

**NOVEMBER 11, 2021**

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## GAME CHANGER

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### Dubai Court Finds Directors and Managers Personally Liable for Over AED 448 Million in Company Debts

#### INTRODUCTION

For a manager, officer or director of a distressed company, it is tempting to indulge in what one court called “terminal optimism”: hope that macroeconomics will change, liquidity will return, and a rising tide of working capital will lift the stricken ship off the shoals.

For years, this practice prevailed, in part because there was little risk in quietly pressing onward, whilst there was significant personal risk in publicly admitting that a company had become insolvent. Laws on the books of most countries, including GCC states, potentially penalize officers or directors for conducting business while insolvent, but these laws were rarely enforced in large part because courts are reluctant to tell management how a business should be run.

A recent bankruptcy decision of the Dubai Court of First Instance may change that. In the case of Marka PJSC and its subsidiaries (collectively, “**Marka**”), the court held the debtor company’s managers and directors personally liable for over AED 448 million (approximately USD 122.3 million) in company debts. The court also froze the directors’ and managers’ personal bank accounts, investment securities, real estate and other personal assets to ensure payment.

#### MARKA’S MELTDOWN

Marka is a UAE retail and leisure company with subsidiaries that marketed retail products like Loreal and Sonia, and held a wide variety of dining franchises and sports brands. Marka floated an AED 500 million IPO in 2014 (Dubai’s first since 2009). But its aggressive acquisition strategy racked up debts of AED 682 million by the end of 2016. Marka’s buying binge coincided with a steep drop in oil prices, and after running into cash flow problems, its shares were suspended on the Dubai Financial Market. It ceased doing business in 2019, and its shareholders voted for liquidation.



## THE BANKRUPTCY CASE

In 2019, Al-Dar Properties PJSC, a creditor of Marka, filed a bankruptcy application, which was accepted by the Dubai Court of First Instance (the “**Court**”) in November 2020. The Court appointed two registered experts as trustees (the “**Trustees**”), and the Trustees calculated Marka’s debts at AED 448.2 million. The Trustees were unable to determine the value and location of Marka’s assets due to a dearth of company information and inability to gain access to the company’s offices. However, Marka’s last audited financial statements, from December 2018, indicated that the company had AED 304.2 million in assets, of which nearly half were goodwill and trademarks. Board members stated during the bankruptcy case that they did not know where Marka’s assets were.

## THE COURT’S RULING

After ordering Marka liquidated, the Court observed that, under Article 144 of the Decree Law No. 9 of 2016 (the “**UAE Bankruptcy Law**”), managers and directors may be held personally liable for company debts where the company is unable to pay at least 20 percent of its debts. It also noted that under UAE Bankruptcy Law Article 201, managers and directors may be imprisoned for up to two years for failing to keep commercial books sufficiently reflecting the financial position of the company. Moreover, Article 162 of the 2015 law on commercial companies provides that board members and managers may be held personally liable for acts of fraud or misuse of power.

The Court found that Marka lacked funds to pay 20 percent of its debts. It also found that the directors and managers violated the law by failing to maintain and provide the Trustees with financial statements, and by failing to provide an explanation for the extent of Marka’s insolvency. In light of these findings, the Court held Marka’s directors and managers personally liable for all of Marka’s debts, totaling AED 448,195,864.05. Under its power to “take additional provisional measures,” the Court also froze the bank accounts, real estate, securities and investments, and cars and vehicles of the nine directors and managers, and ordered all of the attached assets transferred to the treasury of the Court. The Court similarly prohibited the directors’ or managers’ banks from honoring cheques and other third-party payments by the individuals.

## ANALYSIS OF THE MARKA DECISION

The *Marka* decision is particularly brutal, as it was based on the reports of two Trustees without apparent opportunity of the directors or managers to dispute the Trustees’ findings, or tell the Court their sides of the story. The managers and directors were not even named as parties to the case. From an international perspective, the lack of an opportunity even to be heard before judgment was issued will be seen as harsh.

However, the facts of the case seem rather egregious. The directors and managers evidently walked away from an AED 500 million company, leaving in their wake a commercial debtor with no current organized records and little or no ability to collect and liquidate assets. By 2018, the company appears to have been insolvent, yet it continued to operate until 2019. Moreover, the company’s collapse was set against a high-profile IPO that left investors with large losses.

## A WARNING FOR MANAGERS AND DIRECTORS

The *Marka* case has set the restructuring community buzzing. One trustee’s advisor called it a “game changer,” and the “business as usual” approach to distressed companies has been called into question. Assuming the decision is not reversed on appeal, *Marka* serves as a grim reminder of the potential consequences of management abandoning its duties to wind down failing companies in a rational and fair manner.

In light of the Court’s decision, managers may wish to take steps to reduce the risk of personal liability. These steps include:

- Hire restructuring counsel as soon as a serious threat to the company’s survival is discovered.



- Ensure the value of company assets continues to be established and maximized.
- Ensure that books and records, including corporate minutes, audited and unaudited financial statements, and documents relating to the condition and value of asset, are properly maintained.
- In the event of bankruptcy, cooperate as much as possible with the trustee and bankruptcy experts. They may be writing reports that a court will rely upon in deciding whom to hold personally liable.

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