisions contained in the Commercial Code since the government has shares in these companies.

However, in this regard, this article argues that excluding such companies from bankruptcy may harm the interests of secured and unsecured creditors. In this case, creditors are unable to initiate bankruptcy proceedings if these companies do not pay their due commercial debts. This means that these companies will pursue their business, even though the financial affairs of these companies are so disturbed as to lead to a suspension of payments.

(10) Ibid.

(11) The Holy Quran: 2:280; A. AL-Salimi, Jawhar AL-Nizam (Qatar House Publisher, 2002), p. 399.

(12) A. AL-Salimi, above 11, p. 399; S. Nabil, above 9, p. 110.

(13) Article 19 of the Commercial Code; In Qatar, according to Article 719 of the Qatari Commercial Code, it is not possible to declare the bankruptcy of companies that are established by the government and companies in which the government owes more than half of its capital.

(14) Also, this was the case in Egypt where public companies are excluded. However, after the issuance of Egyptian Public Companies Law in 1991 such exclusion was abolished: see S. Darmaki, Bankruptcy Procedures under Commercial Code in Oman (notes prepared to undergraduate students, Sultan Qaboos University, 2013), pp. 3-5; see also Article 802 of the UAE Commercial Transaction Law of 1993.

(15) S. Darmaki, *ibid*, p. 5.

(16) J. Ali, 'The Legal Concepts of Public Companies' (1963) EJPS 90, p. 91.

(17) See, Oman Investment and Business Guide: Strategic and Practical Information (Ibpus.com, International Business Publication, USA, 2012), p. 108.

Thus, it is crucial to regulate the bankruptcy of such companies or at least to establish some rules whereby these companies, subject to viability, can be reconstructed or reorganized in the event of financial distress.

Further, the provisions of the Commercial Code do not apply to the bankruptcy of distressed banks. In this regard, Chapter Seven⁽¹⁸⁾ of the Banking Law of 1974 regulates the bankruptcy of banks. At present, there is no rescue proceeding available for distressed banks and other financial institutions in Oman. In addressing this issue, Tomasic argued that the Global Financial Crisis (GFC) has demonstrated the weakness of legal regimes and regulatory structures for dealing with trouble banks and financial institutions in many advanced markets.⁽¹⁹⁾

In Oman, currently, the formal available bankruptcy regimes for traders under financial distress are bankruptcy proceedings,⁽²⁰⁾ preventive composition with creditors⁽²¹⁾ and liquidation procedures⁽²²⁾ which are designed merely for companies. Unless a debtor is able to propose a composition or scheme acceptable to its creditors, the debtor will be declared bankrupt and, as a result, the debtor company will be liquidated.

The aims of these bankruptcy regimes differ. While the objective of the liquidation proceedings is the dissolution of the company, the ultimate objective of the bankruptcy proceedings is to release the bankrupt from his debts and liabilities so that the trader can begin a new business with a clean slate, free from the burden of the debts.⁽²³⁾ However, such a release normally begins after five years have elapsed from the day of the bankruptcy declaration or earlier if it is proven that the debtor has paid his debts.⁽²⁴⁾ On the other hand, the main aim of the scheme of arrangement, as it stands today, is to allow the trader to escape the consequences of an adjudication of its bankruptcy.⁽²⁵⁾ In this regard, the scheme of arrangement is far from the concept of rescue culture since the main aim of this regime is not to rescue the business of the company. Instead, its aim is to give the trader the opportunity to escape the consequences of being bankrupt.

(18) Articles 82-89 of the Omani Banking Law 1974.

(19) R. Tomasic, 'Establishing a UK Rescue Regime for Failed Investment Banks' (2010) 3 (2) CRI 160, p. 160; Campbell also stated that it has become the international norm for countries to establish a separate legal system to deal with banking crisis: A. Campbell, 'Bank Insolvency and the Interests of Creditors' (2006) 7 JBR 133, p. 134; also in their article, Peter Cartwright and Andrew Campbell highlighted the main objectives of bank insolvency laws by discussing the position in the United Kingdom: 'Bank Insolvency Issue' (2002) 6 IL 198.

(20) Articles 579-752 of the Commercial Code; Articles 645-830 of the UAE Commercial Transaction Law; Articles 606-791 of the Qatari Commercial Code; Articles 550-724 of Egyptian Commercial Act.

(21) Articles 753-783 of the Commercial Code; Articles 831-877 of the UAE Commercial Transaction Law; Articles 792-845 of the Qatari Commercial Code; Articles 725-772 of Egyptian Commercial Act.

(22) Articles 14-27 of the Commercial Companies Law 1974.

(23) For the aim of bankruptcy procedures under Omani Law see S. Al-Hinai, 'Preventive Composition Scheme' (Master Degree Dissertation, Sultan Qaboos University, 2010), pp. 7-11.

(24) Article 752 of the Commercial Code.

(25) See S. Al-Hinai, above 23, pp. 13-16; Article 753 of the Commercial Code.

This paper will focus merely on bankruptcy proceedings, so it is beyond its scope to deal with preventive composition with creditors' procedures and liquidation procedures. This paper will approach a number of issues/questions, which include, but not limited to,; who can request the initiation of such procedures; declaration of bankruptcy and its effects on debtors, on creditors and on pre-existing contracts; the liability of directors of bankrupt companies and setting-off arrangement on bankruptcy. It is worth noting that a reference will be made to the UK and the US, UAE, Qatar, Egyptian and Bahraini insolvency/ bankruptcy laws.

Bankruptcy Procedures

Under the current regime, bankruptcy procedures apply to companies with legal personality and to sole merchants.⁽²⁶⁾ Thus, while liquidation procedures are designed merely for companies,⁽²⁷⁾ bankruptcy procedures are designed for both sole merchants and companies. As will be shown below,⁽²⁸⁾ if a company ceases paying its debts, it may be declared bankrupt. Thus, besides other grounds, bankruptcy is one of the grounds set out in Article 14 of the Commercial Companies Law of 1974 upon which a company may be wound up by the court. Bankruptcy procedures under the Commercial Code are distinguished from winding up procedures under the Commercial Companies Law. Bankruptcy does not entail the extinction of the company, and its legal personality remains in existence until the liquidation of its affairs is concluded.⁽²⁹⁾ Retaining its legal personality means that during the course of bankruptcy proceedings, the company may propose a scheme of arrangement with its creditors in order to terminate the bankruptcy processes.⁽³⁰⁾ It is not like the case in England where a company cannot be made bankrupt,⁽³¹⁾ but if it cannot pay its debts it may be dealt with under the equivalent process of winding up, laid down in the Insolvency Act of 1986.⁽³²⁾

Who can Request a Bankruptcy Declaration?

An application for bankruptcy can be made by the trader itself,⁽³³⁾ a court, and creditors.⁽³⁴⁾ Article 581 of the Commercial Code states that "A merchant may be declared bankrupt at the request of one of his creditors or at his own request. The court may declare a merchant bankrupt of its own accord." Unlike the case in UAE, Bahrain and Egypt,⁽³⁵⁾ in Oman the public prosecutor is not

(26) Article 581 of the Commercial Code.

(27) Article 14 of the Commercial Companies Law 1974.

(28) See below section 2.1.3.

(29) Article 15 of the Commercial Companies Law 1974.

(30) Article 755 of the Commercial Code.

(31) Reeday G., The Law Relating to Banking, (5th edition, Butterworths, 1985), p. 170.

(32) Ibid.

(33) Article 579 of the Commercial Code.

(34) Ibid, Article 581; See Darmaki S., above 14, pp. 62-72.

(35) See Darmaki S., above 14, pp. 67-68; Article 2 of 1987 Bankruptcy and Preventive Compositions scheme

given the authority to initiate a bankruptcy proceeding unless it is shown that the debtor has committed a criminal act e.g. fraudulent bankruptcy.⁽³⁶⁾ In this case, the debtor will be prosecuted according to the applicable provisions of both the Commercial Code of 1990 and Penal Law of 1974.

A- Debtors

The sole merchant may voluntarily file for a declaration of bankruptcy if he is not able to pay his commercial debts.⁽³⁷⁾ However, it is not obligatory for a debtor to apply to a competent court for a declaration of bankruptcy once the cessation of payment takes place, rather it is optional.⁽³⁸⁾ This is contrary to the case under the laws of UAE,⁽³⁹⁾ Bahrain⁽⁴⁰⁾ and Egypt⁽⁴¹⁾ whereby if a period of time -30 days in UAE, 15 days in Egypt- lapses from the date of cessation of payment, the debtor is obliged to apply for a declaration of bankruptcy, however, failure to do so may result in a criminal offence being committed.⁽⁴²⁾

In case of a company,⁽⁴³⁾ power to apply for adjudication of bankruptcy on behalf of a company is generally vested in directors.⁽⁴⁴⁾ Thus, directors of the company may apply for a declaration of bankruptcy when the company is unable to pay its due commercial debts.⁽⁴⁵⁾ However, before submitting such an application, directors should obtain the consent of a majority of partners in the case of general partnerships and limited partnerships; the consent of the ordinary general assembly in the case of joint stock companies; and the consent of partners' committee in the case of limited liability companies.⁽⁴⁶⁾ Similar to the case of the sole merchant, the debtor company is not obliged to apply for a declaration of bankruptcy if it ceases paying its due commercial debts.⁽⁴⁷⁾

The debtor's request must be submitted by way of a report explaining the reasons for the cessation of payment,⁽⁴⁸⁾ in which several documents shall be attached, such as: the accounting books, a copy of the latest balance sheet, the profit and loss account, a detailed statement of movable and

Act in Bahrain; Article 552 of the Egyptian Commercial Code of 1999; Article 647 of UAE Commercial Transactions Law of 1993; Article 608 of the Qatari Commercial Code.

(36) Article 300 of Omani Penal Law; Article 598 of the Commercial Code; Darmaki S., above 14, p. 68.

(37) Article 579 of the Commercial Code.

(38) Darmaki S., above 14, pp. 62-63.

(39) Article 649 of UAE Commercial Transactions Law of 1993.

(40) Article 3 of Bankruptcy and Preventive Composition Scheme Act 1987.

(41) Article 553 of the Egyptian Commercial Code of 1999.

(42) Ibid.

(43) According to Article 2 of the Commercial Companies Law 1974: companies incorporated in Oman have to take the form of one of these types: (1) General Partnerships; (2) Limited Partnerships; (3) Joint ventures;

(4) Joint Stock Companies; (5) Limited Liabilities Companies; (6) Holding Companies.

(44) Article 684 of the Commercial Code.

(45) Ibid.

(46) Ibid, Article 685.

(47) Ibid, Articles 579 & 684.

(48) Ibid, Article 584.

immovable assets and their approximate value on the date of the failure to pay, a statement of the names of the creditors, their addresses, their rights and their obligations and security.⁽⁴⁹⁾ In this regard, it can be stated that the rationales behind presenting such documents are to assist the court in determining the bankruptcy of the debtor and to examine the grounds for the failure and whether they are attributed to the debtor or they are attributed to external factors.

B- Creditors

An application for adjudication in bankruptcy made by creditors takes the form of a petition addressed to the civil court with jurisdiction in the area where the debtor carries on business.⁽⁵⁰⁾ This application can be made by any creditor who must satisfy the court that the trader has not paid a commercial debt when it has fallen due.⁽⁵¹⁾ In this regard, the Commercial Code does not prescribe a de minimis amount of the commercial debt. Thus, principally, whatever the amount of the debt is, the creditor is eligible to initiate a bankruptcy proceeding against the debtor if cessation of payment of a due commercial debt occurs. It is worth noting that, in one of its judgments, the high court asserted that although the unpaid debt is commercial, due and undisputed, because of the amount of the unpaid commercial debt, the court has the discretion to reject the request of bankruptcy declaration.⁽⁵²⁾ Further, even though the debt is not yet due and payable, in some cases the creditor is able to commence the proceeding.⁽⁵³⁾ For instance, any creditor for a deferred commercial debt is entitled to apply for his trading debtor to be declared bankrupt if that merchant has no known domicile, has fled the country, closes down his premises, proceeds to liquidation or takes action harmful to his creditors.⁽⁵⁴⁾ However, it is not enough for the creditor to allege this, rather the creditor must demonstrate that the debtor has already failed to pay a due commercial debt.⁽⁵⁵⁾ In this regard, it can be asserted that such restriction provides some sort of protection to the debtor.

If a bankruptcy application is submitted by a creditor, according to Article 671 of the Commercial Code, the debtor is able to appear before the court to defend himself and prove that he is able to pay his debts. Further, it is worth noting that the Commercial Code puts some measures in place aiming to prevent any creditor from seeking a court judgment against the

(49) Ibid.

(50) Darmaki S., above 14, p. 65.

(51) Article 582 of the Commercial Code.

(52) Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1997', Commercial Department, case number 18/97, p. 531.

(53) Article 582 of the Commercial Code; See also Article 650 of the UAE Commercial Transaction Law; Article 609 of the Qatari Commercial Code; Article 554 of Egyptian Commercial Act.

(54) Ibid.

(55) Ibid, Article 582.

debtor without having legitimate grounds. In this regard, Article 596 of the Commercial Code states that "if one of the creditors applies for the debtor to be declared bankrupt and the court rules to refuse the application, the court may impose a fine not exceeding three hundred Omani Rials on the creditor and the ruling shall be published in the Official Gazette at his expense if it appears to the court that the creditor intended to harm the commercial reputation of the debtor, without prejudice to the debtor's entitlement to demand compensation".

In addition, one of the preconditions for submitting a bankruptcy application is that the petitioning creditor should have an interest in such petition.⁽⁵⁶⁾ Even though all creditors have the right to submit a bankruptcy application, generally the court tends to reject the request of secured creditors if it is satisfied that their securities can be met without affecting the business of the debtor.⁽⁵⁷⁾ In one instance, the high court stated that the secured creditor had no interest in submitting an application of bankruptcy since their debts were secured and they were able to enforce their securities to recover their money.⁽⁵⁸⁾ However, after enforcing the security, if one of the secured creditors did not recover the whole secured debt, the remaining amount was considered to be an unsecured debt.⁽⁵⁹⁾ Having considered it as an unsecured debt, the secured creditor had an interest in approaching the court and, as a result, could apply for the bankruptcy of the debtor.⁽⁶⁰⁾

C- The Court

Unlike the case in both England⁽⁶¹⁾ and the US,⁽⁶²⁾ in Oman the court acting, under its own initiative, can apply for the bankruptcy of a trader.⁽⁶³⁾ As a general rule, the court should be a neutral entity and cannot be one of the petitioners.⁽⁶⁴⁾ Thus, giving such power to the court can be considered as a departure from this general rule. However, due to such a departure and lack of any court precedent, it is unclear how, in practice, an application of bankruptcy is submitted by the court. Nonetheless, Article 763 of the Commercial Code provides an example in which the court may initiate bankruptcy proceedings against the debtor. It is provided that if the debtor applies for a preventive composition scheme and the court rejects

(56) Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1997', Commercial Department, case number 18/97, p. 531.

(57) Ibid.

(58) Ibid.

(59) Ibid, p. 532.

(60) Ibid, p. 533.

(61) Part I (sections 1 & 2) & Part II (section 9) of the UK Insolvency Act 1986.

(62) Sections 301 & 303 of the US Bankruptcy Code.

(63) Article 581 of the Commercial Code; this is the case also in UAE (Article 647 of UAE Commercial Transactions Law of 1993); Bahrain (Article 2 of 1987 Bankruptcy and Preventive Composition scheme Act); and Egypt (Article 552 of 1999 Commercial Act).

(64) Naseef A., Comprehensive Commercial Encyclopedia, (4th edition, Beirut, Ewidat Press, 1999), p. 120.

the application, in such a case the court may at its own discretion initiate bankruptcy proceedings.⁽⁶⁵⁾

2.1.2 The Nature of the Debt

Even though all the above mentioned players have the right to submit a bankruptcy application, failure to pay a single debt is not enough grounds to accept such a request. Thus, a number of conditions should be met in order for a bankruptcy petition to be proceeded.⁽⁶⁶⁾ First, the unpaid debt must be a commercial debt and ceasing to pay a civil debt is not sufficient to apply for a bankruptcy application.⁽⁶⁷⁾ Nevertheless, a creditor of a civil debt can apply for the bankruptcy of the debtor if it is demonstrated that the debtor has failed to pay a commercial debt.⁽⁶⁸⁾ Secondly, the debt must be due, unless one of the exceptional cases stated above is proven, e.g. the debtor has no known domicile, proceeds to liquidation or takes action harmful to his creditors.⁽⁶⁹⁾ Further, the petition should be based on an undisputed due commercial debt.⁽⁷⁰⁾ A bankruptcy petition that is based on a disputed commercial debt will usually be rejected and the petitioner is asked to establish the debt in a separate proceeding.⁽⁷¹⁾ Finally, as mentioned above, the Commercial Code does not prescribe a de minimis amount of the commercial debt.⁽⁷²⁾ However, in one of its judgments the high court stated that even though the unpaid debt was commercial, due and undisputed, in this case the amount of the debt did not justify the declaration of the debtor's bankruptcy.⁽⁷³⁾ It went further by saying that although the appealing bank demonstrated the debt, the declaration of bankruptcy was governed by judicial discretion.⁽⁷⁴⁾ However, it is difficult to take this ruling as a base to rely on since in one of its judgments the high court stated that "regardless of the amount of unpaid debt, the court has the right to declare the bankruptcy of any trader even though he ceases to pay a single commercial debt".⁽⁷⁵⁾ Even though in the former decision the court refused to declare the bankruptcy of the trader since the amount of the commercial debt, in the view of the court, did not justify the bankruptcy declaration, in the later decision it is clearly stated that it is possible to declare the bankruptcy of the trader without taking

(65) See Article 763 of the Commercial Code.

(66) Ibid, Articles 579 & 582.

(67) Ibid, Article 579.

(68) Ibid.

(69) Ibid, Article 582.

(70) Ibid.

(71) Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1997', Commercial Department, case number 179/97, p. 405.

(72) Darmaki S., above 14, p. 11.

(73) Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1997', Commercial Department, case number 179/97, pp. 406-407.

(74) Ibid.

(75) Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1992', Commercial Department, case number 14/92.

into consideration the amount of the unpaid debt. Thus, it can be concluded that at the end of the day, the facts of each case determine the outcome of the bankruptcy application.

2.1.3 Declaration of Bankruptcy

After the bankruptcy application is submitted, the court may order the necessary actions to be taken to maintain or manage the assets of the debtor until the bankruptcy petition is determined.⁽⁷⁶⁾ Also, the court may appoint whomsoever it chooses to investigate the financial affairs of the debtor and the reasons behind the failure to pay and submit a report accordingly.⁽⁷⁷⁾ Principally, at this stage, the management of the company will be displaced and a person called "a bankruptcy trustee" will manage the assets of the debtor, unless the court opts that the management (directors) retains its position.⁽⁷⁸⁾

Under the current regime there is no exact time-limit whereby a bankruptcy process should be completed. For example, during the bankruptcy proceedings, Article 665 of the Commercial Code states that the bankruptcy trustee, within thirty days of the date of his appointment, should present to the court a statement containing the reasons behind the cessation of payment; however the court can extend this period at its own discretion. Also, Article 669 states that once the debts have been verified, the bankruptcy trustee, within sixty days, should deposit to the court a list containing the names of the secured creditors and the amount of their securities, however where it is necessary the court has the power to extend such period. Hence, in both articles the court is given the power to extend the period without setting a maximum period.

Having ensured that the conditions for adjudication exist,⁽⁷⁹⁾ the court makes an order declaring the debtor bankrupt.⁽⁸⁰⁾ In case of a company, if a firm is declared bankrupt, all the general liability partners must be declared bankrupt.⁽⁸¹⁾ This includes general liability partners who have left the company after the suspension of payment, provided that no more than two years has elapsed since the date on which notice of their departure from the company was entered in the commercial register.⁽⁸²⁾ It is worth mentioning

(76) Article 588 of the Commercial Code.

(77) Ibid.

(78) Article 661 of the Commercial Code.

(79) As stated above, an application is submitted by the debtor itself, the creditor or the court; the debtor ceases to pay a due commercial debt.

(80) Article 580 of the Commercial Code.

(81) Ibid, Article 690.

(82) Article 690 of the Commercial Code, states that "Where a company is declared bankrupt, all general liability partners therein shall likewise be declared bankrupt. The bankruptcy shall include a general liability partner who leaves the company after it ceases making payments where the company is declared bankrupt before two years lapse as from the date when the departure of such partner is declared in the Commercial Register": *ibid*.

that, under Omani law, the bankruptcy of one of the general liability partners may not lead to the bankruptcy of the company,⁽⁸³⁾ although it is one of the grounds for winding up a general partnership and a limited partnership.⁽⁸⁴⁾ Article 41 of the Commercial Companies Law of 1974 states that “unless the partnership’s Memorandum of Association provides otherwise, the partnership shall be deemed dissolved upon the death, declaration of ineligibility or bankruptcy or withdrawal of one of its partners. The remaining partners, however, may decide unanimously to continue the partnership between them provided such decision is registered in the Commercial Register”.

Furthermore, it is worth noting that in its bankruptcy judgment the court should determine a provisional date for the cessation of payment.⁽⁸⁵⁾ However, if it does not, the date on which the judgment was pronounced is deemed to be the date for the suspension of payment.⁽⁸⁶⁾ If it does, the date of cessation may not be referred back to more than two years from the date the bankruptcy judgment is pronounced.⁽⁸⁷⁾

2.1.4 Effects of the Bankruptcy

A- Effect on the Debtor

The handcuffing of a bankrupt is immediately effective from the day in which the judgment of declaration of bankruptcy is issued.⁽⁸⁸⁾ In this regard, the debtor may not leave Oman until court permission is sought and the court is given the power to place him under supervision and bar him from leaving Oman.⁽⁸⁹⁾ Also, upon the day on which the judgment of bankruptcy is issued, a bankrupt will be prohibited from practising a number of civil rights, e.g. becoming a director or a member of the management board of any company and the bankrupt is forbidden from applying for a public job or position.⁽⁹⁰⁾ Such restrictions apply to both sole merchants and the general liability partners in a bankrupt company.⁽⁹¹⁾ Thus, since the bankruptcy of a company leads to the bankruptcy of all general liability partners, all general liability partners are prohibited from practising these civil rights.

Further, upon the issuance of bankruptcy adjudication, the debtor will be prohibited from managing his assets or disposing of them.⁽⁹²⁾ The prohibition

(83) Article 50 of the Omani Commercial Companies Law 1974.

(84) Ibid, Articles 41 & 50.

(85) Ibid, Article 590.

(86) Ibid.

(87) Ibid, Article 591.

(88) Ibid, Article 604.

(89) Ibid, Article 603.

(90) Ibid, Article 602.

(91) Ibid, Article 681.

(92) Ibid, Article 604.

on administration and disposal by the bankrupt debtor covers all assets owned by the bankrupt including those that accrue to him after the declaration of bankruptcy.⁽⁹³⁾ In this case, the management of the business will be handed over to the trustee who is responsible for administering the assets⁽⁹⁴⁾ on behalf of the bankrupt under the supervision of a bankruptcy judge.⁽⁹⁵⁾ Thus, after declaring the bankruptcy of the company, the management of the company will be displaced and the bankruptcy trustee will administer the assets of the bankrupt company. In this regard, Omani law does not distinguish between an honest, negligent, or fraudulent debtor.

It is worth noting that the trustee in bankruptcy might be considered as a representative of the bankrupt, the bankrupt's creditors and the public. Since the trustee administers the property on behalf of the bankrupt debtor, it can be said that the trustee is a representative of the bankrupt. The trustee may, also, be considered as the representative of creditors of the bankrupt in that one of his duties is to realise the greatest amount of assets for the benefit of creditors.⁽⁹⁶⁾ In addition, safeguarding the public interest is one of the duties of the trustee.⁽⁹⁷⁾ In affirming such contention, it is stated that "the trustee shall assume responsibility for all actions necessary to safeguard the rights of the bankrupt";⁽⁹⁸⁾ and that "at the request of the trustee, the bankruptcy judge may authorise the continued operation of the business where the public interest, the interest of the debtor, or the interest of creditors so requires".⁽⁹⁹⁾ Having been authorised, the trustee shall appoint an external person to run the business of the bankrupt or the bankrupt himself may be appointed to run the business.⁽¹⁰⁰⁾ In this regard, the trustee has discretion in determining whether to appoint a new management to run the business or allow the old management to do this task.⁽¹⁰¹⁾ Hence, even though in principle directors will be displaced upon the initiation of the bankruptcy process, the bankruptcy trustee may order that they retain their position during bankruptcy processes.

Further, it is worth mentioning that under the current Omani bankruptcy regime, a number of bankruptcy officials play a central role in any bankruptcy case- starting with the judges who administer the whole bankruptcy law and ending with trustees who realise and distribute the assets of the bankrupt. These tasks which are performed by bankruptcy officials require expertise,

(93) Ibid. However, Article 605 contains some exemptions to this rule.

(94) Ibid, Article 660.

(95) Ibid, Articles 659 & 660.

(96) Ibid, Article 648.

(97) Ibid, Article 661.

(98) Ibid, Article 660.

(99) Ibid, Article 661.

(100) Ibid.

(101) Ibid.

skill and sufficient knowledge of various bankruptcy issues. However, one of the main issues with the current bankruptcy regime in Oman is that judges revolve between different courts, dealing with different subject matters and there are no specialized bankruptcy judges who deal only with bankruptcy cases. In addition, Oman does not have in place a regulation for bankruptcy trustees/ administrators nor there is a program whereby sufficient training for a number of professionals is provided. As a result, the trustee is not required to have a particular qualification nor he is required to obtain specific training.

B- Effect on Creditors

By statute, once a bankruptcy adjudication is declared, a 'group of creditors' is established.⁽¹⁰²⁾ Such a group consists of ordinary creditors having valid claims against the bankrupt arising prior to the issue of the adjudication of bankruptcy.⁽¹⁰³⁾ This group enjoys a legal personality and is represented by the bankruptcy trustee.⁽¹⁰⁴⁾ It is believed that the purpose of organising the ordinary creditors into a body is that of protecting their collective interests and being represented by the bankruptcy trustee. However, secured creditors are not considered part of this group unless they waive their rights.⁽¹⁰⁵⁾ It can be said that their ability to enforce their securities despite the commencement of bankruptcy proceedings justifies the exclusion of secured creditors from becoming a part of a 'group of creditors'.⁽¹⁰⁶⁾

In addition, upon the issuance of an adjudication of bankruptcy, ordinary creditors' actions are stayed and these creditors are unable to take individual enforcement proceedings against the assets of the bankrupt, nor may they finalise proceedings begun before the issuance of the adjudication of bankruptcy.⁽¹⁰⁷⁾ It is believed that the reasons for such a stay are that the claims of the ordinary creditors will be satisfied proportionately out of the assets of the bankrupt debtor; and that the bankruptcy trustee normally takes action on their behalf since he is responsible for safeguarding their interests.⁽¹⁰⁸⁾ Nonetheless, this restriction does not apply to secured creditors since they are not prevented from bringing or continuing actions against the bankrupt company.⁽¹⁰⁹⁾ In this case, it can be argued that granting a secured creditor the right to enforce his securities might result in preventing any effort from the trustee to authorise the continued operation of the business.

Furthermore, upon bankruptcy, the terms of all monetary debts will be

(102) Ibid, Article 615.

(103) Ibid.

(104) Ibid.

(105) Article 615 of the Commercial Code.

(106) See Darmaki S., above 14, p. 101.

(107) Article 620 of the Commercial Code.

(108) Ibid, Article 660; See Darmaki S., above 14, pp. 101-102.

(109) Article 620 of the Commercial Code.

eliminated and all bankrupt's debts are deemed to have become due at the date of the bankruptcy declaration.⁽¹¹⁰⁾ Also, an adjudication of bankruptcy halts the interest on debts only with respect to the group of creditors.⁽¹¹¹⁾ However, "interest on debts guaranteed by mortgage or lien may be claimed only from sums produced by the sale of assets guaranteeing those debts".⁽¹¹²⁾ The distinction made between secured and unsecured creditors during bankruptcy proceedings clearly demonstrates that under the current bankruptcy regime the interests of secured creditors, usually banks, are well protected and their ex ante bargains are respected even though a debtor goes into bankruptcy proceedings.

C- Effect on Contracts Concluded before the Declaration of Bankruptcy

In general, the adjudication of debtor bankruptcy does not result in the automatic rescission of a contract to which a bankrupt is a party,⁽¹¹³⁾ unless such a contract is based on 'personal consideration' in which a contract cannot be performed except by the bankrupt himself.⁽¹¹⁴⁾ Since one of the responsibilities of the trustee is to administer the business of the bankrupt,⁽¹¹⁵⁾ the trustee is required to perform the contract on behalf of the bankrupt. However, if the bankruptcy trustee decides not to perform the contract or will no longer continue to do so, the other party is given the right to seek the rescission of the contract.⁽¹¹⁶⁾ Having sought the rescission of the contract, the contracting party is not given priority in respect of compensation arising from the termination of the contract, rather he is entitled to share in the bankrupt's estate as an ordinary creditor.⁽¹¹⁷⁾ It is, thus, apparent that in Oman the bankruptcy of the trader alone cannot be used as a ground to terminate the contract. This is the case in England, as well, where the mere fact of insolvency does not in itself put an end to contracts.⁽¹¹⁸⁾ In affirming this, in *Chalmers, re Edwards*,⁽¹¹⁹⁾ Sir G Mellish, L. J, stated that "I agree with what was said by Crompton, J. in *Griffiths v. Perry*, that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if

(110) Ibid, Article 616.

(111) Ibid.

(112) Ibid.

(113) Ibid, Article 633.

(114) Ibid.

(115) Ibid, Article 660.

(116) Ibid, Article 633.

(117) Ibid.

(118) In this regard, Goode states that "the entry of the company into administration does not automatically terminate contracts entered into by the company except where the contract in question so provides, which is often the case": Goode R., *Principles of Corporate Insolvency Law*, (4th edition, Sweet & Maxwell, 2011), p. 463; Wood P., *Principles of International Insolvency*, (Sweet & Maxwell, 2007), p. 398.

(119) *Ex P. Chalmers, Re Edwards* (1872-73) L.R. 8 Ch. A, p. 289

they could not have the benefit of those contracts”.⁽¹²⁰⁾

Article 630 of the Commercial Code goes further by annulling any contract clause to terminate or modify the contract based on the debtor’s bankruptcy or based on the initiation of bankruptcy proceedings.⁽¹²¹⁾ This is similar to the case under the US Bankruptcy Code where any contract clause that terminates or modifies the contract based on the debtor’s financial condition or insolvency is invalidated.⁽¹²²⁾ Thus, in both Oman and the US, clauses which allow a counterparty to cancel a contract by reason of the commencement of bankruptcy proceedings are void. Article 633 of the Commercial Code gives the bankruptcy trustee the choice of determining whether to accept or to reject the performance of such a contract. If the bankruptcy trustee rejects the performance of the contract, the other contracting party has the right to seek court judgment to terminate the contract.⁽¹²³⁾

The case in England differs in that high respect is given to the sanctity of a contract⁽¹²⁴⁾ and the contracting parties are allowed to insert such a clause. Such a clause is known as an ‘ipso facto clause’ in which a contract contains a provision permitting the counterparty to cancel on the insolvency of the other.⁽¹²⁵⁾ In addressing this issue Goode stated that the ipso facto clause “caused concern among insolvency practitioners, who consider that such clauses are detrimental to the administration procedure” and, as a result, they should be annulled as contrary to public interest.⁽¹²⁶⁾ Further, in liquidation for instance, the effect of a termination clause is that a contract right that constitutes an asset of the firm prior to the commencement of proceedings is removed from the reach of the general body of creditors.⁽¹²⁷⁾ Also, it is claimed that allowing a supplier to cut off the lifeblood of a manufacturing company could obstruct any attempt to rescue the business of the company.⁽¹²⁸⁾ Therefore, it is argued that ipso facto clauses can give suppliers considerable leverage against administrators to get paid ahead of other creditors, thereby disrupting the administration process.⁽¹²⁹⁾ Nevertheless, Milman, rightly, argued that “it is not appropriate to require a supplier to continue to deliver goods or services to an insolvent customer’

(120) Ibid, pp. 293-294.

(121) Article 632 of Egyptian Commercial Act.

(122) McEowen R., ‘The Assumption or Rejection of Executory Contracts in Bankruptcy- Are Commodity Contracts within a Safe Harbor?’, (March 18th, 2009), Iowa State University, available at: www.calt.iastate.edu; Section 365 (c) (e) (1) of the US Bankruptcy Code.

(123) Article 633 of the Commercial Code.

(124) Finch V., Corporate Insolvency Law: Perspectives and Principles, (2nd edition, Cambridge University Press, 2009), p. 283.

(125) Wood P., above 118, p. 429.

(126) Goode R., above 118, p. 361.

(127) Ibid, p. 183.

(128) Milman D., ‘Moratoria in UK Insolvency Law: Policy and Practical Implication’, (2012) 317 C.L.N. 1, p. 3.

(129) In his article Suchak discusses ipso facto termination clause in both the US and UK and the pros and cons of statutory invalidation: see Suchak R., ‘Corporate Rescue Proceedings and the Enforcement of Ipsos Facio Termination Clauses: A comparison of the English and US Approaches’, (2012) 8 (2) I.C.R. 131, p. 132.

unless "there is in place a cast iron guarantee that payment for any future deliveries will be made".⁽¹³⁰⁾ It is worth noting that during the Standing Committee stage of the Enterprise Act 2002, an amendment was proposed to suspend ipso facto clauses in administration,⁽¹³¹⁾ however the Minister rejected this by saying that "a keystone of jurisprudence north and south of the border is freedom of contract and that is the fundamental difficulty with the amendment.... if those entering into contracts knew that the terms could be overridden, they might be less likely to enter into or continue a contract if they became aware that the company was in financial difficulty".⁽¹³²⁾

As shown, counterparties are prohibited from exercising their rights to terminate the contracts under both Oman's bankruptcy regime and the US Chapter 11 while they are permitted to exercise them under administration proceedings in England. However, this paper stands on the view that a balance should be struck between respecting the notion of freedom of contract and promoting the concept of business rescue. Giving the contracting parties the right to negotiate their own contract and to include ipso facto clauses and, on the other hand, stay the enforcement of such rights pending the completion of the reorganisation process or bending the approval of the court creates some sort of balance. In this regard, following the experience of the US,⁽¹³³⁾ where the bankruptcy trustee is given the right to assume or reject any executor contract of the debtor is advisable. Upon the rejection, other contracting parties have the right to terminate their contracts after seeking the approval of the court. However, if the bankruptcy trustee assumes the contract, the other contracting parties should be given adequate assurance of future performance.

2.2 Liability of Directors of Bankrupt Companies

Upon the initiation of bankruptcy proceedings, directors or managers of the company may be subject to a civil liability or may be found guilty of a criminal offence.⁽¹³⁴⁾ Article 695 of the Commercial Code gives a bankruptcy trustee the right to seek court permission to order all members of the Board of Directors or all of the managers, or some of them jointly or severally to pay all or some of the debts of the company unless they establish that they have exercised the necessary care in running the business of the company. Thus, according to this Article, if the assets of the company is not sufficient to pay at least 20% of the whole debt, the

(130) Milman D., above 128, p. 3.

(131) Tett R., 'Administration Falls Short: The Need for Contractual Stability and an Executory Contract Regime', (2012) 9 (3) I.C.R. 167, p. 169.

(132) Ibid.

(133) Section 365 of the US Bankruptcy Code.

(134) Article 695 of the Commercial Code; Article 301 of Oman's Penal Code 1974.

court may request the directors severally or jointly to pay part or all the debts. It is stated that in determining the liability of the managers for compensating the damages resulting from their weakness in managing the company, such compensation should be restricted to the level of their faults.⁽¹³⁵⁾ Further, the company's directors may incur criminal liability in the case where the company's bankruptcy has been caused by fraudulent actions on their part, pursuant to Article 301 of Oman's Penal Code of 1974 which provides for imprisonment for a period not exceeding seven years. The Penal Code provides a number of actions that are considered as fraudulent actions, including concealment, mutilation or destruction of the company's books or concealment of assets.⁽¹³⁶⁾ It can be said that the rationale behind such liabilities is to encourage the directors or managers of the company to initiate bankruptcy proceedings once they perceive that the financial crisis, even though they will be displaced during the process. Running the business, despite such trouble, is against the interests of creditors and might lead to further loss.

2.3 Set-off in Bankruptcy

Set-off is defined by Roy Goode as "the right of a debtor who is owed money by his creditor on another account or dealing to secure payment for what is owed to him by setting this off in reduction of his own liability".⁽¹³⁷⁾ In clarifying such a concept Wood states that "a creditor with a set-off on insolvency is a super-priority creditor: the bankrupt owes him 100, he owes the bankrupt 100. On set-off the creditor is paid in full. If there is no set-off, then the creditor pays 100 to the bankrupt and may get little or nothing on the 100 which the bankrupt owes the creditors".⁽¹³⁸⁾ Both England and the US laws recognise the concept of set-off in insolvency, although with some differences.⁽¹³⁹⁾ For instance, in the US, even though the Bankruptcy Code does not create a right of set-off,⁽¹⁴⁰⁾ it recognises the right of set-off

(135) Sarkhoh Y., 'The Manager of A Limited Liability Company under Kuwait Commercial Companies Law: A Comparative Study', (1990) 5 A.L.Q. 163, p. 202; See also Article 809 of the UAE Commercial Transaction Law.

(136) Article 300 of the Omani Penal Code of 1974.

(137) Goode R., above 118, p. 277; However, Derham stated that "it is difficult to give a comprehensive definition of set-off without reference to the various forms that it can take, but on a general level it can be defined as the setting of money cross-claims against each other to produce a balance": Derham R., *The Law of Set-off*, (3rd edition, Oxford University Press, 2003), p. 1.

(138) Wood P., above 118, p. 403.

(139) Prewitt P., 'Netting/ Set-off Under the Bankruptcy Code', (2003), 27 (3) G.E.R., p. 46; Finch V., above 123, p. 614.

(140) It should be noted, here, that Article 553 of the US Bankruptcy Code provides a number of conditions in order to pursue the right of set-off.

existing under non-bankruptcy laws.⁽¹⁴¹⁾ However, in the US whether or not to allow a set-off right on a specific contract, is entirely within the discretion of the bankruptcy judge.⁽¹⁴²⁾ In England, insolvency set-off is mandatory and contracting out of insolvency set-off is not allowed.⁽¹⁴³⁾ In this regard, Rule 4.90 of the Insolvency Act 1986 makes all actual, contingent and future debts subject to set-off whether they are owed by or to the debtor company.

In Oman, Article 604 of the Commercial Code declares that upon the adjudication of bankruptcy, the bankrupt debtor is forbidden from receiving or making any payments. Thus, in principle, bankruptcy set-off is not allowed under the current bankruptcy regime. However, Article 607 provides certain requirements that, if met, render set-off rights to be accepted. Accordingly, on the bankruptcy of the debtor, set-off arrangements are allowed if it is demonstrated that the rights and obligations of the parties are 'associated'.⁽¹⁴⁴⁾ Association of the rights and obligations of the parties exists specifically if they result from a 'single cause' or are included in a 'current account'.⁽¹⁴⁵⁾ Therefore, Omani courts might dismiss any setting-off arrangements if it is satisfied that the rights and obligations of the parties are not sufficiently associated.

3. Conclusion

Bankruptcy procedures, preventive composition with creditors, liquidation are the main bankruptcy regimes that are available under the current bankruptcy regime in Oman. This paper dealt with bankruptcy procedures by approaching a number of issues/ questions. These issues included who has the right to submit a bankruptcy application and the conditions that must be met before submitting such an application; the impact of bankruptcy declaration on debtors, creditors and pre-existing contracts. Also, this article discussed the liability of directors of bankrupt companies and setting-off arrangement on bankruptcy by exploring the position of Omani law comparing to that of the UK and the US.

- Main findings:

This paper reached a number of findings and the most important of which are:

(i) there is no definite time-limit for the completion of all bankruptcy

(141) For more details about set-off on bankruptcy in the US: see Prewitt P., above 138, pp. 46-52.

(142) Ibid

(143) For more discussion: see Goode R., above 118, pp. 277-282; Finch V., above 123, pp. 614-621.

(144) Article 607 of the Commercial Code.

(145) Ibid.

procedures. Such a lengthy period has an impact on wasting the assets of the company since secured creditors' actions are not stayed during the process;

- (ii) one of the main deficiencies of the current bankruptcy regime in Oman is that even though unsecured creditors' claims are stayed during bankruptcy processes, secured creditors' actions are not stayed. As a consequence, bankruptcy trustees have to use some of debtor's resources to defend secured creditors' actions before the court; and
- (iii) Oman does not have in place a regulation for bankruptcy trustees/ administrators nor there is a program whereby sufficient training for a number of professionals is provided. As a result, the trustee is not required to have a particular qualification nor he is required to obtain specific training.

- Main recommendations:

The following recommendations should be considered if the efficiency of the bankruptcy procedures are to be realized:

- (i) Easing the process of rescuing/ liquidating the assets of the company requires a legal mechanism whereby secured and unsecured creditors are prevented from commencing or continuing legal claims against the company and secured creditors are prevented from seizing assets of the company and enforcing their rights for a limited period of time. However, in imposing a stay, caution should be taken since secured creditors are most particularly burdened by the imposition of such a stay. In this case, there should be a mechanism where secured creditors are given the necessary legal right to seek the lifting of the stay;
- (ii) Since it is the role of bankruptcy trustees to administer bankruptcy processes from the day of filing until bringing the process to conclusion. These practitioners should be equipped with the necessary skills in order for them to control the process successfully; and
- (iii) it is important to prescribe a time-limit for the completion of all bankruptcy processes. However, it is essential to have qualified bankruptcy practitioners in order to complete all bankruptcy procedures within the stipulated time-limit.

References list:

A- Books & Articles

Al-Hinai S., 'Preventive Composition Scheme' (Master Degree Dissertation, Sultan Qaboos University, 2010).

Ali J., 'The Legal Concepts of Public Companies' (1963) EJPS 90.

AL-Salimi A., Jawhar AL-Nizam (Qatar House Publisher, 2002).

Armour J. & Mokal R., 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' (2005) 1 LMCLQ 28.

Campbell A., 'Bank Insolvency and the Interests of Creditors' (2006) 7 JBR 133.

Cartwright P. & Campbell A. 'Bank Insolvency Issue' (2002) 6 IL 198.

Darmaki S., Bankruptcy Procedures under Commercial Code in Oman (notes prepared to undergraduate students, Sultan Qaboos University, 2013).

Derham R., The Law of Set-off, (3rd edition, Oxford University Press, 2003).

Finch V., Corporate Insolvency Law: Perspectives and Principles, (2nd edition, Cambridge University Press, 2009).

Fletcher F., 'UK Corporate Rescue: Recent Development- Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements- the Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002' (2004) 5 (1) EBOLR 120.

Franks J., Nyborg K. & Torous W., 'A Comparison of US, UK and German Insolvency Codes' (1996) 25 (3) FMJ 86.

Goode R., Principles of Corporate Insolvency Law, (4th edition, Sweet & Maxwell, 2011).

McCormack G., 'Apples & Oranges? Corporate Rescue and Functional Convergence in the US and UK' (2009) 18 (2) IIR 109.

McCormack G., 'Control and Corporate Rescue: An Anglo- American Evaluation' (2007) 56 (3) ICLQ 505.

McEowen R., 'The Assumption or Rejection of Executory Contracts in Bankruptcy- Are Commodity Contracts within a Safe Harbor?', (March 18th, 2009), Iowa State University.

Milman D., 'Moratoria in UK Insolvency Law: Policy and Practical Implication', (2012) 317 C.L.N. 1.

Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1997', Commercial Department.

Ministry of Justice, 'A Set of the Supreme Court Judgments in Oman: 1992', Commercial Department.

Nabil S., The General Principles of Saudi Arabian and Oman Company Laws: Statutes and Sharia (Namara Publications, 1981).

Naseef A., Comprehensive Commercial Encyclopedia, (4th edition, Beirut, Ewidat Press, 1999)

O'kane D. & Bawlf P., Global Guide to Corporate Bankruptcy: A Comprehensive Guide to Corporate Bankruptcy and a Survey of Global Corporate Bankruptcy Regimes (July 2010, Nomura International).

Prewitt P., 'Netting/ Set-off Under the Bankruptcy Code', (2003), 27 (3) G.E.R.

Reeday G., The Law Relating to Banking, (5th edition, Butterworths, 1985).

Sarkhoh Y., 'The Manager of A Limited Liability Company under Kuwait Commercial Companies Law: A Comparative Study', (1990) 5 A.L.Q. 163.

Suchak R., 'Corporate Rescue Proceedings and the Enforcement of Ipsos Facio Termination Clauses: A comparison of the English and US Approaches', (2012) 8 (2) I.C.R. 131.

Tett R., 'Administration Falls Short: The Need for Contractual Stability and an Executory Contract Regime', (2012) 9 (3) I.C.R. 167.

Tomasic R., 'Establishing a UK Rescue Regime for Failed Investment Banks' (2010) 3 (2) CRI 160.

Uttamchandani M., 'No Way Out: The Lack of Efficient Insolvency Regimes in the MENA Region' (March 2011), Policy Research Working Paper 5609, The World Bank.

Wood P., Principles of International Insolvency, (Sweet & Maxwell, 2007).

A. Laws:

Bahraini Bankruptcy and Preventive Composition scheme Act of 1987.

Egyptian Commercial Act of 1999.

Omani Commercial Code of 1990.

Omani Commercial Companies Law of 1974.

Qatari Commercial Code of 2006.

UAE Commercial Transaction Law of 1993.

UK Insolvency Act of 1986.

UK Enterprise Act of 2002.

US Bankruptcy Act of 1978.