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Myanmar's 2020 Insolvency Law

Myanmar's new Insolvency Law (IL) came into effect on February 14, 2020, replacing the Yangon Insolvency Act 1909 and the Myanmar Insolvency Act 1920. The long-awaited replacement law was soon followed by the Insolvency Rules, issued by the Supreme Court of the Union on April 28, 2020.

The IL covers all aspects of insolvency-related matters in Myanmar, including insolvency procedures for natural persons and corporate entities; corporate rescue and rehabilitation plans; micro, small, and medium-scale enterprise (MSME) insolvency; company liquidation proceedings; and cross-border insolvency.

Insolvency Procedure

In proceedings against a natural debtor, a creditor may choose between either serving a bankruptcy notice to the debtor or proceeding directly with the court. The bankruptcy notice must use Form-13 prescribed by the Insolvency Rules, requiring a natural debtor to pay a debt to the satisfaction of the creditor within 21 days. If the payment is not made by the deadline, the creditor can file a petition with the court, along with proof that a bankruptcy notice has been served.

If a creditor chooses to forgo serving the bankruptcy notice and instead proceed directly with court action, section 248 of the IL provides that a creditor's petition may only be presented to the court when a natural debtor meets the following criteria for personal insolvency:

- ▶ The amount of debt (or aggregate of debts) is at least MMK 1,000,000 (approx. USD 733);
- ▶ The debt is for a liquidated sum payable to a petitioning creditor either immediately or at a certain point in the future;
- ▶ The debt is unsecured, unless the provision of "creditor with security" applies;
- ▶ The debtor is unable to pay the debt or appears to have no reasonable prospect of being able to pay; and
- ▶ There is no outstanding application to set aside a bankruptcy notice served by other creditors regarding the debt.

For corporate insolvency, a company is presumed insolvent if:

- ▶ a creditor owed at least MMK 1,000,000 (approx. USD 733) has served the company with a written demand using Form-9 prescribed in the Insolvency Rules by leaving it at the company's registered office and, within 21 days, the company has not paid, secured, or compounded the debt to the reasonable satisfaction of the creditor; or
- ▶ a creditor submits to the court that a court execution or other process issued in favor of the creditor has not been satisfied in whole or in part.

After this presumption of insolvency has been made, an

application to the court for the winding up of the company based on insolvency can be presented by a company director or by a creditor. The court will then decide to appoint a liquidator and proceed with considering the company's outstanding debts.

A bankruptcy petition for either personal or corporate insolvency may be presented by one creditor or joint creditors. In its assessment of the matter, the court will also consider whether the debtor is domiciled in Myanmar or is personally present in Myanmar when the petition is presented; or has been ordinarily resident in Myanmar, has had a place of residence in Myanmar, or has carried on business in Myanmar at any time in the preceding three years.

Corporate Rescue and Rehabilitation

Corporate rescue and rehabilitation proceedings are prescribed in part V of the IL, with the initial aim of rescuing the distressed company. If a rescue cannot be achieved, the next priority is to ensure that as much of the company's business as possible continues in existence. If this in turn is not viable, the goal then becomes to obtain a better result for the company's creditors as a whole than would be likely if the company were wound up.

The application for a rehabilitation order can be made by the company itself, the liquidator of the company, one or more directors of the company, or one or more creditors of the company (including secured creditors), or a combination of these persons.

The rehabilitation proceedings can be divided into two stages: a rescue stage, during which rehabilitation options are explored and a decision is made by creditors; and a plan stage, where the company's creditors resolve to approve a rehabilitation plan and its implementation.

Once the application for rehabilitation has been approved by the court, a rehabilitation manager will be appointed to manage the affairs and assets of the company during the rescue stage while investigating options for achieving the rescue and rehabilitation objectives. The creditors may also appoint a creditors' committee to consult with the rehabilitation manager. In addition, a meeting of creditors of the company must be convened by the rehabilitation manager within 30 days of his or her appointment so that the creditors can consider the rehabilitation plan proposed by the rehabilitation manager. If the creditors approve it, a plan supervisor will be appointed at the plan stage to implement the rehabilitation plan as efficiently as is reasonably practicable.

MSME Insolvency

Section 2 of the IL defines an MSME as an incorporated or unincorporated enterprise or business, but does not provide any specific criteria. The Myanmar Companies Law 2017, in comparison, defines a "small company" as having annual revenue of less than MMK 50,000,000 (approx. USD 36,600) or having no more than 30 employees. The Small and Medium Enterprises Development Law further defines SMEs along specific criteria varying by industry.

Incorporated and unincorporated MSMEs with business debts totaling no more than MMK 10,000,000 (approx. USD 7,340) or MMK 1,000,000 (approx. USD 733), respectively, are eligible to apply for MSME rehabilitation as prescribed in part VI of the IL. Similar to company rehabilitation proceedings, MSME rehabilitation consists of the rescue stage and the plan stage.

If the MSME is able to continue business operations during the MSME rescue stage, a rehabilitation advisor will be appointed to advise and assist MSMEs in exploring options for its rehabilitation plan. A rehabilitation plan must

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be prepared by the MSME or a rehabilitation advisor (with the MSME's consent) and sent to all creditors. The rehabilitation advisor will summon the creditors to a meeting, and they must accept or reject the proposed plan within 21 days of being notified. Upon approval of the rehabilitation plan, a plan supervisor will be appointed for its implementation.

Company Liquidation Proceedings

Part VII of the IL provides company liquidation proceedings that are to be enforced with all liquidated companies in Myanmar. Previously, liquidation could only proceed in accordance with the Myanmar Companies Law 2017; now, it will proceed in accordance with the IL, with the relevant statutory requirements expected to be announced soon by the Directorate of Investment and Company Administration.

Cross-Border Insolvency

The IL embraces the principle of the Model Law on

Cross-Border Insolvency of the United Nations Commission on International Trade Law to promote recognition of foreign proceedings in local courts. According to part X of the IL, the Model Law has force in Myanmar as if it referred to the IL itself—in other words, the Model Law applies to the extent that it is consistent with the IL. Section 381 of the IL also affirms that the claims of foreign creditors must not be ranked lower than the unsecured claims of other creditors solely because the creditor concerned is a foreign party.

Conclusion

Replacing century-old legislation, the IL is another notable and significant step on Myanmar's ongoing journey of legislative modernization. This welcome development indicates a positive and improving legal environment for companies operating in Myanmar or considering expanding into the jurisdiction. Moreover, it provides guidance for companies about what could be in store should they face hard times—a real concern given current global developments—and confirms that distressed businesses in the jurisdiction will be able to rely on up-to-date legal instruments. 🏡