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Client Alert

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UAE: New Insolvency Law explained

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In brief

The UAE has issued Federal Law No. 48 of 2023 in relation to insolvency (the "**New Insolvency Law**"), which replaces Federal Law No. 9 of 2016 and comes into effect on 1 May 2024. Although the previous law was more progressive compared to the previous insolvency articles embedded in the old Commercial Code of 1993, at least in relation to the numerous insolvency matters and other protective composition and restructuring witnessed by the courts.

We have set out below some of the key characteristics of the New Insolvency Law:

1. In terms of definitions, the new law has clarified definitions that were somehow unclear or unfortunate in the previous law, by removing for instance the concept of "negative financial position" which restricts the jurisprudential role of the courts.

2. In terms of application, the new law applies to traders, whether physical persons or corporate entities, and civil professional companies.

3. In terms of exclusion to the scope of the law, the following entities are still excluded: (i) government related entities unless their decree of incorporation or articles of association provide for their submission to the insolvency law; and (ii) free zone companies that have distinct legislation and here we assume DIFC and ADGM companies and individuals that would be governed by the Personal Insolvency Law No. 19 of 2019.

4. Interestingly, the new law has carved out a new exclusion in relation to banks and insurance companies licensed by the Central Bank that are subject to specific legislations that govern their financial distress.

5. The new law resumes with the practice of the possibility of a preventive composition before or after insolvency proceedings.

In more detail

I. Introduction of Insolvency Courts, IMU and FRIU

The new law has created a specialised Insolvency Court which is a very welcome step and that was requested by insolvency practitioners for a very long time. The law also creates a unit within the Insolvency Court called the Insolvency Management Unit (IMU) chaired by a Court of Appeal judge to manage insolvencies, preventive composition, and restructuring, and ascertaining that they are procedurally compliant—meeting creditors and debtors.

Further, the new law has created under Article 12 a Financial Restructuring and Insolvency Unit (FRIU) at the Ministry

of Justice (thus confirming that the Ministry of Finance is no longer concerned with managing restructurings) composed of enough members of civil servants with experience in the areas of law, economy, and finance. The FRIU may also be assisted by external experts.

The FRIU powers are provided under Article 13 and those are mainly the coordination between the regulatory authorities and the Insolvency Courts to manage financial restructuring and insolvencies of regulated entities; to hold a register of insolvency experts and to fix their fees; to hold an insolvency register; and to train various insolvency practitioners (judges, lawyers, experts etc.) on international best practices.

II. The preventive composition regime

This section extends from Article 55 to Article 86. The debtor may submit an application for preventive composition if its business is capable of being pursued.

It is to be noted here that the new law in its definitions section under Article 1 defines the cessation of payment as the non-payment by the debtor of any matured debt after ten days of its being notified to do so, even if its assets were sufficient to pay such debt and even if said debt was secured by enough security.

The new law has kept the exclusive power to file the preventive composition to the debtor in line with the previous laws (Article 57).

Very importantly, Article 59 provides for the freezing of claims for three months as soon as the judgment declaring the opening of the proceedings is issued.

The IMU will provide the debtor with a certificate in relation to the freeze and its timeline.

As provided in the previous law, the opening of proceedings does not affect the maturity of outstanding debts, nor its interests and any agreement to the contrary shall be void. The same with contracts that remain valid as long as the debtor is performing its obligations.

A welcome development that was introduced in the previous law and kept in the new law is the financing which allows the debtor to get loans or facilities with or without security as requested in the application, or in any application submitted to the IMU after the submission of the application.

Article 75 of the new law in relation to the ratification by the court of the preventive composition plan is a very new article and provides more detailed requirements and conditions than in the previous law.

The order approving the plan shall be enforceable *erga omnes*, including towards creditors that rejected the plan or did not attend the meeting. This is reminiscent of the provisions of the old Commercial Code of 1993.

III. The restructuring regime

The debtor, the creditors, or the concerned regulatory authority may file an application for the opening of restructuring proceedings, if the operations of the debtor are capable of being continued, provided that the debtor is in cessation of payment or in financial distress or if the creditors had rejected a preventive composition plan or the court had issued an order refusing to endorse a plan. In that latter case, no new application may be submitted before the expiry of three months from the creditors' meeting or the court’s order.

The application may be submitted, generally, at any time with evidence of the approval of the creditors at the required majority on the restructuring plan.

The provisions of the preventive composition in relation to contracts, new financing and creditors committee shall apply *mutatis mutandis* on the restructuring process.

IV. Insolvency

This section extends from Article 120 to Article 190.

A. The insolvency regime

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The Insolvency Court issues an order declaring the insolvency of the debtor if the following conditions are met:

- If the debtor is in cessation of payments;
- If the debtor is in a negative financial position;
- If the operations of the debtor may not proceed.

The amount of debt threshold that was AED 100,000 in the previous law was not retained in the new law and any commercial loan that has matured and that remains unpaid after a 30 day-warning may lead to the insolvency of the debtor. This is reminiscent of the law of 1993 and a departure from the 2016 law.

The articles related to the insolvency under the new law give the impression that the law is more adapted to sole traders rather than groups and corporate entities, despite Articles 239 to 246 being dedicated to companies.

B. Clawback provisions

Provisions in relation to clawback of assets remain the same as in the previous law.

In relation to the sale of goods, the new law provides that if the continuation of the activity was decided, then the trustee shall continue to pay the goods and services necessary for the continuation of the operations of the debtor. The notion of retention of title is still not fully consecrated under Article 236 of the law and not much progress in this respect has been made compared to the 2016 law.

C. New trade and deprivation of civil rights

Article 160 of the new law allows an insolvent debtor to commence a new trade, which is a welcome development.

Article 164 deprives of political right any debtor who has been sentenced for fraudulent insolvency.

V. Penalties and rehabilitation

The concepts of negligent bankruptcy, gross negligent bankruptcy, and fraudulent bankruptcy that existed under the previous law remain the same and have been transposed in the new law, with an increase in fines for these offences.

Any person found criminally liable may be prevented from operating, managing, or supervising any commercial company for a period not exceeding three years (it was five years in the previous law) from the date of closure of the insolvency proceedings, and the name of the person shall be flagged at the relevant commercial or professional registry (as the case may be).

A debtor may be rehabilitated after one year (it was five years in the previous law) from the closure of the insolvency proceedings or earlier if they have repaid all of their debts, or have reached a settlement with their creditors, or received a waiver from their creditors.

Conclusion

It is clear that the legislator has tried very hard to put in place a good, modern, and comprehensive law.

However, the new law has some failings and it is—as was the 2016 law—procedurally heavy and complex. Trustees and the courts have seen their respective roles reinforced and expanded. The legislator has tried to make some clear and definite definitions but the complexity may work against the wishes of the legislator, and any layer of intervention will add additional time for the resolution of proceedings. Further, the new law seems to be more adapted to sole traders rather than groups of companies and corporate entities when the latter increasingly constitute the backbone of the UAE economy.

Finally, the most important thing is that this law is used by the courts and insolvency practitioners alike. However, it will only be used if it is considered user-friendly, which does not unfortunately seem to be the case *prima facie*.

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