

Modernising Insolvency in Myanmar: Opportunities and Challenges

Overview

Myanmar is often seen as a land of mysteries. The Southeast Asian nation of 53 million people is strategically located between the two economic giants of China and India and has in the last decade, begun to emerge from five decades of military rule. Amid a challenging global environment, Myanmar's democratically elected Parliamentarians are committed to the development of a market economy; determined to reform an economy which had been centrally planned for decades. Among its package of commercial law reforms, insolvency was identified as a key priority by both the Myanmar government and the Asian Development Bank (ADB) to improve the economic environment in Myanmar. In 2016, Norton Rose Fulbright (NRF) Sydney Office was engaged by the ADB to draft a new insolvency law. On 14 February 2020, more than three years of education, consultation, and drafting resulted in the *Insolvency Law* becoming Union Hluttaw Law 1/2020 (Law). It will come into effect on a date soon to be promulgated,

Background – Myanmar's Changing Economic Circumstances

Myanmar has for some time restricted lending to the form of 'English mortgage' of land with duration limited to one year. Access to credit has been, and largely remains, extremely limited. People resort to informal lending market for financing needs. However, the Central Bank has recently allowed banks to lend according to their own credit management plan and grant loans of up to three years in duration. Myanmar banks are also now able to accommodate basic necessities in international trades, such as issuing letters of credit or bank guarantees without requiring full cash deposits. Myanmar had shut its door to foreign banks in the past but the Central Bank has gradually allowed foreign banks to enter the Myanmar market. International lenders with branches in Myanmar are now permitted to serve both domestic and foreign companies in Myanmar. Personal credit, in the form of credit cards and home mortgages, has also become increasingly common in Myanmar. With these significant reforms in the banking and financial sectors, the once closed Myanmar economy is ready to embark on expansion based on sustainable credit growth.

Insolvency before the new Law

The *Burma Companies Act 1914* was repealed in 2017 and replaced with a new *Companies Law*. The 1914 Act was a colonial-era statute that contained unreformed 19th century provisions for winding up, receivership and schemes of arrangement. These provisions were incapable of accommodating the needs of a modern economy. They are particularly unsuited to addressing the needs of Myanmar's small businesses: the backbone of the economy. As broader reform of Myanmar's insolvency laws was anticipated, the *Myanmar Companies Law 2017* maintained the old winding up provisions of the former *Companies Act* without change as an interim measure. Despite their British origin and Myanmar's common law tradition, these provisions were hardly ever used. We are not aware of any reported judgment in respect of Myanmar's existing insolvency laws in the past 50 years.

Personal insolvency was governed by *Rangoon Insolvency Act 1910* and *Burma Insolvency Act 1920*, which might similarly be described as colonial anachronisms.

Insolvency law in Myanmar is in a dire state in need of urgent reform.

NRF and the new Law

Myanmar's *Insolvency Law 2020* was drafted by NRF under instructions from the ADB and the Union Supreme Court of Myanmar. It is intended to strengthen and modernise legal and institutional frameworks of insolvency and restructuring regimes in Myanmar.

Being aware of the undesirable effects of wholesale transplantation of foreign law, NRF sought to address many specific needs of Myanmar's economy in drafting the new Law. The unreformed winding up provisions in the *Companies Law 2017*, as well as the *Rangoon Insolvency Act* and *Burma Insolvency Act*, were repealed upon enactment of the Law. Provisions on corporate and personal insolvency and restructuring are included in the new law.

While the Law has incorporated the best global practices in both corporate and personal insolvency regimes, it has also retained some

flexibility to adjust to Myanmar's unique cultural and economic environment. Wide consultations were undertaken to ensure that Myanmar has a law that responds to its legal, cultural and economic context. We believe that the new Law contains all necessary ingredients for success for Myanmar.

Introducing Corporate Rescue

Governments across the world have increasingly recognised benefits associated with insolvency regimes that focus on corporate rehabilitation and value-preservation rather than penalisation and stigmatisation. The Law introduces to Myanmar the concept of corporate rehabilitation. The rehabilitation process in Part V of the Law has been carefully crafted to deal with the current business environment in Myanmar. However, it also has the capacity to facilitate increasingly complex rehabilitations as the Myanmar economy develops and the use of complex corporate structures and investment vehicles become more common. The Law prescribes for an independent rehabilitation manager to take control of the management of the debtor company during the rehabilitation process. This concept has never existed in Myanmar. Most importantly, the Law imposes a strict timeline for approval and implementation of a rehabilitation plan. In the case of a rehabilitation plan not being approved or implemented, there is a conversion mechanism for the company to enter into liquidation. These provisions are vital in ensuring that rehabilitation process is not caught by red tape and administrative delays which are common features in Myanmar. The availability of corporate rehabilitation will greatly assist Myanmar to expand its booming manufacturing sector where the disruption in supply chains due to insolvency can be costly and undesirable.

MSME Specific Insolvencies

The Law also recognises the important role of Micro, Small and Medium Enterprises (**MSMEs**) in the Myanmar economy. Part VI of the Law contains provisions for dealing with insolvency of both incorporated and unincorporated MSMEs. The use of corporate structure in Myanmar is not as widespread as in other economies and there is a very poor understanding of the concept of separate legal personality. Therefore, access to Part VI has been defined with reference to business debt, whether or not the business entity is incorporated, and excludes those enterprises that become insolvent due to personal or consumer debt. The Law provides a simplified and cheaper rescue and rehabilitation regime for MSMEs, where the proprietor of the business remains in control under the general oversight of a rehabilitation advisor, who will assist with the preparation of a rehabilitation plan within strict timelines.

In the event that winding up becomes necessary, the key focus of MSME specific insolvencies will be on the expedited distribution of available assets. Unless creditors consent and provide funding, a liquidator will have no obligation to investigate the affairs of the company or pursue the recovery of preferential or uncommercial transactions. However, creditors will have recourse for judicial review if they are dissatisfied. Severe delays in dispute resolution has always been a concern for investors and the new law, through the imposition of precise deadlines, will provide temporal certainty for creditors and other stakeholders in insolvent MSMEs.

Focus on Timeliness

The Law aims to deliver quick, cheap and efficient insolvency regimes. With strict timelines, elimination of unnecessary procedures and minimal involvement of courts, the Law aims to address and overcome investors' concerns about delays in Myanmar courts and bureaucratic red tape. It is hoped that the Law will not only streamline insolvency procedures but also reduce unwanted frivolous lawsuits on minor procedural grounds. The Law aims to support and strengthen the development of commercial law in Myanmar.

NRF is also assisting Myanmar's Supreme Court to finalise Rules to be made under the new Law. We anticipate that this task will soon be completed and are confident that the Rules will be in place when the Law comes into effect.

Assisting with Capacity Building

A legal regime can only be as effective as its practitioners. NRF has been actively involved in the process of capacity building in Myanmar's judiciary and insolvency profession; with a team of experienced advisors having made numerous trips to Myanmar, not only to better understand the legal and economic context in which the Law has been drafted, but also to explain modern insolvency concepts as well as the content of the Law as it has developed to various stakeholders in government, the business community and NGOs. NRF partners Scott Atkins and John Martin, along with internationally prominent commercial judges (and retired judges), conducted a judicial colloquium held in Myanmar's capital Naypyitaw to educate selective judges and other judicial officers on the Bill, as well as other wider issues for judicial considerations in insolvency matters.

In a country where most judges lack commercial experience, let alone experience of international commercial realities, capacity building is not without challenge. However, NRF has been working closely with the ADB to assist the Myanmar judiciary to play a more active role in commercial law reform process.

Myanmar will also need professional insolvency practitioners to implement the new Law. Currently, only a handful of older members of the accounting and legal professions have any experience in insolvency beyond uncontested voluntary windings up, due to the scant use of existing insolvency regimes. NRF has actively worked with legal and accounting professional associations to achieve the goal of establishing a thriving profession of insolvency practitioners in Myanmar, upon which the proper function of the new law depends. There has been a particular focus on the establishment of a professional body to represent practitioners and to play an important role in the education, admission, and disciplining of insolvency practitioners. Advice on the constitution of such a body has been an important part of NRF's remit.

Some Other Challenges

NRF's educational efforts have included the country's lawmakers. The enactment of the Insolvency Law by Myanmar's Parliament is one of the most significant milestones in commercial law reform in Myanmar since the end of military rule in 2010.

Successful integration of Myanmar's economy into the global economy requires significant commitment from its government beyond domestic law reforms. Both NRF and ADB believe that the adoption of the *UNCITRAL Model Law on Cross-Border Insolvency*, which is a significant feature of the new Law, will make Myanmar a more attractive investment destination.

Final Thoughts

Myanmar's Constitution provides for a market economy and the functioning of a market economy requires sound commercial law regimes. Myanmar's new *Insolvency Law* provides for quick, cheap and effective insolvency regimes and will discourage the use of informal channels of debt recovery. The Law will demonstrate to international businesses an example of best global practices being applied to Myanmar's unique economic circumstances. The Myanmar people have long been living under extreme economic hardships that have contributed to many political and social conflicts in a nation of rich cultural diversity. NRF believes that insolvency and corporate rehabilitation regimes created by the Law will directly contribute to expansion of the economy through better access to financing and lower cost of credit. Economic prosperity and improved living standards will, in turn, assist in resolving difficult social and political issues facing Myanmar society and promote the 'rule of law.' NRF is optimistic of the far-reaching consequences and positive effects of Myanmar's new *Insolvency Law*.

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