

■ BY MAJELLA GOMES

# CHANGING THE RULES OF INSOLVENCY

The complex and delicate process of insolvency looks set to change with the introduction of new company regulations. Fresh talent must also be sought and trained to replace the current limited cadre of insolvency practitioners who are well into their sixties.

At best, insolvency is a complex issue. At worst, it is an issue that can compound itself over the long-term if not understood and handled properly from the beginning. The process itself is complicated enough, but new developments look set to affect the profession as well as the insolvency and business landscape, said practitioners and experts at MIA's Insolvency Conference 2014.

## REGULATORY FACILITATION

One notable game changer will be the proposed Companies Bill, which seeks to make key changes in current insolvency laws. Nor Azimah Abdul Aziz, Director, Corporate Development & Policy Division, Suruhanjaya Syarikat Malaysia (SSM) said that these changes will cover better clarity of



the Receiver's powers in liquidation, the introduction of corporate rescue mechanisms, overall enhancement of the winding-up process, and qualification of insolvency practitioners. Of particular interest to practitioners will be the introduction of two new mechanisms: Corporate Voluntary Arrangement (CVA) and Judicial Management (JM). CVA applies only to private companies, and when a company enters into a binding compromise or arrangement with its creditors without court approval.

JM, on the other hand, is a temporary court-supervised rescue plan where a judicial manager (a qualified insolvency practitioner) takes over the management of the company. Application for JM can be made by the company, its directors or creditors, on the grounds of its inability to pay debts. A JM order can be discharged if its purpose has been achieved, or if the judicial manager is of the view that the rescue plan is

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unachievable. Among the changes sought by SSM to enhance the overall winding up process are measures that may shorten winding up time, and allow auditors who have the prerequisite insolvency experience but are not approved liquidators, to act as liquidators. "Any member of a recognised professional body will be able to apply, under the new rules," she said.

"Winding up is essentially the death of a company," stated Lee Shih, Partner, Dispute Resolution Division, Skrine. "The duty of the JM is to revive the company by putting forward a proposal acceptable to at least 75% of its creditors. Once the JM has filed the proposal, an automatic moratorium falls into place that provides "breathing space" for the firm to resolve matters. The JM

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(L-R): Nor Azimah Abdul Aziz, Stephen Duar & Rabindra S. Nathan

has to preserve the company's assets but this depends on the court order. A creditors' meeting has to be called, and if the JM feels that the exercise is actually a lost cause, he/she can apply to discharge him/herself. You have to trust the JM to make the correct call with regards to assets and disposition."

## CORPORATE VOLUNTARY ARRANGEMENTS VS JUDICIAL MANAGEMENT

Lim San Peen, Partner, PwC, spoke about the technical aspects of Corporate Voluntary Arrangement (CVA), and in what aspects it differed from Judicial Management. "CVA is a procedure to propose debt compromise, supervised by an insolvency practitioner with a mandate to report on its viability," he explained. "It is created for insolvent businesses which have sufficient survival funds and credible management. A director of the firm,

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a Judicial Manager or liquidator can apply for CVA, but by design, a CVA does not involve the courts very much. Decisions made under the CVA are binding on all creditors of the firm under receivership. A nominee or any other qualified person may be appointed as supervisor to implement the CVA."

## WHICH SHOULD APPLY?

To a question on how to determine

whether CVA or JM would work better, Lee said that would depend on what the company wanted. Lim opined that CVA would be a better choice as JM required fairly extensive court intervention. "If the company is professional, data is current and business processes are in place, CVA has a better chance of turning the company around," he said. "But its data has to be credible." Statistics from January 2001 to December 2010 show that of the 120 JM cases filed, 105 had been reviewed; 27 were successful and 50 were unsuccessful, while the remaining had been withdrawn or rejected. The figures were not very encouraging but Chee Yoh Chuang, a member of the Board of Directors, Insolvency Practitioners Association of Singapore, pointed out that turnaround was particularly difficult when clients ask for help only at a very late stage.

Chee said that in Singapore, proposals had recently been submitted to revamp the country's Insolvency Act. "There is no provision for CVA in Singapore," he said. "So JM is preferred. But Singapore is generally very wary of granting JM, with the courts asking if the same results can be achieved with winding up. Listed companies have been successful with JM; but it doesn't work so well for small firms."

"When JM is in place, the company is already out of funds and cannot keep going," he said. Lim agreed, adding that companies being restructured are inevitably companies in crisis but they don't always behave as if they are. "You have to work according to a certain timeframe," he concluded. "But many firms do not have the prerequisite sense of urgency. You really need to draw up and execute

plans properly, and manage the whole process efficiently.”

## BUILDING CAPACITY

Dato’ Gan Ah Tee, President of the Insolvency Practitioners Association of Malaysia, called attention to the shortage of qualified liquidators and the lack of succession planning. “There are currently very few accounting professionals who can act as liquidators, and most of them are aged 61 and above. The profession has to find ways to improve its methods and increase its numbers.”

Stephen Duar, Partner, Restructuring & Insolvency, Ernst & Young, commented that one of the most talked-about topics in connection with the new Bill was which bodies would be recognised as the new approved liquidators. “There are very few liquidators at present,” he said. “The majority of liquidators are a very mature group, but this may be characteristic of the job itself. It cannot be denied that with insolvency, an accounting professional

will need both skills and experience to be effective in the position. There is also the matter of personal liability. Younger practitioners may not have the resources to undertake the task because they just haven’t been in the business long enough.”

“There is an ongoing debate about who should be a liquidator,” Rabindra S. Nathan, Partner, Shearn Delamore, said. “Before the new Companies Bill came about, many lawyers were

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already working with the Insolvency Department to harmonise laws,” he said. “However, the Insolvency Act did not materialise; instead, the proposals that were under discussion then were incorporated into the new Companies Bill”.

## LOOKING AHEAD

While there has been significant progress on insolvency issues, there are still matters to be ironed out. On cross-border insolvency, he noted that there was no provision that recognised the ability of the courts in countries other than Malaysia to deal with insolvency. “Malaysian courts are territorial,” he remarked. “But if other courts’ abilities are recognised, Malaysian companies could benefit, especially when Malaysian companies or lawyers have to deal with international companies.”

Inability to pay debts will also be reviewed, with the current amount of RM500 being increased to RM5,000. “The present amount of RM500 is too low,” Nor Azimah said, adding that Singapore and Hong Kong had minimum rates of S\$10,000 and HK\$10,000 respectively. “The amount should not be too high that it precludes small creditors from initiating claims, but it should be high enough to discourage trivial claims.” Unsecured creditors will also be paid in priority, in order to enhance the social obligation of a company towards the wellbeing of its employees, in particular those in the lower income category who will be most affected by the winding up. The Bill also has a new clause on undue preference transactions that is expected to reduce the possibility of fraudulent claims. ■



(L-R): Ong Hock An, Lim San Peen, Chee Yoh Chuang & Lee Shih