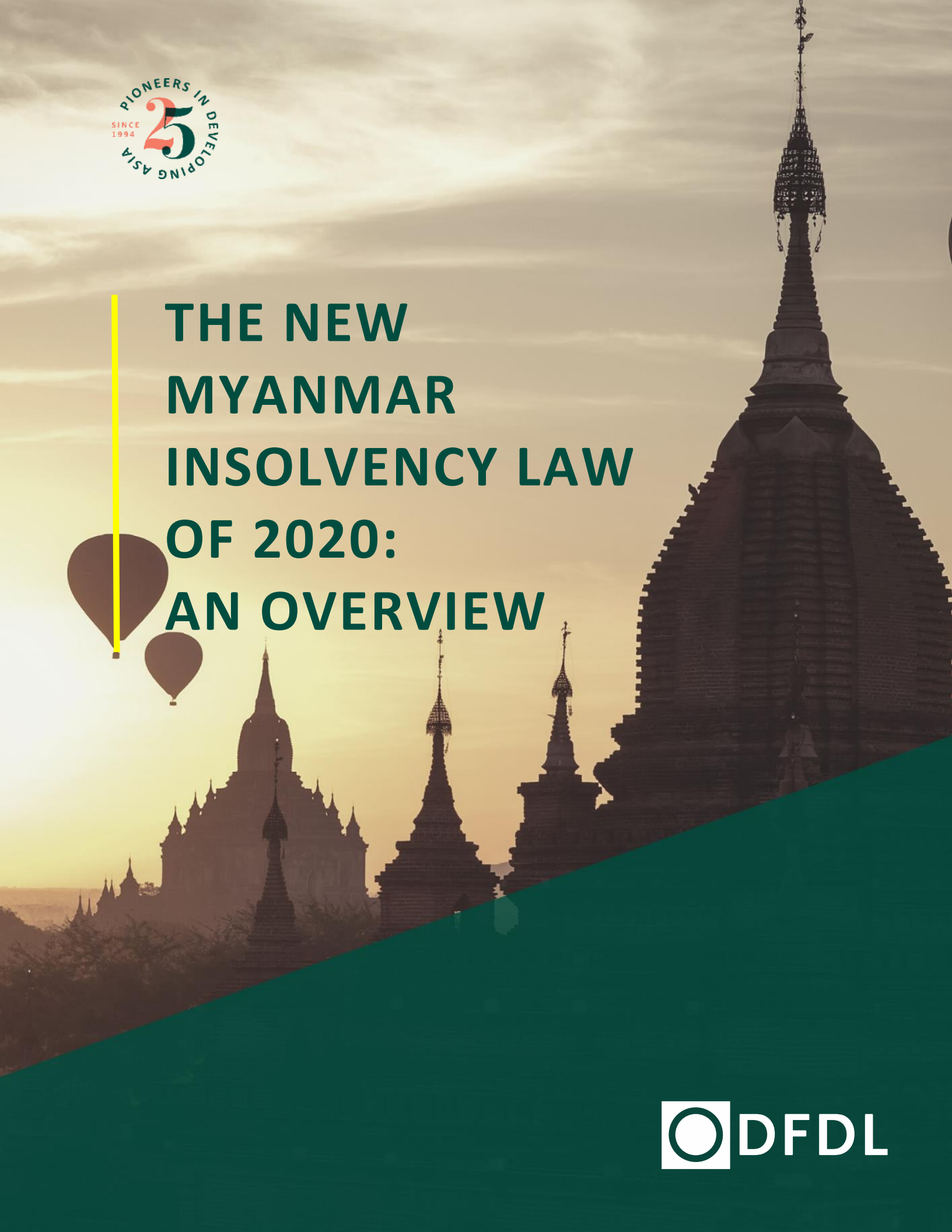


THE NEW MYANMAR INSOLVENCY LAW OF 2020: AN OVERVIEW

DFDL

On 25 March 2020, the Insolvency Law 2020 ("**Law**") which had been enacted by the Pyidaungsu Hluttaw entered into force. Subsequently, on 28 April 2020, the Insolvency Rules 2020 ("**Rules**") also came into force (the Law and Rules collectively are the "**Insolvency Regulations**"). The Insolvency Regulations repeal the antiquated Yangon Insolvency Act 1910 and Myanmar Insolvency Act 1920 and introduces a new regime applicable to corporations with a special focus on micro, small and medium scale enterprises ("**MSMEs**"). The Rules prescribe the timeframe for each phase of insolvency proceedings along with the applicable fees, forms and penalties for violations of the Law.

A company that is unable to pay its debts as and when they become due will be declared insolvent. Insolvency proceedings in the form of rehabilitation or liquidation may be initiated when a company is declared insolvent. Corporate rehabilitation proceedings to rescue the company may be initiated by a company, its secured creditor(s) or by a rehabilitation order passed by the court. In the event that company rescue is not possible, the company may be liquidated either by a voluntary or court mediated winding-up process. A company may also be directly liquidated without going through the rehabilitation phase. Such a petition for the direct winding-up of a company without having to go through the rescue process, may be filed before a court by the company's directors or creditors.

This article discusses the rehabilitation and liquidation processes of a company under the Insolvency Regulations and briefly outlines other noteworthy features of the new Law.

1. CORPORATE RESCUE AND REHABILITATION PROCEEDINGS

1.1 Initiation of Rehabilitation Proceedings

Rehabilitation proceedings of a company which is unable to pay its debts begin with the appointment of a Rehabilitation Manager ("**Manager**") who may be appointed by the directors of the company, a secured creditor who holds security over all or the majority of a company's assets or by a rehabilitation order passed by a court.

Rehabilitation Proceedings for corporates are divided into two phases:

i. **Rescue Stage** – where the Manager conducts a meeting with the creditors to discuss preparation of the Rehabilitation Plan ("**Plan**"); and

ii. **Plan Stage** – where the Plan that has been adopted is given due effect and the assets of the company are distributed as per the Plan and the company is revived as a going concern.

1.2 Rescue Stage

During rehabilitation proceedings, the Manager is deemed to be an agent of the company and must manage the affairs of the company and adopt reasonable measures to effectively revive the company. The Manager is required to conduct a meeting of the creditors, facilitate the appointment of a "**Creditors Committee**", float the Plan, and ensure that the Plan is acceptable to the creditors. The Manager assumes personal liability in respect of the debts incurred by the company during the rehabilitation process.

A meeting of the creditors must be summoned by the Manager within 30 days of appointment to discuss the rehabilitation proceedings and deliberate on the Plan (if already prepared). A Creditors Committee may be appointed through the mutual consensus of the creditors at this meeting. The primary objective of appointing the Committee of Creditors is to assist the Manager in preparation of the Plan.

This Plan is a compromise between the company, its creditors and members. It may be prepared by the Manager or any other interested party. The Plan must contain details of the company's property, the manner of the fulfillment of liabilities, order of payment priority, the responsibilities of the directors and other officers of the company to give effect to the Plan and details regarding termination of the Plan. Once the Plan has been accepted, the company will thus enter into the Plan Stage.

1.3 Plan Stage

After acceptance of the Plan, the company will have to appoint a Plan Supervisor ("**Supervisor**") to ensure its due implementation.

The Supervisor will give effect to the Plan, ensure that the terms mentioned in the Plan have been met, the claims of the creditors have been duly fulfilled and this will conclude the Plan Stage. In the event that objectives mentioned in the Plan are not achieved, it should be altered accordingly at a meeting of the creditors and the Plan so altered should be enforced. If alteration of the Plan is not possible then the company will move to the liquidation phase and will have to be wound up.

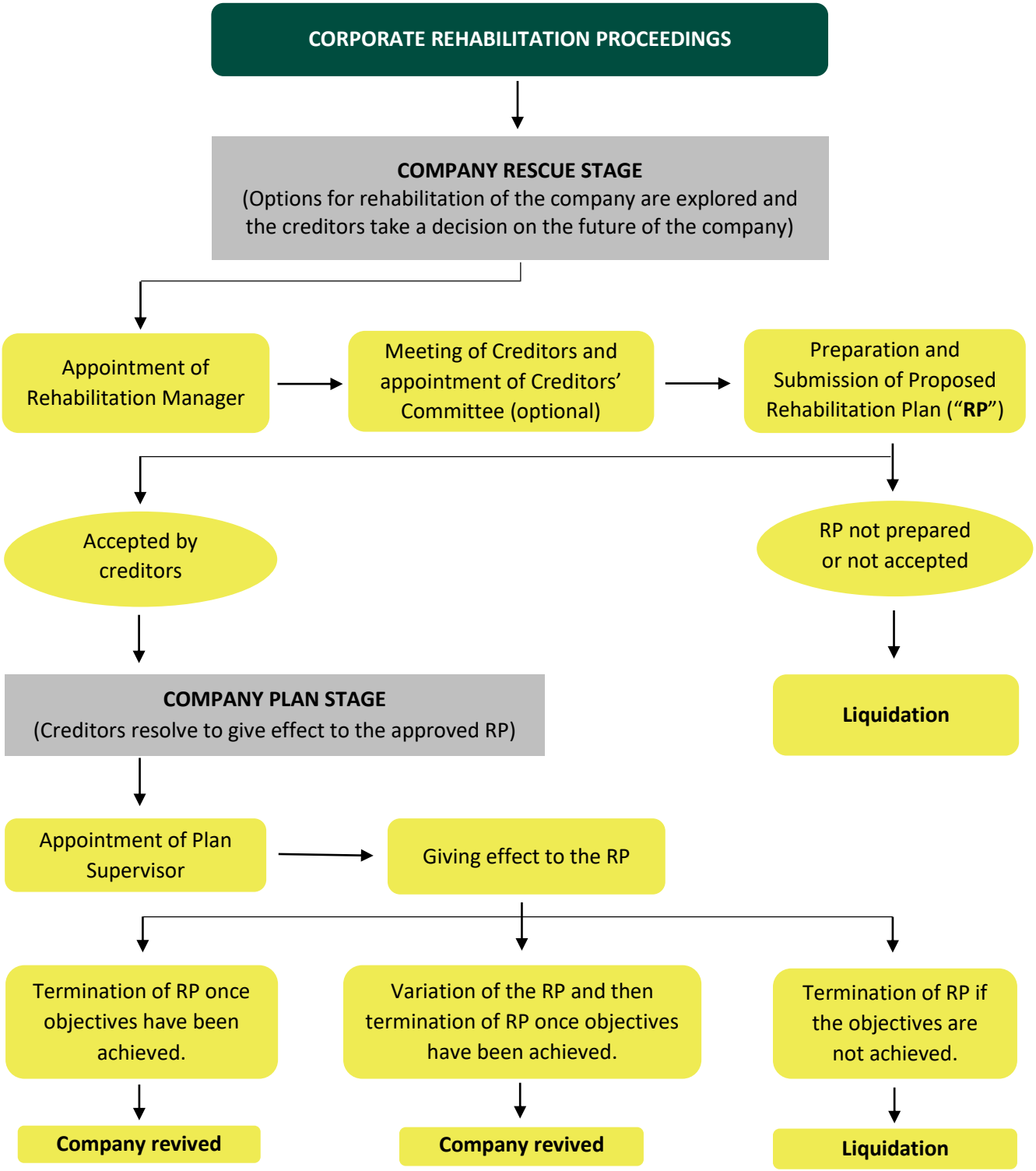
1.4 Protections available to a company undergoing insolvency proceedings

A company subject to rehabilitation proceedings enjoys certain protections. No action may be initiated against the company without permission of the court. Furthermore, any form of attachment or execution of security interest over the property of the company would require prior consent from the Manager. Any change in the members or shareholding pattern/ratio is also restricted.

1.5 Receiver

A receiver may be appointed by a company or secured creditor during the rehabilitation proceedings. A secured creditor may appoint a receiver in respect of security created prior to enactment of this Law or when the secured creditor does not hold security over all or the majority of the company's assets. The receiver would assist the company in the dealings of the company and assist the secured creditor(s) in realization of the security they hold. However, the duties undertaken by the receiver shall not contravene or be at odds with the Manager's duties.

1.6 A snapshot of the corporate rescue and rehabilitation proceedings:



2. WINDING UP PROCEEDINGS

The Law allows a company to be liquidated if it is not possible for the company to continue its activities as a going concern. The winding-up process may be voluntary or initiated by the court.

2.1 Initiation of the Winding up Process

The voluntary winding up may be initiated under the following circumstances:

- The occurrence of an event giving rise to winding up conditions or expiry of a fixed period of time; or
- A special resolution passed by the members of the company to this effect; or
- If a Plan is unable to be adopted by a company during the Rescue Stage; or
- If a Plan is terminated without its objectives being fulfilled.

A court mediated winding up may be initiated by receiving an order from the court based on a petition filed by the directors or creditors of the company.

2.2 Liquidation Process

The liquidator, appointed in the general meeting or by the company creditors is deemed to be an agent of the company who must act in the best interests of the company. The company will cease to carry on its business except as required for its beneficial winding up.

The liquidator must summon a meeting of the creditors of the company within 28 days of appointment in the event of a winding-up initiated by members. A Creditors Committee may also be formed to assist the liquidator in the winding-up process.

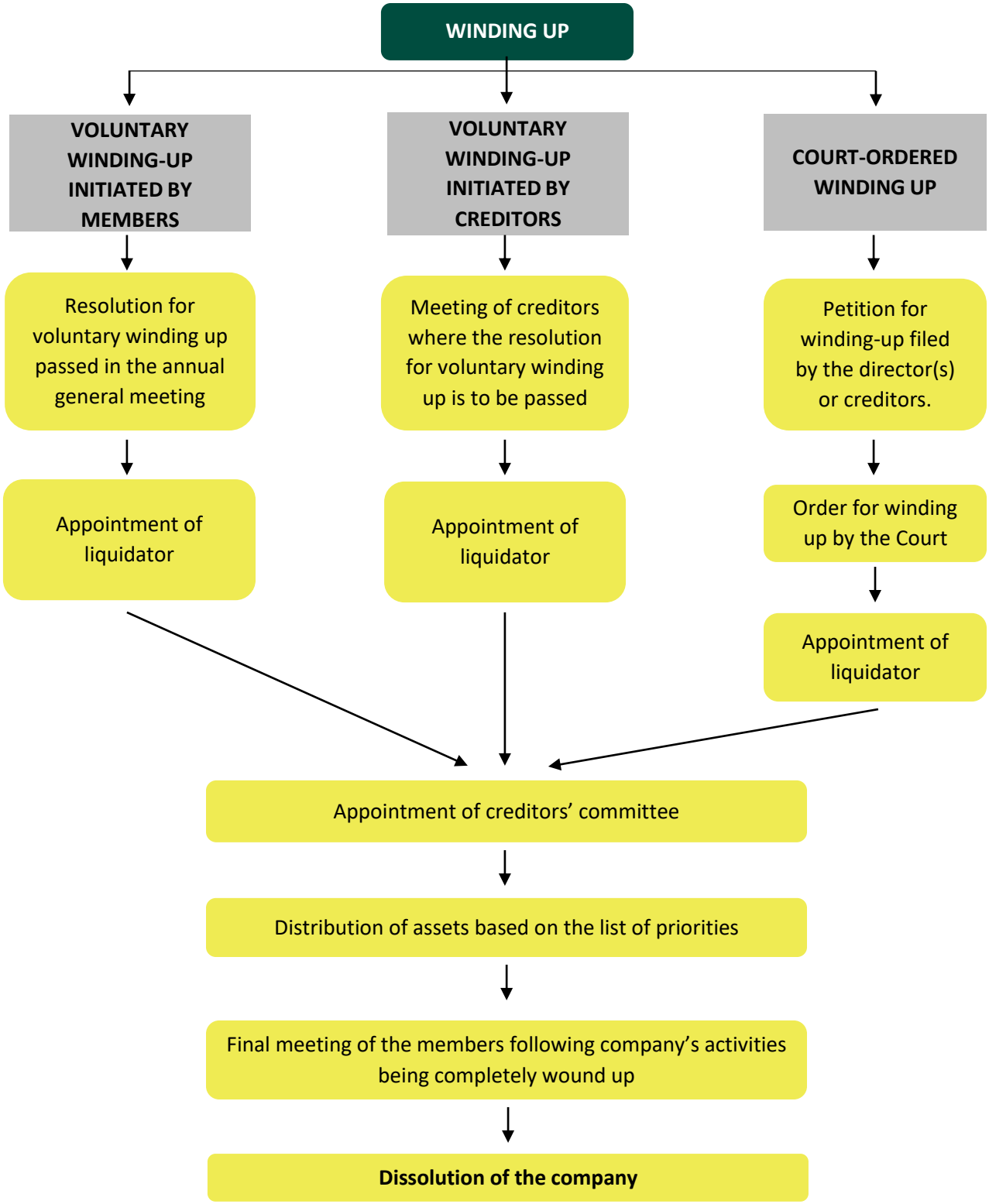
2.3 Priority of Claims

In the case of a company winding up, the distribution of assets will be based on the pari passu liabilities of the company and the remainder must be distributed among the members based on their rights and interests. As a general principle of law, the payment of secured creditors' claims rank above the payment of unsecured claims of the company. The fees and costs associated with the liquidation process are to be paid followed by payments due to employees and finally the claims of the secured and unsecured creditors are to be paid by the company.

2.4 Liquidation of the Company

Following distribution of the debts, a final meeting of the creditors or the members (in the case of a voluntary winding up orchestrated by the members) has to be called by the liquidator. The liquidator will explain how the company is being wound up and how the assets are to be distributed among the claimants. The company will subsequently be dissolved and such information will be recorded by the DICA.

2.5 A snapshot of the winding-up process:



3. SUSPICION PERIOD/ TRANSACTIONS UNDER THE LAW

Any past transaction involving the following activities may be deemed a suspicious transaction if it is determined as causing the company to become insolvent or took place after the company became insolvent:

- transactions involving gifts;
- transactions without consideration or at consideration significantly less than market value;
- a transaction where a creditor has received an amount more than it would have ordinarily received in respect of an unsecured debt;
- provision of credit by a company for any overpriced transaction; and
- creation of a floating charge on the companies undertaking or property.

Depending on the individual transaction, the suspicion period may vary from six months to five years from the initiation of rehabilitation or liquidation of a company.

If a transaction is determined to be suspicious, the court may pass an order and restore the position of the company to what it would have been had the suspicious transaction not taken place. The courts may also order any property transferred by or as part of such a transaction to be vested in the company, or an order to release the whole or portion of any security given by the company or an order to require any person to pay any sums received by him or her by way of benefit from the company.

CONCLUSION

The Insolvency Regulations have outlined a clear and robust process for corporate and personal insolvency proceedings. Given the unprecedented economic upheaval caused by the ongoing COVID-19 pandemic, this dynamic framework will assist in effectively addressing insolvency issues in a timely and efficient manner. While the Law and the Rules have duly entered into force, the Insolvency Registry has yet to be established. We understand that the Registry is in the process of being readied and would be housed within the Directorate of Investments and Company Administration ("**DICA**").

We are hopeful that this Law will go a long way towards streamlining insolvency issues and setting in place a smooth and seamless insolvency regime.

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Nishant has more than thirteen years of professional experience of practicing law in India and Myanmar, out of which he has devoted five years of his practice to Myanmar. Nishant has advised on some of the largest, most challenging and groundbreaking transactions and investments in Myanmar. His areas of specialization include: M&A and general corporate, banking and finance, telecommunication, aviation, energy and real estate. Nishant's client portfolio features some of the leading Myanmar companies across a range of sectors. In addition to transactional advisory work, Nishant has substantial experience in dispute resolution in India. In addition to being a frequent speaker at various national and international conferences and seminars across the globe, Nishant has authored several articles and papers published in various journals such as the IBA, Asia-MENA, Lexis Nexis and IFLR. He holds a Master of Laws (LL.M.) in Business and Finance Law from the George Washington University Law School, Washington DC and speaks English, Hindi and Urdu.

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