



NEW MYANMAR COMPANIES LAW SENT TO PARLIAMENT FOR FINAL APPROVAL

On 5 January 2017, the new Myanmar Companies Law (**MCL**) was approved by the Myanmar Government. The MCL was drafted by the Department of Investment and Company Administration (**DICA**) of the Ministry of National Planning and Economic Development with the assistance of the Asian Development Bank. The draft legislation has now been forwarded to Myanmar's parliament (the Pyithu Hluttaw) for final approval. The Government has stated its intention to pass the draft legislation into law by the end of March 2017.¹

Introduction

The MCL - which will replace the outdated Myanmar Companies Act (1914) (**MCA**) - has been drafted with a view to encouraging foreign direct investment in Myanmar as well as foreign participation on the Yangon Stock Exchange (**YSX**). The introduction of the MCL is part of a broader legislative initiative to bring Myanmar's company law into line with international standards. The MCL will complement the revised Myanmar Foreign Investment Law (2017 FIL) which is also expected to be introduced by the end of March 2017. The MCL updates the regulatory framework governing the establishment and operation of Myanmar incorporated companies. The new law includes provisions to improve standards of corporate governance and provide greater shareholder protection. The MCL will apply to existing companies incorporated under the MCA as well as newly incorporated companies including foreign invested MCL incorporated companies.

Classification of a 'foreign company'

¹ It should be noted however that the MCL's progress to date has been slow. First drafts were circulated in 2015 and updated drafts in 2016. The new Myanmar Government's legislative priorities are subject to change.

Under the MCA 'foreign companies' are prohibited or restricted from participation in numerous activities which a local 'private company' (i.e. non-foreign company) is generally free to carry out. Under the MCL restrictions will still apply, however the MCL widens the scope for foreign participation through its definition of a 'foreign company'.

The MCL defines a "foreign company" as a company incorporated in Myanmar "*in which an overseas corporation or other foreign person [or a combination of both] owns or controls, directly or indirectly, an ownership interest of more than the prescribed ownership amount*". This is a significant departure from the MCA, pursuant to which a company is considered to be a foreign company if a single share in the company is owned by a foreign national or corporation.

For example, under the MCA only wholly owned Myanmar companies are permitted to engage in 'trading' activities. Foreign participation in 'trading' activities - other than those trading activities ancillary to its business - is prohibited². The MCL is silent in respect to 'trading' activities. However, applying the new definition of a 'foreign company' a company will be deemed a 'Myanmar company' until foreign nationals or companies hold '*more than the prescribed ownership amount*'. The corollary of this provision is that a company will *not* be deemed a 'foreign company' if foreigners hold *less than the prescribed ownership amount*. This would appear to open up

² Instruction 2/2015 on the "Scope of Trading Activities Permitted for Investors in the Thilawa Special Economic Zone" introduced a limited exception to the general prohibition on foreign participation in 'Trading Activities'. Instruction 2/2015 applies to investors in, and promoters of, the Thilawa SEZ only.

participation in 'trading' activities to foreign investment, as long as the level of foreign ownership is less than the prescribed ownership amount.

The MCL is silent as to '*the prescribed ownership amount*'. It is expected that the 'ownership interest' or 'ownership amount' will be fixed at 35%³, although the Government is likely to reserve the right to waive or vary permitted levels of foreign ownership to encourage foreign investment in certain sectors or to protect local companies. Moreover, the Government will want to retain the power to vary permitted levels of foreign ownership as the Myanmar economy develops.

Incorporation, capacity and powers of a company

Under the MCL a single constitutional document (**Constitution**) replaces a company's memorandum of association and articles of association. Under the MCA companies are required to state their objectives in the company's memorandum and articles of association. The MCL removes the requirement for an 'objects clause'. The Constitution gives a company "*legal capacity to carry on any business or activity*"⁴ (assuming participation in such activities is generally permitted by law and that the company is in receipt of all the requisite permits and licences to engage in such activities). A company can file its Constitution in either the Myanmar or English language. The memorandum of association and articles of association of an existing company shall take effect as the Constitution of that company following the commencement of the MCL. The 'objects clauses' of companies established under the MCA will lapse 12 months from the passing of the MCL. These companies will then automatically be deemed to have the capacity and powers granted to newly companies incorporated under the MCL.

The removal of the 'objects clause' broadens a company's powers on incorporation. Companies established under the MCA should therefore consider the early removal of their 'objects clauses' to benefit from the broadened powers available to the company. Alternatively, certain companies may prefer to retain their original objects clause, especially if the clause was drafted as a shareholder protection measure. Companies whose original objects were either prescribed by, or approved by a Government Department or Ministry should consider whether the further approval of that Department or

Ministry is required before it amends its objects. A company may amend its objects through a special resolution of its shareholders.

Under the MCA, companies are also required to state their objectives in the company's Form 1 (**Permit to Trade**) issued by the DICA as well as in the memorandum and articles of association. The MCL removes the requirement to obtain a Permit to Trade. A company registered under the MCL will be granted a Certificate of Incorporation. The Certificate of Incorporation shall be a conclusive evidence that all the requirements of the MCL in respect of registration have been complied. No Permit to Trade will be issued. When registering a transfer of its shares with DICA, a company is required to state whether or not the share transfer being registered causes the company to become, or alternatively cease to be, classified as a 'foreign company' under the MCL.

Directors

Pursuant to the MCL, a Myanmar private company must have at least **one** resident director.⁵ The MCA requires private companies to have at least two directors. Public companies are now required to have three directors, a reduction from seven required under the MCA. There is no requirement for a company to appoint a Myanmar national as a director. However, at least one director must be ordinarily resident in Myanmar, i.e. a resident in Myanmar for at least 183 days in each year.

Directors - Duties

The MCA does not contain detailed provisions on directors' duties or the remedies available to members, other directors, and the company for breach of directors' duties. The MCL introduces internationally recognisable rules and standards in respect to the exercise of power by company directors in Myanmar. Directors have a general duty to act in good faith, in the company's best interest⁶ and for a proper purpose. The MCL sets out more specific requirements with regard to a director's use of position, use of information, and disclosure of interests, and make a director duty bound to act lawfully and in accordance with the company's Constitution. To discharge their duty to act in the company's best interest and for a proper purpose, directors should consider the likely long-term consequences of decisions. Directors are specifically required

³ Htin Lynn Aung, "Myanmar Companies Act sent to parliament"; Myanmar Times, 12 January 2017, <http://www.mmmtimes.com/index.php/business/24508-myanmar-companies-act-sent-to-parliament.html>

⁴ Section 5 (a) (ii)

⁵ Section 4, Essential Requirements of Companies (a) (5)

⁶ Section 166

to consider the effect their decisions will have on the company's employees, its business relationships with customers and suppliers, the environment and the company's reputation⁷.

The members of a company can amend the Constitution of a company to expressly permit a director to act in a manner which he or she believes is in the best interests of that company's holding company or in the best interests of a shareholder (or joint-venture partner) in the company even though it may not be in the best interests of the company itself.

Shareholders

Under the MCA a Myanmar private company is required to have between two and 50 shareholders. The MCL requires a company to have 'at least one member' and 'at least one share in issue' (excluding companies limited by guarantee). The MCA requirement that a director of a company holds at least one share (commonly referred to as the 'director's share') has been removed⁸. Existing foreign invested companies may wish to consider amending their share structure to establish a 100% Myanmar subsidiary.

Minority shareholder protections

The MCA contains limited protections for minority shareholders. The MCL introduces numerous new provisions safeguarding the rights of minority shareholders in Myanmar companies. Division 19 of the MCL - '*Members' rights and remedies*' - sets out detailed provisions in respect to the oppression of shareholders. Under Section 192 'oppression' is broadly defined to include acts contrary to the interests of the members as a whole or oppressive to, or unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. The list of persons who can take an action for 'oppression' is set out in Section 194 and includes members, former members (if the application relates to the circumstances in which they ceased to be a member), or any person DICA deems to be an appropriate person.

Section 196 of the MCL provides for the bringing of derivative actions by shareholders and directors⁹ on behalf of a company. Pursuant to Section 271 a shareholder owning over

10% of the shares in a company can apply to DICA¹⁰ to have the affairs of the company investigated. DICA will investigate the company if it is of the opinion that the company or one of its directors or officers may have committed an offence and the application by the appellant shareholder was made in good faith and on reasonable grounds. Section 126 sets out provisions and procedures in respect to the variation of rights of holders of classes of shares. Pursuant to Section 126(e) a shareholder who has had the rights attached to their shares varied can appeal against the varying of such rights, provided that they voted against the resolution tabled in respect to the variation. Companies can also provide for additional minority shareholder rights in their Constitutions.

Classes of shares

Section 62 of the MCL expressly permits companies to issue different classes of shares, including convertible and redeemable shares, preferential shares (providing for both preferred voting rights and rights to dividends) and non-voting shares. Shares can be denominated in different currencies¹¹. Under the MCA the share capital of a Myanmar company can be divided into different classes of shares but a foreign investor cannot hold preference shares that are convertible into ordinary shares. The use of different classes is expected to assist financing efforts and the structuring of the rights of different shareholders.

Capital management

The MCL introduces new rules on capital maintenance and alteration. Section 115 sets out detailed requirements on the reduction of share capital whereas Section 120 sets out provisions in respect to share buy-backs.

Reductions of share capital and share buy-backs may be equal or selective. An agreement for an equal reduction of share capital or buy-back must be approved by an ordinary resolution passed at a general meeting of the company or must be made conditional to such approval. Agreements for a selective reduction of share capital or selective buy-back must be approved by a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the buy-back, or by their associates or alternatively by a resolution agreed to, at a general meeting, by all ordinary

⁷ Section 166 (e) (i) (A) – (D)

⁸ Section 70 of the MCA

⁹ Derivative actions can also be brought by former members, or person entitled to be registered as a member, of the company or of a related body corporate, former directors, or former officers of the company, and persons acting with leave granted by the Court under Section 197 of the MCL

¹⁰ Or another Government body as may be nominated by the authority of the Ministry of Planning and Finance whose responsibilities include the administration of the MCL.

¹¹ Section 14 (b) (i)

shareholders. A solvency test applies to reductions of share capital, share buy-backs and the redemption of redeemable preference shares¹².

Security, mortgages and charges

Division 22 of the MCL sets out provisions in respect to mortgages, penalties and charges. Under the MCL charges or mortgages on a company's shares or property are void if not registered. The DICA will keep, with respect to each company, a register of all mortgages and charges created by the company after the commencement of the MCL. Companies will be issued with a certificate of the registration of any mortgage or charge registered. Pursuant to Section 239 every company is required to keep a copy of every instrument creating any mortgage or charge requiring registration under Section 229 at its registered office. The copy of the instrument creating a mortgage or charge shall be kept at the company's registered office and be available for inspection at all reasonable times by any creditor or member of the company. There is no fee for the inspection of these instruments by a creditor or member. The register of mortgages and charges maintained by DICA will also be open to inspection by any other person on payment of such reasonable fee as the company may specify.

Small companies

The MCL introduces simplified statutory requirements for small companies. A 'small company' is a company which is not a subsidiary of a public company, which has less than 30 employees and which together with subsidiaries has an annual revenue of less than Kyats 50 Million (or approximately US\$37,000). Small companies may be exempted from requirements such as the appointment of auditors, the filing of financial reports¹³ and the holding of Annual General Meetings¹⁴. The DICA will determine whether or not a 'foreign company' qualifies as a small company.

YSX

Foreign participation in Myanmar companies will allow foreign investors to purchase shares on the YSX, which in turn is expected to aid the development of the YSX as a trading platform by opening it up to more institutional investors. Division 20 of the MCL sets out provisions in respect to the filing of a prospectus by a public company and the contents of the prospectus. In this respect the MCL reiterates many of

the requirements contained in Sections 92 and 93 of the MCA. The MCL will, together with The Security and Exchange Law (2013), The Securities and Exchange Rules (2015), relevant Government notifications and the YSX business Regulations, provide the framework for the listing of securities on the YSX.

Conclusion

It is important that the directors and officers of companies incorporated under the MCA understand how the changes introduced by the MCL affect them and their companies. Directors should become familiar with the various new directors' duties contained in the MCL. The directors and members of a company should consider whether or not to seek to amend the Constitution of the company to expressly permit a director act in a manner which he or she believes is in the best interests of that company's holding company or in the best interests of a particular shareholder (or joint-venture partner) in the company even though it may not be in the best interests of the company itself. Companies which are already established under the MCA should generally consider whether or not to amend their Constitutions immediately after the enactment of the law (thereby broadening their corporate powers) or alternatively allow the 12 month transitional period lapse, after which they will then automatically be deemed to have the capacity and powers granted to newly companies incorporated under the MCL. 'Two-shareholder' companies established under the MCA should also consider whether or not they wish to become a 'single-shareholder' company, i.e. a wholly owned subsidiary. It should be noted that the MCL does not substantially amend the financial reporting requirements for companies. Minor changes have been introduced to reflect changes in the Myanmar Accountancy Council Law. The procedures for winding up and liquidation of companies have not been substantially changed however a new insolvency law is expected to be introduced in the future.

¹² Section 74 (c) (iii)

¹³ Pursuant to Section 257 (c) Sections 260 to 268 (inclusive) and 279(e)279(b) do not automatically apply to a small company

¹⁴ Section 146 (e)

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