



MYANMAR INSOLVENCY REGIME: Key Questions & Answers

MAY 2020

NO.	KEY QUESTION (S)	ANSWERS
1.	<p>What is the primary legislation which governs corporate insolvency in Myanmar?</p> <p>Are there any other laws in force dealing with corporate insolvency?</p>	<p>The primary legislation dealing with corporate insolvency is the Insolvency Law of 2020 (the “Law”). While the Insolvency Rules of 2020 (the “Rules”) have also been framed, the Rules are yet to be enforced.</p> <p>The Yangon Insolvency Act of 1909 (“YIA”) and the Myanmar Insolvency Act of 1920 (“MIA”) were the existing laws (now repealed) that governed the insolvency and bankruptcy regime in Myanmar. The Myanmar Companies Law (“MCL”) includes provisions in relation to winding up of companies incorporated under the MCL in Part V; however, the operation of those provisions is effectively suspended in favour of the Law.</p>
2.	<p>Is there any conflict provisions in the corporate insolvency laws of Myanmar?</p>	<p>The Law repeals both the YIA and MIA. However, Part V of the MCL, which deals with winding up of companies is not repealed by the Law. With the commencement of the Law, the winding up of companies, incorporated and unincorporated MSMEs and partnerships must be carried out as per the Law and not under the MCL.</p> <ul style="list-style-type: none"> ▪ However, the Law would not apply to the winding up of any company or partnership or bankruptcy of an individual which commenced before the commencement of this Law. The winding-up of such companies or partnerships or bankruptcy of an individual shall be carried out as per the previous law which includes YIA, MIA, and MCL. ▪ However, an application for the winding up of a company or other entity made under the previous law, but not completed before the commencement of the Law will be, unless withdrawn by the applicant, taken to be an application made under the Law. <p>Thus, for proceedings which have commenced under previous laws, provisions of the previous will apply while fresh proceedings and proceedings which have just been applied for will commence as per the provisions of this Law.</p>
3.	<p>Who can initiate a corporate rehabilitation proceeding under the insolvency laws in Myanmar?</p>	<p>A corporate rehabilitation proceeding may be initiated by the following:</p> <ul style="list-style-type: none"> ▪ A company following a resolution passed by the board of directors where it has been resolved that the company is unable to pay, or is unlikely to be able to pay, its debts as and when they become payable; or

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		<ul style="list-style-type: none"> ▪ A secured creditor who holds security over all or majority of the assets of the company and the terms of such security allows the appointment of a receiver or rehabilitation manager (“Manager”); or ▪ Rehabilitation order passed by a court based on an application made by the company or liquidator of the company or directors or creditors of the company. <p>A rehabilitation proceeding against a company is initiated with the appointment of an insolvency professional as the Manager for the company.</p> <p>A Manager may not be appointed under the following circumstances:</p> <ul style="list-style-type: none"> ▪ The manager has not consented in writing; ▪ Company is already under rehabilitation proceeding and order has not been given by the court for appointment of Manager; ▪ Company is already in liquidation; and ▪ If the company is a bank, NBFIs, or scheduled entity within the meaning of Section 2 of the Financial Institutions Law. <p>In the event a Manager is not appointed as per the Law, insolvency proceeding will not be deemed to have commenced.</p>
4.	What are the rights of secured vs. unsecured creditors for corporate insolvency proceeding in Myanmar?	<p>In the case of winding up of a company, the debts should be paid as per the <i>pari passu</i> liability of the company. As a general concept of law, the rights of secured creditors are ranked above those of unsecured creditors. Thus, the debts of the secured creditors may be given priority over the debts of the unsecured creditors. The Law expressly preserves the rights of secured creditors under their security in a winding up, subject to the priority given to employee entitlements.¹</p> <p>In case of rehabilitation of a corporate, the secured creditors enjoy a privilege whereby the Manager may not deal in the properties of the company which would prejudice the interest of the secured creditors. In case of the distribution of proceeds of the sale by the Manager, the priority of the secured creditors stands over the priority of the unsecured creditors.</p>

¹ Refer sections 172 & 205

<p>5.</p>	<p>When can a receiver/liquidator be appointed in Myanmar?</p> <p>Who can appoint a receiver under the applicable laws in Myanmar?</p>	<p>A receiver is an insolvency professional who may be appointed by a secured creditor of the company under the terms of its security to manage and/or realize secured assets to pay the sum secured to the creditor. A receiver may also be appointed by the court.</p> <p>The Law prohibits the appointment of a receiver by a secured creditor, save in limited circumstances. It is intended that secured creditors will generally exercise their rights to appoint a Manager under the rehabilitation provisions rather than a receiver.</p> <p>A receiver can be appointed only under the following circumstances:</p> <ul style="list-style-type: none"> ▪ where the security pursuant to which the receiver is to be appointed was created before the enactment of the law; ▪ where the secured creditor does not have security over all or majority of the assets of the company and the law does not otherwise prohibit the appointment of a receiver (allowing for an appointment to a single secured asset of the company rather than its business); ▪ where the court orders the appointment of a receiver in special circumstances; ▪ where permitted by the rules; ▪ a receiver may also be appointed in the following periods: <ul style="list-style-type: none"> ▪ during the period in which the secured creditor is bound to observe a rehabilitation plan under corporate or MSME rescue and rehabilitation and the appointment is permitted by the plan; and ▪ when the company is in liquidation. <p>A liquidator, on the other hand, is entrusted with proceedings of winding up and liquidation of a company. The winding-up commences upon the appointment of a liquidator.</p> <p>A liquidator may be appointed by the members of the company or the creditors of the company in cases of a voluntary winding up. He/she may also be appointed by the court upon a court-ordered winding up.</p>
<p>6.</p>	<p>What are the protections available to a company during the corporate insolvency proceeding in Myanmar?</p>	<p>The following protections are available to a company during the insolvency proceedings:</p> <ul style="list-style-type: none"> ▪ No action, proceeding or arbitration against the company or its property may be proceeded with or commenced without the leave of the Court or on such terms as the Court may impose; ▪ No attachment, sequestration, distress or execution may be put in force against the company or its property; ▪ No transfer of shares or any alteration in the status of the company's members arising from the transfer may be made without the express consent of the Manager; ▪ The property used by the company or in possession of the company cannot be transferred to the owner or lessor without leave of the court;

		<ul style="list-style-type: none"> ▪ No step to enforce or continue to enforce security over the property of the company may be exercised by any person without leave of court or written consent of Manager; and ▪ No legal process may be initiated or if initiated, continued against the guarantor of the company without leave of court.
7.	Does the law separately provide for the duties of directors and how does it pave with the existing laws?	The Law does not separately provide for specific duties for directors of companies undergoing restructuring or rehabilitation or winding up, rather the powers of directors are restricted (See below).
8.	Are there any restrictions on the power of directors with the onset of corporate insolvency?	With the initiation of the rehabilitation proceeding of a company, the directors of the company cease to have any power of the company. The Manager who is appointed on behalf of the company as an insolvency practitioner to oversee the rehabilitation proceeding may perform the activities of the directors of the company. Further, the Manager will have the power to appoint new directors or remove existing directors of the Company.
9.	Is the difference between financial credit and operational credit recognized in Myanmar?	<p>No, the term financial and operational credit has not been defined under the Law. Accordingly, no distinction between the two has been recognized under the Law.</p> <p>A corporate resolution proceeding may commence if a company is unable to or it is unlikely that the company will be able to pay its <u>debts</u>. Similarly, a liquidator may initiate a winding-up proceeding against a company that is unable to or it is unlikely that the company will be able to pay its debts. Debts may be either financial or operational <u>debts</u>.</p>
10.	Is there a specific time-frame for the corporate insolvency or winding-up proceedings to be concluded under the applicable laws in Myanmar?	<p>No, the Law does not provide a definitive time-frame for completion of the entire rehabilitation proceeding or winding up proceeding for a company.</p> <p>For rehabilitation proceedings, the Law requires the Manager to conduct a meeting of creditors within three months from the date of appointment and float the Rehabilitation Plan. While the Rehabilitation Plan may contain the period within which the rehabilitation of the company must be effected, the Law does not specify the period by which the Rehabilitation Plan has to be implemented. However, creditors and the court have the power to terminate the plan should it not be meeting its goals.</p> <p>The Law is silent on the total period within which the winding-up process for the company is to be completed.</p>

<p>11.</p>	<p>Is the concept of a suspicion/suspension period recognized in Myanmar?</p>	<p>Yes, the concept of suspicion and suspension is recognized under the Law.</p> <p>Any past transaction involving the following matters may be deemed to be a suspicious transaction if it causes the company to become insolvent or had taken place after the company has become insolvent:</p> <ul style="list-style-type: none"> ▪ transactions involving gifts; ▪ transactions without consideration or at a considerably significantly less than the present value; ▪ a transaction where a creditor has received an amount more than it would have ordinarily received in respect of unsecured debt; ▪ provision of credit by a company for any overpriced transaction; and ▪ creation of a floating charge on the companies undertaking or property (save for specific circumstances under the Law). <p>Depending on the transaction mentioned, the suspicion period may vary from anywhere 6 months to 5 years from the initiation of rehabilitation or liquidation of a company.</p> <p>In case a transaction is adjudged as a suspicious transaction, the court may pass an order and restore the position of the company to what it would have been had the suspicious transaction not been entered into. Some of the other orders that may be passed by the court are order for any property transferred by or as part of such transaction to be vested in the company, order to release or discharge in whole or in part any security given by the company and order to require any person to pay any sums received by him or her by way of benefit from the company.</p> <p><i>A suspension period</i> on the other hand, is a period when the business of the company is undergoing a winding-up proceeding and is about to be liquidated. During this period, the regular business activities of the company are suspended and the appointed liquidator shall act as the agent of the company to undertake such activities as required to offset the liabilities of the company. Upon distribution of the debts as per priority claims and holding the meeting of creditors and members, the company proceeds to dissolution. The name of the company is then struck off from the records of the DICA.</p>
<p>12.</p>	<p>When does a corporate insolvency proceeding transition to a winding-up process in Myanmar?</p>	<p>The transition of a corporate insolvency proceeding to a winding-up proceeding may take place on the occurrence of the following:</p> <ul style="list-style-type: none"> ▪ the creditors of the company resolve that rehabilitation plan cannot be given effect to and the rehabilitation plan is terminated;

		<ul style="list-style-type: none"> ▪ no rehabilitation plan can be formulated and if the rehabilitation plan is formulated, then it cannot be agreed upon by the creditors; ▪ creditors resolve to wind up the company in the meeting of the creditors; and/or ▪ the court resolves to wind-up the company.
13.	Does Myanmar have a dedicated regulator and a dedicated court or tribunal for insolvency matters?	No, the DICA, which is also the registrar of companies for Myanmar serves as the regulatory authority for insolvency and bankruptcy proceedings. There are no dedicated courts or tribunals for dealing in insolvency matters and we understand that the courts having jurisdiction over commercial cases will have the jurisdiction for insolvency matters.
14.	Does the law governing insolvency proceeding in Myanmar provide for personal insolvency and bankruptcy proceeding?	Yes, the Law has a dedicated chapter for insolvency and bankruptcy proceedings against individuals. For insolvency of a natural person, the Law provides for the rehabilitation of such a person by making a compromise with the creditors and paying off the debts. In case rehabilitation is not possible, a formal bankruptcy proceeding is initiated by the creditors or by the debtor by applying to the court. A liquidator is appointed to supervise the bankruptcy proceeding and ensure that the debts of the individuals are duly paid.
15.	Is the concept of transnational or cross-border insolvency recognized in Myanmar? Are there separate provisions dealing with cross-border insolvency?	<p>Yes. The concept of cross border insolvency is recognized under the Law.</p> <p>The provisions of cross-border insolvency apply to:</p> <ul style="list-style-type: none"> ▪ insolvency proceedings in a foreign state when assistance is sought by a foreign court or foreign representative in respect of such foreign proceedings; or ▪ insolvency proceedings in a foreign state concerning this Law; or ▪ when a concurrent foreign and domestic insolvency proceedings under this Law involves the same debtor; or ▪ when a creditor or other individuals in a foreign country have an interest in an insolvency proceeding under this Law. <p>However, this Part of the Law does not apply to proceedings concerning banks, financial institutions, and insurance businesses and will also not apply to other businesses or entities as and when notified by the President.</p>

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