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ANALYSIS ON LAW OF INSOLVENCY IN MYANMAR*

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Abstract

Insolvency means being unable to pay due debt. When a corporation or company cannot pay its due payment, it may be defined as “corporate insolvent”. As Myanmar is a developing country, a corporate insolvency regime is critical to encourage economic prosperity and sustainable economic growth of the country. Myanmar’s corporate sector is linked not only to ASEAN countries but also to non-ASEAN countries. Hence, the well-established transparent corporate insolvency system may support the economic development. This study provides an overview of the literature and explores the rehabilitation of a company so that it is not insolvent to the extent possible. It begins by defining some relevant terminology and then reviews theories about the principle of insolvency law.

Keywords: Corporate Insolvency, Rehabilitation, Economic Prosperity.

Introduction

Insolvency laws, similar to many other legal frameworks, have their roots in English law. These laws have evolved to create distinct systems for addressing insolvency issues for both individuals and corporations. A legal framework exists wherein the rights and remedies of creditors are temporarily suspended, allowing for a structured process to collect and liquidate the debtor’s assets. Consequently, insolvency law was established to clarify the responsibilities and liabilities of debtors and the entitlements of creditors, particularly when financial resources are inadequate or when a debtor’s obligations exceed their capacity to pay. Corporate insolvency specifically pertains to a scenario in which a company cannot meet its financial commitments, either due to a lack of timely cash flow or because its total liabilities exceed its available assets. Within the corporate insolvency framework, there are three primary stakeholders: the debtor, the creditor, and society at large.

The main objective of insolvency law is “to create a strong insolvency framework that is effectively aligned with the broader legal and commercial landscape”.[2] An insolvency system means a legal structure that allows financially distressed businesses may choose either a form of liquidation or a rehabilitation process satisfying creditors with any future earnings so that the business can continue. According to the modern insolvency regime under Myanmar Insolvency Law, 2020, businesses pursuing the rehabilitation process must hire an insolvency practitioner, also known as the rehabilitation manager and he/she is responsible for the rehabilitation process.

Materials & Methods

This research mainly focuses on related laws, cases, and other materials published by authors. Besides, to complete this paper's goal, other countries’ insolvency laws were studied. Therefore, the research paper applies qualitative research methodology. Primary data on the national legislation and international instruments dealing with corporate insolvency are mainly

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2 Section 6 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1/2020).

relied and literary, books, publications, articles, and online resources are used as secondary sources.

Problem Statement

Myanmar's developing contemporary corporate insolvency system is one of the most enticing benefits for prospective international or domestic investors. However, there should be a distinct commercial court for problems about cross-border insolvency or parties who appear before the court relating to commercial affairs. If the court proceeding relating to corporate insolvency does not proceed timely and effectively, it will negatively impact an economy's prosperity to flourish economically even if it is neither a crime nor a civil wrong. To adequately adjudicate the rights of debtors, creditors, and the public interest promptly, a separate commercial court should exist in the event that a corporation experiences corporate insolvency. It is not a favorable impression for foreign investors if the court is not distinct and the parties involved in corporate insolvency have to squander time.

Moreover, according to section 162 of the Insolvency Law of Myanmar, 2020 and Rule 78 of the Insolvency Rule of Myanmar, 2020, a company is considered insolvent if it owes a creditor an amount that exceeds 1,000,000 Myanmar Kyats. The amount that shall be presumed to be insolvent should be more than 1,000,000 Myanmar kyats because corporate insolvency is one of the drawbacks to the economic prosperity of the country.

Findings

One of the aspects of economic expansion is the company. In both local and international economic transactions, doing business through a company is more dependable than doing it through an individual or non-company. However, businesses should be the most protected from insolvency to the extent possible. Consequently, legal frameworks linked to companies or corporations are the most crucial especially insolvency regimes. Stakeholders will have rights in addition to powers and duties under the insolvency system. Thus, the insolvency system is crucial for achieving economic development and preserving the nation’s economic prosperity.

Discussion

Sources of “Corporate Insolvency Law”

In Myanmar, Section 2(x) of Insolvency Law states that insolvent means “unable to pay debts as and when they become payable”.[3] Corporate insolvency may involve numerous concerned parties like creditors, debtors, overseas corporations, shareholders, directors, managers and employees of a company, insolvency practitioners, courts, and customers. The objective of corporate insolvency law extends beyond merely ceasing business operations. The main goal of insolvency law is to go from an unstructured legal system where creditors’ rights and remedies are temporarily suspended to a structured legal framework. This framework facilitates the systematic collection and liquidation of the debtor's assets, ensuring an equitable distribution of these assets under the claims of creditors.

[3] Section 2 (x) of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1/2020).

Corporate insolvency law may be traced back to the company's growth in the nineteenth century. The essential law was the Joint Stock Companies Act of 1844, which established the business as a separate legal entity while retaining limited responsibility for stockholders. Since 1844, corporate insolvency has been handled with by particular statutory measures.[4] In Salomon case, [5] it proved that a properly constituted corporation was a different legal entity from its members, and as a result, even the debts of a one-man operation were independent and distinct. As a result, the laws about corporate insolvencies and individual bankruptcy grew apart. By the end of the 1800s, individual and corporate bankruptcy cases were governed by two distinct bodies of law, handled by several courts using various procedural guidelines.[6] In 2020, the Insolvency Law and Rule were enacted as part of the contemporary Corporate Insolvency system in Myanmar.

"Determining whether a company even meets the solvency test is not always easy," the Court of Chancery stated in Prod. Res. Group, L.L.C. and NCT Group, Inc. [7] In Parkway/Lamar Partners, L.P. and Tom Thumb Stores, Inc. [8], a Texas court observed that the concept of "insolvency" is "not definitely fixed and it is not always used in the same sense, but its definition depends rather on the business or fact situation to which the term applies." Furthermore, if a person who was called acknowledges that he owes the insolvent money, the court may compel him to pay the obligation to the Official Assignee in the Official Assignee High Court case of Rangoon and VE. RM. N. R.M. Kasivisvanthan Chettyar[9].

Insolvency presents a considerable challenge for societies that depend on credit. The principles of insolvency law are intricately linked to the historical contexts of legal, social, and economic systems. This legal domain functions as a triadic relationship involving debtors, creditors, and society. Achieving equilibrium among the interests of these three stakeholders is a critical policy concern. In instances where the insolvent party is an individual, it is clear that the legal framework should focus on the debtor's rehabilitation.[10]

Insolvency law is concerned with companies and individuals who are debtors and who are unable to repay their debt. In other words, a corporation or organization becomes insolvent when it cannot pay its debts. Besides, when a company faces corporate insolvency, there have been some formal proceedings such as winding-up or rehabilitation procedures. Thus, corporate insolvency is neither a criminal offense nor a civil wrong to become insolvent.

Principles of Corporate Insolvency

The corporate insolvency system shall ensure equal legal and economic treatment among creditors in the debtor's estate. Furthermore, a nation's insolvency system has to satisfy the requirements of its principal players in the market. The earliest corporate principle of corporate insolvency emerged in the case of RE Scheibler, Ex P. Holthausen[11]. In this case, corporate

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[4] Vanessa Finch, (2009), Perspectives and Principles of Corporate Insolvency Law, Second Edition, p-9.
[5] [*1896*] *UKHL 1*, [*1897*]*AC 22.*
[6] Fletcher, (2017), Law of Insolvency, Fifth Edition, p-12.
[7] 863 A.2d 772 (Del. Ch. 2004).
[8] 877 S.W.2d 848 (Tex. App. 1994).
[9] 1961, B.L.R, (CC), 107.
[10] Fiona Tolmie, (2003), Corporate & Personal Insolvency Law, Second Edition, p-3.
[11] (1874) 9 Ch. App. 722.

insolvency law recognizes the rights accrued under the general law before liquidation. In the case of Dowsley and British Canadian Trust Co., Ltd[12], the appellant had claimed that he was entitled to possess and control of theatre property under an agreement and that the respondent, to whom B. & H. had made an assignment under the Bankruptcy Act, had wrongfully dispossessed him, sued the respondent for damages. Appeal dismissed with costs. Therefore, the rights accrued after liquidation are not recognized.

As the second principle, the company ceases to be the beneficial owner of its corporate assets while in its liquidation. Though winding up does not of itself divest the company of legal title to its assets, it ceases to be the beneficial owner and holds the assets on trust to apply them in the discharge of the company's obligations. Thus, in Ayerst's case[13]

> The House of Lords relating to revenue law and insolvency law confirmed that "where a company goes into insolvent liquidation it ceases to be the beneficial owner of its assets, and the liquidator holds those assets on a special "statutory trust" for the company's creditors."

Therefore, it is forbidden to utilize or sell a company's property during liquidation for the company's gain.

The third principle is that creditors can only access the debtor company's assets. The purpose of corporate insolvency is not to seize assets that belong to third parties that the firm owns or controls for the benefit of creditors. The only assets that the company's creditors can access are those that it owns at the time of liquidation or those that it later acquires. [14]

The fourth principle is security interests and other real rights created prior to the insolvency proceeding are unaffected by the winding up. It is to take the assets subject to all limitations and defences by the liquidator. In asserting rights in the name of the company the liquidator stands in no better position than the company itself. In situations where the company is involved in a contract, the opposing party retains the right to present any defenses that could have been asserted before the winding-up process and to invoke any termination rights stipulated in the contract.[15] Therefore, the liquidator has full authority while the company is in liquidation or insolvency.

The fifth principle is, that the pursuit of personal rights against the company is converted into a right to prove for a dividend in the liquidation.[16] Therefore, the liquidation of a company is not completed until dividends are distributed following the scheme.

The last point is that the statutory trust that the company is winding up holds the realizations and assets upon does not grant the creditors any kind of proprietary interest or beneficial co-ownership; instead, their only recourse is to seek court protection to guarantee that the liquidator carries out his statutory obligations. In the case of Buchler and Talbot[17], Leyland DAF Ltd went into creditor's voluntary winding up and it revolves around the priority of payment for liquidation expenses and debts with preference in a floating charge situation.

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[12] [1933] S.C.R 115.
[13] [1976] AC 167.
[14] Roy Goode, (2005), Principles of Corporate Insolvency Law, 3rd Edition, p-70.
[15] Ibid, p-72.
[16] Ibid, p-72.
[17] [2004] 2 A.C 298.

The House of Lords held there was no priority for the liquidator's expenses. Therefore, the last principle is no creditor has any interest in specie in the company's assets or realizations.

In summary, safeguarding debtors' rights and upholding creditors' rights are the cornerstones of corporate insolvency concepts. To achieve economic prosperity of a country, the insolvency system of the country is crucial i.e. it is important to ensure the rights of creditors and to protect the rights of debtors if a company faces corporate insolvency.

Nature of Insolvent and Rehabilitation

The terms "insolvent" and "bankruptcy" may be confused. Sometimes, the term "bankruptcy" is misused when mentioning company insolvency. When a business experiences financial difficulties, it is referred to as being insolvent. A business may owe more than it owns, or it may have run out of cash and be unable to pay debts. The insolvency law and Rule 2020 sets out several procedures which aim to deal with insolvent people and companies.

A person is considered "bankrupt" when a bankruptcy order has been issued against them due to their inability to settle outstanding debts. A "bankruptcy order" refers to a legal order that declares an individual bankrupt as a result of their inability to settle outstanding debts under section 2(e) of the Insolvency Law ("Law"). A bankruptcy order against an individual may be initiated by one of the individual's creditors, by multiple creditors collectively, or by the individual themselves. Upon receiving an application from the individual, the Court is competent to issue a bankruptcy order concerning the debtor. Therefore, a creditor has the option to either issue a bankruptcy notice to the debtor or to initiate proceedings directly in court.

If the payment is not received by the specified deadline, the creditor has the right to submit a petition to the court, accompanied by evidence that a bankruptcy notice has been issued in accordance with the Insolvency Law, provided that the total amount of debt or the cumulative debts is no less than MMK 1,000,000.[18]

A bankruptcy petition may be filed by a single creditor or multiple creditors collectively. In evaluating the case, the court will take into account whether the debtor is domiciled in Myanmar or is physically present in Myanmar at the time the petition is submitted. Additionally, the court will consider if the debtor has been ordinarily resident in Myanmar, has maintained a residence in Myanmar, or has conducted business activities in Myanmar at any point during the last three years.[19]

A corporation is considered insolvent in the context of corporate insolvency if it has received a notice from a creditor to whom at least MMK 1,000,000 is owed. A creditor who has a security interest in the debtor's assets about their claim is referred to as a "secured creditor"; a "unsecured creditor" does not..[20] Typically, secured creditors are often financial institutions, such as banks, and they may have a right to a significant portion of any available funds. For instance, if a creditor has provided a loan to an individual or a corporation to purchase a property, and that individual or corporation subsequently becomes insolvent, the creditor may have a claim to the proceeds from the sale of that property.

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[18] Rule 105 of Insolvency Rule 2020, (Notification No. 321, 2020, The Supreme Court of the Union).

[19] Section 145(a), 146(a) of Insolvency Law, 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).

[20] Section 2(rr) of Insolvency Law, 2020, (Th Pyidaungsu Hluttaw Law No. 1, 2020).

The debts categorized as corporate insolvency and those recognized as bankruptcy are equal in value. It would be more suitable to set separate amounts, given the substantial differences in the financial capabilities of individuals and corporations.

Once the presumption of insolvency is established, either a company director or a creditor may file an application with the court to initiate the winding up of the company due to insolvency. The court will then determine the appointment of a liquidator and assess the company's outstanding liabilities. A business may choose to close on its own initiative.To allow a member to wind up their company voluntarily, the directors must declare solvency, which means they must believe the business can settle all of its debts, including interest, within a year of the winding up procedure starting.[21]

The underlying philosophy of Myanmar Insolvency Law may be described as combining the elements of distributive, and rehabilitative. Therefore, the objectives of the Insolvency Law, 2020 is to establish a vigorous insolvency framework that will:

- "be properly integrated with the broader legal and commercial systems of the Union";
- "provide an appropriate structure for the supervision and administration of insolvency proceedings in the Union and to develop insolvency practitioners who can administer the regime effectively";
- "provide predictable and consistent outcomes for parties involved in insolvency proceedings in the Union";
- "provide timely, efficient and impartial resolution of insolvencies";
- "facilitate the rescue and rehabilitation of viable businesses, particularly MSMEs experiencing financial difficulties, thereby preserving employment and protecting investment where appropriate";
- "provide an efficient liquidation process for non-viable businesses, and in doing so, ensure that the value of the property of an insolvent business are maximized so that recovery by creditors is also maximized";
- "provide equitable treatment between similarly situated creditors";
- "prevent improper use of insolvency systems"; and
- "facilitate access to the global markets by the establishment of a framework for cross-border insolvencies".[22]

As a result, "Bankruptcy" refers to a legal ruling made against an individual, as opposed to a corporation, in accordance with the Insolvency Law of 2020 and the Insolvency Rules of 2020. Following the declaration of bankruptcy, the individual involved (the debtor) is barred from holding the position of director in any company.

The Insolvency Law and Insolvency Rule, 2020 are the primary pieces of legislation under which insolvency or analogous proceedings to which companies are incorporated under the Companies Law. The first insolvency law in Myanmar was the "Yangon Insolvency Act (India Act III, 1909)" and "the Myanmar Insolvency Act (INDIA Act V, 1920)". Myanmar's insolvency regime has been in a state of transition for a relatively long period of time, although a new insolvency law was passed in 2020. The insolvency regime in Myanmar is very rudimentary. The

[21] Section 164, 151(a) of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).
[22] Section 6 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).

key laws and rules which will be considered are the Insolvency Law 2020, Insolvency Rule 2020, and Myanmar Companies Law, 2017.

Since the late 1990s, corporate insolvency law has shifted towards a greater focus on rescue efforts and measures to address corporate difficulties. In *Powdrill and Watson*[23]case, Lord Browne-Wilkinson stated that "the recuse culture, which seeks to preserve viable businesses, was and is, fundamental".

The terms of insolvency practitioner include receiver; rehabilitation manager; rehabilitation adviser; supervisor of a rehabilitation plan; liquidator including provisional liquidator; and trustee.[24]

Moreover, the District Courts located in each State, Region, Self-Administered Division, and Self-Administered Zone of the Union possess the jurisdiction to dissolve a company that is registered under the Myanmar Companies Law. Therefore, any issues relating to insolvency or solvency proceedings may apply to the competent courts and the court may, if it deems it just and advantageous, fully or partially grant the application under conditions it finds suitable, or it may issue any other order it considers appropriate.[25] When a business is wound up by the court, it can happen for a number of reasons, including special resolutions, failure to start operations within a year of incorporation, suspension of operations for an entire year, insolvency, or the court's determination that "it is just and equitable that the company should be wound up" or "the Court is satisfied there are proper grounds of public interest." [26]

Insolvency practitioners carry out administration orders under insolvency Law and Rule, 2020 and must be qualified as insolvency practitioners.

The objective of rehabilitation proceedings is to maintain the business's operations as a viable entity. If the business is unable to be rescued, efforts are made to ensure that as much of its activities persist as possible. In cases where the business cannot be saved or continued, the aim is to achieve a more favorable outcome for the company's creditors collectively compared to what would likely transpire if the business were liquidated. A company facing financial challenges may appoint a receiver. It is possible for an individual to be designated as a receiver of a company's assets. [27]

The receiver is entitled to the privileges outlined in section 30 of the Insolvency Law, which include responsibilities related to new contracts, managing the company's assets, conducting the company's operations, negotiating settlements or compromises on behalf of the company, and having the authority to hire or terminate employees. In cases of financial distress, companies should initiate rehabilitation proceedings to save the company as a going concern.

Companies in financial distress have the option to reach settlements with different conditions, either through a formal legal framework or informally through contracts involving the company, its creditors, and possibly other general creditors. The agreements may include delaying payments, refraining from collecting debts, agreeing to settle for less than the full

[23] [1995] 2 AC 394.
[24] Section 7 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).
[25] Section 159 ,160 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).
[26] Section 161 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).
[27] Section 40, 28 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).

amount owed, or, in a compromise situation, making a defined payment when the validity or amount of a claim is uncertain.[28]

Therefore, a company should not be declared insolvent or shut down solely due to financial distress. Having more insolvent companies would result in reduced economic prosperity and fewer job opportunities. Even when facing financial distress, companies undergoing rehabilitation proceedings should consider the country's economic prosperity and sustainability.

Cross-Border Insolvency

In cases of cross-border insolvency, a company’s assets or creditors are located in different countries, posing challenges for multinational corporations that must address insolvency issues across various legal systems. The United Nations Commission on International Trade Law (UNCITRAL) Model Law, enacted in 1996, states that creditors or stakeholders in a foreign jurisdiction have the right to initiate or participate in insolvency proceedings governed by the adopting state’s laws.

The priority of foreign creditors’ unsecured claims should not be lower than that of domestic creditors solely because they are foreign. A “foreign representative” is responsible for overseeing the debtor's reorganization or liquidation and represents the creditor in foreign proceedings, including temporary appointments. [29]

The mere act of submitting an application to a court under the Model Law does not automatically place the foreign representative or the foreign assets and affairs of the debtor under the jurisdiction of the state’s courts, except for the specific application outlined in Article 10. When urgent requests for interim relief need to be filed, the foreign representative must make these filings through the local Inspector or Receiver, rather than directly through the state courts. Article 10 of the Model Law protects the foreign representative and the debtor’s estate from being subjected to local court jurisdiction solely due to a recognition application. However, the legislation does empower the court to issue cost orders in the proceedings and to hold the foreign representative responsible for all court orders.

Myanmar’s Insolvency Law of 2020 has adopted the UNCITRAL Model Law on Cross Border Insolvency. This law sets up a framework for courts and other competent authorities in multiple states to collaborate in cases of cross-border insolvency involving companies with assets and/or creditors in more than one country. This update in Myanmar’s insolvency regulations represents a significant step forward, aligning the country with international standards on corporate insolvency and aiding in the rescue of financially troubled companies, thus safeguarding investments and jobs across jurisdictions. Additionally, under this law, a foreign representative has the right to directly petition a court in Myanmar, calling for a transparent insolvency system and the establishment of a distinct commercial court in the country.

The Insolvency Law of Myanmar 2020 adopts the United Nations Commission on International Trade Law UNCITRAL, Model Law on Cross Border Insolvency. The Insolvency Law 2020 introduced a framework under which courts and other competent authorities in more than one state may cooperate in cases of cross-border insolvency law involving companies with

[28] Vanessa Finch, (2009), Perspectives and Principles of Corporate Insolvency Law, Second Edition, p-23.
[29] Section 381, 369 of Insolvency Law 2020, (The Pyidaungsu Hluttaw Law No. 1, 2020).

asserts and/or creditors in more than one country. This development in the insolvency regime in Myanmar is a significant progression that brings it in step with international frameworks on corporate insolvency and helps to facilitate the rescue of financially distressed companies, thereby protecting investments and employment regardless of jurisdiction. Besides, a foreign representative is entitled to apply directly to a court in this State and there should be a transparent insolvency system and a distinct commercial court in Myanmar.

Conclusion

The recently enacted insolvency law, which replaces over a century-old legislation, represents a crucial element of Myanmar's efforts to update its legal system. It is also the introduction of the rescue and rehabilitation process for companies and the implementation of the United Nations Commission on International Trade Law (UNICITRAL Model Law) on cross-border insolvency which provides a legal framework for assisting the financial distress of corporations that are related in more than one country. Therefore, it helps to facilitate the rescue and rehabilitation of financially distressed corporations and to protect investment, and employment regardless of jurisdiction. This development indicates a positive and improving legal environment for companies already established in Myanmar or those considering growth in Myanmar.

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