



SWEEPING CHANGES TO MYANMAR'S INSOLVENCY LAW REGIME

On 14 February 2020, Myanmar passed the Insolvency Law 2020, which came into effect on 25 March 2020. The new insolvency law replaces the Yangon Insolvency Act 1909 and the Myanmar Insolvency Act 1920, addressing both corporate and personal insolvency and modernises the insolvency regime.

Initially approved at the beginning of 2019 and developed in partnership with the Asian Development Bank (ADB), the new Insolvency Law notably focuses on micro and small to medium enterprises (MSMEs) and adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency.

1. Development of Insolvency Law in Myanmar

Previously, personal insolvency legislation in Myanmar comprised of the Rangoon Insolvency Act 1910 and the Burma Insolvency Act 1920, with the former applicable only in Yangon, and the latter applying across the whole country. Both acts originated from Indian Law and are known collectively as the "Insolvency Laws".

While primarily applicable to individuals, s.390 of the Myanmar Companies Law 2017 states that the Insolvency Laws also apply to the winding up of insolvent companies.¹ Prior to the 2017 Companies Law, the Burma Companies Act 1914 (now repealed) contained provisions for the winding up of

companies, which were incorporated into the 2017 Companies Law, albeit remaining unchanged and unsuited to Myanmar's growing economy.

In view of this rapid economic development and increasing foreign investment and the availability of credit, consultations began between representatives of an international law firm, assisted by the ADB, with individuals, institutions, interest groups, the Central Bank of Myanmar (CBM), the Ministry of Planning and Finance, the Directorate of Investment and Company Administration (DICA) and others.²

Comparative analysis was also undertaken of other insolvency regimes in Asia and drafts of the new Insolvency Law were reviewed by the World Bank and the International Monetary Fund (IMF) for feedback.

The draft Insolvency Bill was then presented for consultation and a consultation meeting was held on 9 May 2018 and the Bill was approved on 14 November 2019 during the fourth-day meeting of the 14th regular session of the second Pyithu Hluttaw.³

2. Particulars of the New Myanmar Insolvency Law

The new Insolvency Law covers the following main areas:

- Corporate rescue and rehabilitation;

1 Section 390 of Myanmar Company Law, 2017. https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/final_mcl_english_version_6_dec_president_signed_version_cl.pdf

2 <https://www.nortonrosefulbright.com/en/knowledge/publications/672efb15/norton-rose-fulbright-advises-myanmar-on-new-insolvency-law>

3 <https://www.globalnewlightofmyanmar.com/pyithu-hluttaw-approves-myanmar-insolvency-bill/>

- MSME insolvency (i.e. enterprise rescue and rehabilitation);
- Winding up;
- Personal insolvency; and
- Cross border insolvency.

Notable features of the new Insolvency Law are the introduction of the rescue and rehabilitation process for corporates and MSMEs, the implementation of the UNCITRAL Model Law on cross-border insolvency, which provides a model framework for solving financial distress for companies that have creditors or assets in more than one state, therefore helping to facilitate the rescue of financially troubled companies and protecting investments and employment regardless of jurisdiction and, as for personal insolvency, the encouragement for debtors to reach a voluntary arrangement with their creditors, a legally binding agreement between the debtor and creditor(s) to write off part of the debt or pay over a fixed period of time, usually with no interest.

The following provides a summary of the main points of the rescue and rehabilitation process and transition to winding up.

a. Corporate Rescue and Rehabilitation

The benefits of corporate rehabilitation have been recognised by governments around the world, and as such Part V of the new Insolvency Law introduces the process of corporate rescue and rehabilitation, which has been crafted with Myanmar's developing economy in mind.

The process consists of the company Rescue stage, during which options for rehabilitation are explored and decisions on the future of the company are made by creditors, followed by the company Plan stage, where the creditors resolve to approve the rehabilitation plan and the plan is implemented.

The main features of the corporate rescue and rehabilitation process are the requirement for the appointment of an insolvency practitioner (known as a rehabilitation manager) who takes control of the company during the process and a timeline for approval and implementation of the rehabilitation plan, which failing such, a mechanism is available for the company to enter liquidation.

Rehabilitation Manager

The rehabilitation manager, in exercising his or her functions to manage the affairs of the company, acts as the company's agent. The rehabilitation manager's functions, duties and powers are outlined in Part V, with the main objective being preparation of the rehabilitation plan to be submitted to creditors.

One significant function of the rehabilitation manager is that they must, where a plan is to be proposed to the creditors, investigate the viability of the plan, whether the plan benefits an associate or the company or secured creditor and the likely return to creditors if the plan is approved.⁴

As regards protections in favour of the company during the Rescue stage, it is stated that the protections set out in section 172(d), (e), (f) and (g) that apply to a company and its property in liquidation also apply and the rehabilitation manager may exercise the powers of the liquidators under those sections.

As for property subject to floating charge, the rehabilitation manager may dispose of or otherwise deal with property the subject of a floating charge:

- i. in the ordinary course of the company's business; or
- ii. with the written consent of the secured party; or
- iii. with the leave of the Court, which is conditional on the court being satisfied that the interests of the secured creditor are adequately protected.

Similarly, the rehabilitation manager may dispose of or otherwise deal with property the subject of a fixed charge:

- i. with the written consent of the secured party; or
- ii. with the leave of the Court, which is conditional on arrangements being made to adequately protect the interest of the secured party and the order being likely to assist in achieving the objects of the rehabilitation process.

As for the replacement of a rehabilitation manager at a creditors' meeting, it is outlined that such requires the consent of the secured creditor where that rehabilitation manager was appointed by those secured creditors.⁵

⁴ Section 51(c) of the Insolvency Law, 2020; Section 102(b) (MSMEs).

⁵ Section 70 of Insolvency Law, 2020

The control that the secured creditor may have over the rehabilitation manager may see the manager become a “rubber-stamp in the hands of the secured creditor”,⁶ to enforce their interests during the rehabilitation and rescue process.

Timeline for Submission and Coming into Effect of the Proposed Rehabilitation Plan

The timeline for submission of the proposed rehabilitation plan is outlined in section 71 of the new Insolvency Law, which states that the rehabilitation must convene a meeting of creditors to consider adoption of the plan within 3 months from the date of their appointment.

Any such meeting convened, may be adjourned, provided that the period of adjournment is no longer than 4 months from the date of appointment of the rehabilitation manager.

Both periods may be extended by order of the Court in exceptional circumstances where the Court considers an extension is likely to further the objectives of the rehabilitation proceedings.

Where the rehabilitation plan is approved by the requisite number of creditors, the rehabilitation manager must then prepare a formal document recording the terms of the plan and make arrangements for the document to be signed on behalf of the company and the plan supervisor (who must implement the plan as quickly and efficiently as is reasonably practice able) within 14 days. The rescue stage then ends and the Plan stage commences.

Transition to Winding Up

Section 88 stipulates that the company may transition to a creditors’ voluntary winding up where:

- i. creditors resolve to terminate the rehabilitation plan;
- ii. the creditors do not agree to enter into a rehabilitation plan or no rehabilitation plan is executed within the timeframe;
- iii. the creditors resolve to wind up the company at a creditors’ meeting; or
- iv. the court resolves to wind up the company.

In such a scenario, the liquidator is the rehabilitation manager or plan supervisor, unless the creditors resolve to appoint a different insolvency practitioner.

b. Enterprise Recue and Rehabilitation

Part VI outlines the process of rescue and rehabilitation for MSMEs (both incorporated and unincorporated) and similarly consists of the enterprise rescue stage and enterprise plan stage, albeit the process is simplified, less costly and the rehabilitation advisor takes more of an advisory role.

Similar to the corporate rescue and rehabilitation process, transition to winding up is also outlined.

The main differences between the corporate rescue and rehabilitation process and enterprise rescue and rehabilitation process are as follows:

- i. a rehabilitation advisor is appointed for whose functions and duties are broadly similar to a rehabilitation manager, albeit the rehabilitation advisor does not have control of the enterprise’s business, properties and affairs;⁷
- ii. the rehabilitation plan may be prepared by the rehabilitation manager or any interested party for corporate’s, however for MSMEs, it may be prepared by the enterprise or by the rehabilitation advisor with the consent of the enterprise;⁸
- iii. as for consideration of adoption of the rehabilitation plan for MSMEs, a copy of the proposed rehabilitation plan and notification that the plan must be voted on within 21 days must be prepared and sent to all creditors and a creditors meeting must be summoned within the 21 days to vote on adoption or rejection of the plan. This must be carried out within 10 weeks beginning on the date of the rescue and rehabilitation process commencing;⁹ and
- iv. during the rescue stage for corporates, all powers of all directors cease unless the rehabilitation manager sanctions their exercise,¹⁰ however for MSMEs, the

⁷ Section 104, the Insolvency Law, 2020.

⁸ Section 104, the Insolvency Law, 2020.

⁹ Section 122 and Section 123 of the Insolvency Law, 2020.

¹⁰ Section 55(c) of the Insolvency Law, 2020.

⁶ <https://www.dfdl.com/resources/legal-and-tax-updates/insolvency-laws-in-myanmar/>

directors, proprietors or partners may exercise their powers during the rescue stage to ensure that the business continues in the ordinary course.¹¹

c. Looking to the Future of Insolvency Law in Myanmar

The new Insolvency Law is a great step for Myanmar in enhancing its attractiveness to international investors, developing the market economy and discouraging the use of informal channels for debt recovery.

Importantly, the new Insolvency Law and in particular the introduction of the rescue and rehabilitation process, will hopefully aid Myanmar in raising its ranking on the World Bank Ease of Doing Business Report. In the 2020 Report, Myanmar ranked 165th out of 190, rising 6 places from 2019, and with one of the criteria analysed being resolving insolvency, which in turns considers the time, cost, outcome and recovery rate for commercial insolvency and the strength of the legal framework.

In order to encourage the success of the new Insolvency law and foster Myanmar's development, it is therefore important that supplementary efforts are undertaken, including focus on capacity building, owing to the current sparsity of experienced insolvency practitioners, and continued commitment from the Government to commercial law reform.

¹¹ Section 105(c) of the Insolvency Law, 2020.

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Hong Kong Office:

Dominion Centre
12th Floor
43-59 Queen's Road East
Hong Kong
Tel: + (852) 2905 7888
Fax: + (852) 2854 9596

Myanmar Office:

161, 50th Street
Yangon, Myanmar
Tel: + (95) 1 8203898
Email: enquiries.myanmar@charltonslaw.com

www.charltonslaw.com / www.charltonsmyanmar.com