BY MAJELLA GOMES

GREAT SCOPE FOR INSOLVENCY PROFESSIONALS

THE IMPLEMENTATION OF THE NEW COMPANIES BILL 2015 IS SET TO STIMULATE THE INSOLVENCY PROFESSION, ACCORDING TO EXPERTS AT THE MIA INSOLVENCY CONFERENCE 2016.

THE new Companies Bill 2015 is poised to usher in a far more facilitative business regime for companies. But at the same time, it could also offer more solutions for troubled companies. "The Companies Bill 2015 aims to rescue companies in distress," remarked Stephen Duar, President, Insolvency Practitioners Association of Malaysia (IPAM), at the opening of the Insolvency Conference 2016 which focused on the impact of

Future

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The implication of the Bill is that more accountants, especially those with experience in insolvency matters, will be required in the foreseeable future. Currently, the number of accounting specialists in this area is low. "There are only 224 licensed practitioners in Malaysia," Duar continued. "But most are in their 50s, so there is great scope in this area for young professionals." The small number of practitioners is an area of concern for the future of the profession and industry, and the practice of insolvency in Malaysia but it simultaneously offers potential for those looking for a niche in which to establish themselves.

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NEW REGULATIONS' IMPACT ON LIQUIDATORS

One of the aims of the new Companies Bill is to delineate the scope of liquidation work, which is highly complex and specialised. "The new Bill has new provisions for liquidators," explained Rabindra S Nathan, Partner, Shearn Delamore & Co. "It has two separate regimes, i.e., approvals for insolvency auditors and liquidators. This change was prompted by the fact that audit work cannot be easily translated into insolvency easily. However, some professionals are already doing the work although they don't have the qualifications. In cases like this, it is best to decouple, and those who can do the work can help address the issues." The current workload of auditors, he added, was great, but some competencies were common to both auditors and liquidators; hence the ability to undertake both jobs.

Stephen Duar
President, Insolvency Practitioners Association of Malaysia (IPAM)

Approval as a liquidator involves the Minister of Finance being satisfied with the experience and capacity of the applicant. "The most important aspect is the ability to do the forensics connected with liquidity," Lim San Peen, Partner, PwC Malaysia said. "But you do not need formal qualifications for both, if you already qualified as an insolvency auditor or a liquidator."

Norhaiza Jemon, Head of Law Reform, Policy & Internal Affairs, Suruhanjaya Syarikat Malaysia (SSM) remarked that other aspects had to be assessed as well, including an individual's level of qualification, work discipline and processes to be applied. "Many are already members of professional bodies like MIA," she said.

She further clarified that matters

pertaining to this were still under discussion but a subcommittee for insolvency had already been set up by SSM that will be seeking industrial consultation before developing anything further. To a query by Nathan about what resources were available to insolvency practitioners dealing with "rescues," she said that SSM will put up a framework of best practices and other resources. "We want the industry to flourish," she stressed. "So we are trying not to over-regulate. Obviously, there is a need to strike a balance between regulating the industry, and identifying what areas need to be industry-regulated. Some things are best left to the industry."

PROMISING CAREER PATH

Since this area holds so much promise, how should aspiring liquidators go about obtaining a licence? Firstly, they need to be members of an approved, recognised body like MIA, MICPA or IPAM, and have at least five years of corporate liquidation experience, Lim said. "This experience must include all aspects of formal insolvency work," he continued. "They will have to be certified by a supervisor, and sit a written examination on corporate insolvency laws, crisis management and seniority of debts, among other matters." Explaining that other jurisdictions were canvassed for best practices when the common framework for insolvency was drawn up, he said, "We looked at the more mature jurisdictions to find a more robust framework that could better stand scrutiny. All this started even before the Bill reached this stage but we do need a more comprehensive programme."

With so many issues that need to be addressed before insolvency practitioners can be professionally viable, who will develop a common syllabus? Lim pointed to the likelihood of collaboration between MIA, MICPA and IPAM. "It will need continuing professional development," he affirmed. "Candidates will need to demonstrate their capability. While anyone can enter the insolvency profession, we are saying that the best platform is one which incorporates many facets which are already found in the accountancy/auditing profession." Urging the industry to move swiftly on this, he pointed out that current insolvency practitioners could cope with the increase in appointments, but over time, the talent pool needed beefing up. "There will be a need for new candidates later," he emphasised.

L-R: Rabindra S Nathan, Lim San Peen and Norhaiza Jemon.

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CVA VERSUS JM

The Companies Bill 2015 has significantly greater roles for insolvency practitioners, including nominees, trustees, and supervisors under the Corporate Voluntary Arrangement (CVA) and Judicial Management (JM). For guidance, it is useful to look to other markets. "We always ask – how does it work over there? – meaning how are CVA and JM applied and managed in other environments which may be more mature or substantially different from the ones we are used to," said IPAM Council Member Khoo Poh Poh.

"When Singapore decided to take the JM route, many companies were wound up when they could perhaps have been saved," explained Sushil Nair, Director, Drew & Napier LLC. "We also looked at other countries, like

the UK, Australia and New Zealand, when putting our own structures in place. Companies have to be insolvent before being placed under Judicial Management, whereas we are looking at more search-and-rescue type situations – which is what CVA tries to achieve." CVA is based on a rescue culture which tries to rehabilitate the underlying business and allow unsecured creditors to participate in the restructuring as part of a wider solution, rather than "bury" the company. It's about retaining control, not writing off the business completely. However, it can be used inappropriately.

Because it seeks to align the economic burden of the business being "rescued" with the stakeholders who have the most to lose, this could result in an imbalance between affected and unaffected creditors. Also, many firms may perceive it as a means of "getting off the hook" instead of being responsible for their transgressions, and there is no guarantee that the underlying business will, indeed, be rehabilitated. Despite the Singapore experience, there is a growing preference for Judicial Management (JM) over CVA, as JM allows financially-distressed companies with viable businesses a better chance of rehabilitation and to regain financial health. Under JM, a court-appointed Judicial Manager assumes control of and manages the business of an insolvent company.

The company's directors or creditors have to apply to the Court for this, and show that certain outcomes will be achieved with JM. Once JM is granted, the company cannot be wound up, and legal proceedings or execution of judgements against the company cannot continue (except with the leave of the Court). Initially, the JM process is granted for six months but this can be extended by the Court if it is demonstrated that the continuation can achieve the JM's aims. In the case of the example cited, Bilcare Singapore Pte Ltd, business operations were managed as a going concern for nearly two years. The sale of the company's business and assets were successfully completed, and the assets were more advantageously realised for the creditors, than if winding up had taken place. ■

L-R: Khoo Poh Poh, Sushil Nair, Angela Ee and Oliver S. Wright.