The UAE’s Bankruptcy Regime: An Employment Perspective

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The introduction of the Bankruptcy Law is regarded as an important step towards bringing more clarity to the UAE’s insolvency regime. The Bankruptcy Law outlined a more modernized approach to company restructuring and insolvency management.

This article focuses on the employment aspects of the Bankruptcy Law, in particular, how it affects employers with regard to the payment(s) to be made to employees (and where employees rank as creditors) in the event of the employer being declared bankrupt. The article further compares (again from an employment perspective) the position in onshore UAE (following the introduction of the Bankruptcy Law) with that of the DIFC and ADGM which have their own separate insolvency regimes.

New Bankruptcy Law (applicable onshore and in all free zones aside from the DIFC and ADGM)

When a company is declared bankrupt, the courts will order that its assets are liquidated and its debts are paid off in accordance with the order of preferential debts as set out in Article 189 of the Bankruptcy Law. From an employment perspective, the Bankruptcy Law provides some degree of protection for employees by ranking payments owed to employees as second in the order of preferential debts (the first being any expenses of the winding up process and any fees of experts and trustees).

The Bankruptcy Law (Article 189 (B)) provides that end of service gratuity, unpaid wages and salaries due to employees which are paid regularly (not including allowances, bonuses, other contingent payments, or any other benefits either financial or in kind) are to be paid out provided that they do not exceed in total the “salary” of three months as a maximum. There is no definition of “salary” and it is not presently clear whether this is referring to a maximum of three months’ total remuneration or a maximum of three months’ basic salary only. Given that Article 189 expressly states that any allowances and bonuses etc are not to be included, we consider that the three month cap refers to basic salary only as opposed to total remuneration.

Article 189 (B) further states that “The Court shall decide to pay the wages and salaries entitled for the employees and workers of the debtor for a period not exceeding (30) thirty days from any available amounts of the debtor’s assets”. It is not entirely clear whether this is in addition to the aforementioned three month capped payment. However, we consider that it implies that the court may award an additional amount of 30 days’ salary to an employee if there are further monies left following the realisation of the company’s assets (i.e. that it may pay a further 30 days’ salary in addition to the three month capped payment, but only if funds are available). As the new Bankruptcy Law is largely untested in terms of its application before the courts, it is not possible to say with certainty that this will be the case and our view is formed from a literal reading of the wording of Article 189 (B) only (we will have more clarity and direction once the new Bankruptcy Law has been tested).

DIFC Position

The DIFC has its own Insolvency Law (DIFC Law No.3 of 2009) which should be read in conjunction with the DIFC Insolvency Regulations (which are enacted pursuant to Article 140 of the DIFC Companies Law No. 2 of 2009 (as amended) and Article 93 of the DIFC Insolvency Law) and the DIFC Preferential Creditor

Regulations. The DIFC Insolvency Regulations set out the manner (order) of distributing assets as follows: (i) the expenses of the winding up process, (ii) any payments to preferred creditors and (iii) payments of all other debts which are unsecured or secured. The DIFC Preferential Creditor Regulations specify that employees are to be regarded as preferred creditors.

The payments to be made to employees are classed as preferential debts and are set out in the DIFC Preferential Creditor Regulations as follows:

- Any sum owed by the company which is a contribution to a pension scheme on behalf of the company's employees or any end of service gratuities;
- Remuneration of company employees for a period of up to four months;
- Any payments in lieu of notice; and
- Payments in respect of accrued but untaken annual leave.

ADGM Position

The ADGM has its own Insolvency Regulations (ADGM Insolvency Regulations 2015). The ADGM Insolvency Regulations set out the manner (order) of distributing assets as follows: (i) the expenses of the winding up process, (ii) any preferential debts and (iii) payments of all other debts which are unsecured or secured.

Preferential debts are described in the ADGM Insolvency Regulations as any amount which is owed by the company to a person who is or has been an employee of the company and are payable by way of non-discretionary salary (including agreed holiday remuneration) or contributions to a pension scheme in respect of the whole or any part of the period of three months before the relevant date. The relevant date for these purposes means:

- in relation to a company which is being wound up by the court, the date of the appointment of a provisional liquidator or, if no such appointment is made, the date of the winding-up order;
- in relation to a company which is being wound up voluntarily, the date of the resolution for the winding-up of the company; or
- in relation to a company which is in administration, the date on which it entered administration.

Summary

In summary, employees are offered protection under all three jurisdictions (onshore UAE, the DIFC and the ADGM) in that they are regarded as preferential creditors and are second in line to be paid once the company's assets have been liquidated. Any onshore UAE employers who are going through bankruptcy/have been declared bankrupt should ensure that they are aware that, under the new Bankruptcy Law, payments to be made to employees are subject to a cap of three months' salary as a maximum (although note above what seems like a possible additional 30 day salary payment). The DIFC position is more favourable for employees in that, although there is also a cap on the amount of salary to be paid, it is of four months and this relates only to the remuneration of the employees and DIFC employees are also entitled to receive their gratuity, notice pay and a payment in respect of accrued but untaken annual leave as expressly set out in the DIFC Preferential Creditor Regulations. Finally, the ADGM position is that the salary and agreed holiday remuneration of any employee shall be paid in respect of part of or up to a full period of three months.

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