LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

NEWSLETTER 146 - 21 January 2024

Dear Readers,

Welcome to a new edition of our newsletter.

1. Importers of animal feed wanted

A friend of ours who now works for a trading house in Singapore wrote us:

> *"We focus on trading raw materials of processed animal protein for pet and animal food, aqua feed. The processed animal protein is a source animal protein that is derived from Slaughter products of pig, poultry, bovine, and lamb etc. The product is obtained by processing category 3 animal-by products and are produced in an EU approved food grade processing plant in accordance with EU regulation.*
>
> *We are looking for potential buyers and distribution partners in Cambodia, Laos, and Myanmar interested in products like meat bone meal, blood meal, poultry meal, feather meal, and poultry fat oil.*
>
> *We're seeking partners who:*
>
> - *Are importing companies, feed mills for animal and aqua, or local traders.*
> - *Have experience with processed animal protein for pet and animal feed, like meat bone meal, blood meal, poultry meal, feather meal, and poultry fat oil.*
> - *Can import these products locally.*
> - *Can sell to local traders or, ideally, directly to feed mills."*

Please contact us if you think that you might be interested.

2. Supreme Court issues procedures under the Insolvency Law

(a) Introduction

On 20 December 2023, the Supreme Court issued "procedures for adjudicating suits under the Insolvency Law" ("**Procedures**"). Please contact us if you wish to receive an English translation (for a fee).

A new Insolvency Law and new Insolvency Rules were enacted in 2020. These new pieces of legislation replace the insolvency provisions for companies in sections 292-418

La Pyi Wun Plaza, Room 409 (4th Floor), 37 Alan Pya Pagoda Road, Dagon Township, Yangon
Phone: +95-9-262546284 - E-mail: info@lincolnmyanmar.com - Web: www.lincolnmyanmar.com

Myanmar Companies Law 2017 (previously sections 155-247A Myanmar Companies Act 1914) and for individuals in the Yangon Insolvency Act 1909 and the Myanmar Insolvency Act 1920.

(The name "Insolvency Law" is in parts misleading as there are many instances where a solvent company may be liquidated under this law, such as members' voluntary winding up, or winding up due to failure to carry on business, shareholder disputes or public policy considerations.)

The Supreme Court's new Procedures instruct courts what to do if petitions are filed for (i) a liquidation order against companies and unincorporated entities (we suppose that this includes the Myanmar branches of overseas corporations), (ii) a bankruptcy order against individuals, and (ii) a moratorium order to temporarily suspend proceedings against individuals. They also specify among others the minimum contents of such petitions and refer to four forms, but these forms do not seem to have been published yet.

Competent for adjudicating petitions for liquidation orders against companies and unincorporated entities are the district courts (sections 159, 227 (a) Insolvency Law).

(b) Who may petition on what grounds

Liquidation petitions may be filed by the company's directors or the unincorporated entity's legal representative, a creditor (including contingent and prospective creditors), contributories (i.e., members/shareholders), and the Directorate of Investment and Company Administration ("**DICA**"), para. 4 (a), (c) Procedures.

The court may grant the petition on the following grounds (sections 161 (a), 227 (d) Insolvency Law, para. 5 (a) (3) Procedures):

- Petition by special resolution of the company;
- failure by the company to engage in business for a whole year;
- dissolution of, or cessation of the business of, the unincorporated entity;
- the company or unincorporated entity is insolvent (more on this further down in news item 3);

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- winding up the company or unincorporated entity is just and equitable (e.g., if there are unreconcilable differences among the members/shareholders);
- winding up the company is in the public interest (e.g., if the company is used for fraudulent activities) – a corresponding provision is missing for unincorporated entities, but we suppose that they may also be wound up if this is in the public interest.

(c) Court may pass order without hearing the other side

On hearing the liquidation petition, the court may order the winding up of the company or unincorporated entity and appoint a liquidator, dismiss the petition, adjourn the hearing, make an interim order or make any other order (e.g., appoint a provisional liquidator until the final decision), sections 164, 166 (a), 227 (a) Insolvency Law, paras. 7 (a), 8 Procedures.

It should be noted that the court deciding without hearing the other side seems to be the default setting. The court shall (only) summon the respondent if it deems it inappropriate to pass an order after only hearing the applicant (para. 7 (b) Procedure).

The respondent is the company to be liquidated (i.e., the debtor company if a liquidation order is sought for alleged insolvency). In case of an unincorporated entity, the respondent might vary depending on the legal nature of the unincorporated entity.

(d) Summons by e-mail

In what may be a first, the Procedures direct the court to summon the respondent by e-mail using "the Web Mail authorised by the Supreme Court" if the respondent has a business e-mail address (para. 11 (a) Procedures) and decree that the court may consider the summons to be served if "it appears that the e-mail has reached the intended e-mail address according to the e-mail delivery system."

(However, in addition, the court shall also cause a notice of the summons to be affixed to the building where the respondent's business is located, para. 14 Procedures.)

(e) Objections

If the respondent (i.e., the company whose liquidation is sought) heeds the summons and appears before the court, it shall thereafter submit an objection (para. 15 Procedures) to

La Pyi Wun Plaza, Room 409 (4th Floor), 37 Alan Pya Pagoda Road, Dagon Township, Yangon
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which the applicant may reply (para. 24 (a) Procedures). If the respondent fails to submit the objection in time, the court may proceed with the case as if the respondent had not entered into a defence (para. 18 Procedures).

(f) Intervention by interested parties

A person wishing to object to a petition for liquidation shall submit the objection within the time specified by the court, or if there is no such specification, within 14 days from the date on which the respondent first appeared before the court (para. 19 Procedures). The objector shall be treated like the respondent (para. 21 Procedures).

This third-party intervention, not provided for in the Insolvency Law, seems to be modeled after rule 10 (2) Order I to the Code of Civil Procedure which allows a court to add any person to a suit if this seems sensible. Persons interested in intervening might be, among others, shareholders of a company whose liquidation is sought, or other creditors that do not want the company to be carved up.

(g) Liquidators

Upon passing a liquidation order, the court shall direct the applicant to submit the nomination of the liquidator(s) he wishes to appoint (para. 28 Procedures). The court may, as it deems fit, appoint one or more liquidators from the list thus submitted (para. 29 Procedures). If the court cannot appoint an insolvency practitioner as liquidator, the official receiver shall be appointed instead (sections 167 (c), 227 (a) Insolvency Law, para. 30 Procedures).

Apart from the official receiver, only insolvency practitioners may act as liquidators (sections 167 (a), 9 (a), 7, 227 (a) Insolvency Law). An insolvency practitioner must in particular hold a practicing certificate from the Myanmar Insolvency Practitioners' Regulatory Council ("**Council**") and be registered with DICA (section 10(b)(iv), (v) Insolvency Law). Consequently, there are currently no insolvency practitioners in Myanmar as the Council has not held any qualifying exams and has not issued any practicing certificates, and DICA maintains no register of insolvency practitioners.

In this situation, one should expect a court to appoint the official receiver as liquidator (which means that creditors and other petitioners have no say in determining the liquidator).

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The Insolvency Law does not define "official receiver." From the predecessor provisions in sections 308 (a) Myanmar Companies Law and 171A (1) Insolvency Act 1914, we understand that the official receiver is an officer with this function attached to the court or, where there is no such officer, such person as may have been appointed for this purpose by the Union Minister of Investment and Foreign Economic Relations by notification in the Myanmar Gazette.

As an alternative, a court might also for the time being while there are no insolvency practitioners in Myanmar consider appointing a member of the "Myanmar Association of Insolvency Practitioners Inc." ("**MAIP**") as liquidator, in a similar way in which DICA requires filings that by law should be made by insolvency practitioners to be made instead by MAIP members. However, the debtor company could appeal such appointment arguing that it was made in clear contravention of the law.

(h) Finalisation of liquidation and dissolution

After having fully wound up the affairs of the company or unincorporated entity (i.e., after having sold the assets, paid off the creditors, and distributed the remaining assets to the owners), the liquidator shall present and explain the liquidation account to the final meeting of creditors or members (shareholders) and, within 1 week therefrom, send a copy of the account and the meeting minutes to DICA and the court (sections 211, 227 (a) Insolvency Law, para. 33 (a) Procedures).

3 months after DICA registered the documents thus received from the liquidator, the company or unincorporated entity is considered dissolved and the court shall close the case by recording the dissolution in the daily case record (sections 212 (b), 227 (a) Insolvency Law, para. 33 (b) Procedures).

3. Using the Insolvency Law to collect debt - does it work?

Over the last 6 months or so, we have registered an increased interest in making use of the Insolvency Law to collect outstanding debt, and conversely, enquiries from companies locked in payment disputes whether there was any merit in their creditor's threat "to have them declared insolvent" if they do not pay.

To sum it up, it is as follows:

A company (or, for that matter, unincorporated entity) is insolvent if it is unable to pay debts as and when they become payable (section 2 (x) Insolvency Law).

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A creditor with a claim of more than MMK 1,000,000 may trigger a presumption of insolvency by serving on the debtor company a demand with "form 9" (section 162 (a) (1) Insolvency Law, rule 78 Insolvency Rules). The debtor company now has 21 days to either settle the claim or apply to the district court to have the demand set aside.

If the debtor company does not react in time, the creditor may indeed apply to the district court to have the debtor company liquidated on the grounds that it is insolvent (section 163 (a) Insolvency Law). If the debtor company is unlucky, the court will decide without hearing it (para. 7 (a) Procedures).

It is therefore important for the debtor company to react within 21 days after receiving "form 9" and either pay or provide security (if the demand is justified) or request the district court to set the demand aside (if it is unjustified).

The creditor's demand is not justified if the debtor company has (honest) reasons to dispute the creditor's claim, as insolvency is all about not being able to pay and not about not wanting to pay. If the creditor wants payment on a disputed claim, he has to take the debtor company to court (in ordinary civil proceedings) or, depending on the contract, to arbitration and obtain a winning judgment (or arbitral award); this step cannot be substituted or shortened by seizing an insolvency court.

A demand with "form 9" as well as the application to have it set aside has to be backed up by an affidavit (i.e., a sworn declaration before a court confirming that the asserted facts are true). Making a false affidavit is punishable with imprisonment of up to 3 years and a fine (section 181 Penal Code).

Creditors have been able in Myanmar to institute insolvency proceedings against debtors since at least 1914, but only seldom appear to make use of it. This may be because in insolvency, they must share the debtor company's assets with all other creditors and are therefore likely to end up being paid only a fraction of what they are owed.

On the other hand, if a debtor company indeed receives a demand with "form 9," it should react as it otherwise might end up being wound up accidentally.

We hope that you have found this information useful.

Sebastian Pawlita	Nyein Chan Zaw
Managing Director	Director

La Pyi Wun Plaza, Room 409 (4th Floor), 37 Alan Pya Pagoda Road, Dagon Township, Yangon
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About Lincoln Legal Services (Myanmar) Limited

Lincoln Legal Services (Myanmar) Limited provides the full range of legal and tax advisory and compliance work required by investors. We pride ourselves in offering result-oriented work, high dependability and a fast response time at very competitive prices. Please do not hesitate to contact us:

■ Sebastian Pawlita, Managing Director
Phone: +95-9-262546284 (English)
E-Mail: sebastian@lincolnmyanmar.com

■ Nyein Chan Zaw, Director
Phone: +95-9-790488268 (Burmese)
E-Mail: nyeinchanzaw@lincolnmyanmar.com

Office address: La Pyi Wun Plaza, Room 409 (4th Floor), 37 Alan Pya Pagoda Road, Dagon Township, Yangon

Web: www.lincolnmyanmar.com