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Myanmar Modernizes its Insolvency Regime for Investors

Pyidaungsu Hluttaw enacted the Insolvency Law on 14 February 2020 updating the regulatory framework that previously consisted of the provisions under the 2017 Myanmar Companies Law, 1920 Burma Insolvency Act, and the 1909 Rangoon Insolvency Act.

The Insolvency Law (2020) introduces rehabilitation and rescue as the new mechanism for the insolvency process. The companies may now go through rehabilitation, if applicable, instead of immediately winding up upon insolvency – as it was the only option under the previous framework. In addition, detailed regulations for Insolvency Practitioners and Receivership are provided in the Insolvency Law (2020). It also contains provisions for cross-border insolvency proceedings – incorporating the modal law of the United Nations Commission on International Trade Law. Overall, enactment of the new insolvency legislation enhances the growth of corporate governance in Myanmar; having systematic and modern insolvency procedures will help establish trust among the international business community for investments in Myanmar investment.

In accordance with Section 1 (b) of the Insolvency Law, the Insolvency Law will come into effect once the President's Office issues a Directive specifying the commencement date.

Corporate Insolvency

The Insolvency Law (2020) places an emphasis on corporate rescue and rehabilitation processes to facilitate the rescue of businesses. The rehabilitation proceeding consists of the Rescue Stage, where the rehabilitation options are explored and the decision for the future of the company is made by creditors, and the Planning Stage, during which the rehabilitation plan, if approved by the creditors, is implemented.

The Rescue Stage commences when a duly registered Insolvency Practitioner is appointed as a Rehabilitation Manager. The rehabilitation application may be made to the court by the company, the liquidator, one or more directors of the company, one or more creditors of the company or a combination of the aforementioned persons. The appointment of the Rehabilitation Manager take effect either when the court issues the rehabilitation order or when the company or secured creditor delivers the written appointment to the Insolvency Practitioner. During the Rescue Stage, the appointed Rehabilitation Manger takes all of the property of the company under their control and acts the agent of the company in order to achieve rescue of the company from insolvency. The Rehabilitation Manager must prepare and decide together with the creditors whether to adopt a reorganization plan within 3 months of the appointment.

The Planning Stage begins when the creditors have approved and signed the rehabilitation plan and concludes upon the success, failure, or variation of the rehabilitation plan. The rehabilitation plan is a form of deed which has binding effect on the creditors, the company, the company's officers, and, to some extent, the shareholders of the company. The rehabilitation plan must include, among other things, the identity of the plan supervisor who will oversee the company affairs during the implementation of the rehabilitation plan, the roles and responsibilities of the company directors and the plan supervisor, the nature and duration of any moratorium period, and the circumstances in which the deed terminates and whether, upon successful implementation of the plan, the company reverts fully to the control of its directors or is to be deregistered.

Where the rehabilitation plan is not approved or does not succeed, the company may proceed to move into the liquidation stage. Pursuant to sub-section (2) of the Section 88, the liquidator of the company shall be the Insolvency Practitioner who was the rehabilitation manager or plan supervisor immediately prior to the transition to winding up. The rehabilitation mechanism helps to preserve employment and protect investments from being subjected to immediate winding up upon insolvency.

Micro, Small & Medium Enterprises

The Insolvency Law (2020) contains a separate corporate rescue and insolvency regime specifically tailored to the circumstances of Micro, Small & Medium Enterprises ("MSME"). Similar to general corporate insolvency, MSMEs may appoint an insolvency expert as a Rehabilitation Advisor.

Once the Rehabilitation Advisor is appointed, the Rehabilitation Advisor is required to notify the MSME, and the public, the Registrar, and to all known creditors of the MSME. The functions of the Rehabilitation Advisor is to advise and assist on the appropriate means for the rehabilitation of the business, to advise and assist on the continuing operation of the company during the rehabilitation phase, and to carry out the functions related to the rehabilitation procedures and other functions prescribed under the 2020 Insolvency Law. The Rehabilitation Advisor is required to carry out such functions with a view to efficiency and protection of the interests of all creditors. The Insolvency Law (2020) provides that the Rehabilitation Advisor is allowed to dispose of or otherwise deal with properties under a floating charge in the course of regular business operations of the MSMEs, with the written consent of the secured party, or with the leave of the Court.

In the event that a creditor holds the security to all the assets of the MSME, or most of the MSME, a notice of the appointment of the Rehabilitation Advisor will be sent to the said creditor within 2 days. The creditor may, within 5 days, appoint a substitute insolvency expert as a rehabilitation advisor.

With respect to secured properties, the MMSE that is undergoing rehabilitation may dispose of or otherwise deal with properties subject to a fixed charge with the written consent of the secured party, or with the leave of the Court. The Court may only issue such leave if it is satisfied that arrangements have been made to protect the interests of the secured party, and such order would likely assist in achieving the following objectives: (1) rescuing the MSME as a going concern; (2) if the objective above is not achievable, ensuring that as much as possible of its business continues to exist; or (3) if the objectives above are not achievable, achieving a better result for MSME's creditors as a whole than would likely be the case if MSME was placed under insolvent administration.

Distribution priorities

Another notable feature of the Insolvency Law (2020) is that distribution priorities are formalized in the law under Section 196. As a general principle, all debts are ranked equally although the distribution priorities are subject to the following order:

- (1) Insolvency Practitioner's expenses;
- (2) if the liquidator was appointed by Court order, the legal costs in respect to the application for that order;
- (3) Insolvency Practitioner's remuneration;
- (4) wages, salary or other remuneration owed to the relevant employees in respect of work performed before the commencement of the liquidation;
- (5) leave entitlements owed to the relevant employees;
- (6) retrenchment entitlements owed to the relevant employees;
- (7) compensation for any injury suffered in the course of the employee's employment owed to relevant employees;
- (8) debts in relation to rehabilitation; and then
- (9) such further or other debts as may be prescribed by the Regulations.

The Insolvency Law (2020) introduces a modernized insolvency regime to be in line with international developments and modern commercial practices. It also provides creditors with transparency and predictability with respect to the regulations and their rights whereby they can accurately assess their potential risks when extending loans and making investments. On the other hand, the Insolvency Law (2020) affords some options to debtors in the event of financial difficulties.

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About Kelvin Chia Yangon (KCY)

KCY has been in active operation in Myanmar since 1995, currently with offices in Yangon and Mandalay. KCY is the firm of choice for those seeking to navigate Myanmar's fast-changing and complex regulatory landscape, a jurisdiction in which KCY has gained in-depth legal expertise from the numerous transactions it has handled.

Our main practice areas

Foreign Investments | Incorporation and Company Maintenance | General Corporate and Commercial | Due Diligence | Mergers and Acquisitions | Joint Ventures and Production Sharing Agreements | Investment Funds | Energy/Oil and Gas | Natural Resources/Mining | Banking | Project and Project Financing | Manufacturing | Education | Agriculture | Real Estate | Infrastructure | Construction | Telecommunications | Compliance / Regulatory | Licensing and Permits | Labour and Employment | Immigration | Taxation | Insurance | International Arbitration | Intellectual Property | Special Economic Zones

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