



Myanmar's New Companies Law and Investment Framework: Preparing for the law and company administration requirements

Training Series with Australian and British Chamber of Commerce

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Myanmar's New Companies Law and Investment Framework Workshop Series

1. Preparing for the new Myanmar Companies Law and company administration requirements
2. Corporate governance and stakeholder protections
3. Corporate structures and corporate finance
4. Companies and the Investment Law

Workshop 1 Outline

- Company law reform process
- MCL key concepts and principles
- Company administration
- Transition to the MCL

Myanmar Companies Law: Reform process

Companies Law reform process and status

- 103 year old MCA updated in accordance with common law principles, best practice and Myanmar's conditions.
- A modernisation of the rules for the formation, governance, administration and activity of companies.
- Aligned with the new Investment Laws and other business law reforms
- Drafting commenced 2014
- Extensive stakeholder consultation, awareness raising and policy development.
- Long journey through Government and Parliament
- Passed by Parliament November 2017, approved by President 6 December 2017.
- Commencement date – August 2018?

Myanmar Companies Law: Key concepts and principles

What is a company and why do we need company law?

- Primary context: the company as a separate entity with full legal personality
 - An artificial creation of law
 - Owned by shareholders
 - Managed by directors
 - Liability limited to extent of capital contribution
- The key economic unit in society and a successful means of mobilising investment
- But:
 - How do shareholders ensure that directors manage their investment – the business conducted by the company – in the right way?
 - How can a company be held responsible for wrongful acts?

Company forms and basic features under the MCL

- Companies under the Law having share capital and limited liability
 - Private (max. 50 members)
 - Public
- Companies formed under former Acts or overseas companies “carrying on business” covered by the Law
- Business associations
- Myanmar & foreign companies
 - New 35% threshold
 - No transfer restrictions (with notification of change in status)
 - No Permit to Trade
 - Same entity
- Small companies
 - Less than 30 employees
 - Less than MMK 50m revenue
- Single shareholder
- Holding and subsidiary companies
- Directors and officers
 - “shadow” directors
- Constitution
 - Replaces M&AA
 - Flexible document under control of shareholders
- The Registrar - DICA

Carrying on business

- The trigger for registration of non-MCL incorporated companies
- Not “carrying on business” if simply:
 - A party to legal proceedings
 - Holding a meeting or engaging in internal management activities
 - Holding a bank account
 - Selling a property through an agent
 - Seeking orders which are binding if contract made outside Myanmar
 - Lending money or creating a charge on property
 - Securing or collecting debts
 - Conducting an isolated transaction
 - Investing funds or holding property
- Can seek a ruling from the Minister

Myanmar and foreign companies

- Foreign Company
 - company incorporated in the Union
 - overseas corporation or other foreign person (or combination) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent
- Ownership interest
 - Legal, equitable or prescribed interest arising through any means
 - Direct shareholding
 - Direct or indirect shareholding in another company holding a direct or indirect shareholding in the company
 - Through an agreement providing direct or indirect right to control voting rights on a resolution of the company
- Board control and economic rights

What can a company do?

- All the powers of a natural person (subject to other applicable laws and constitution)
 - “ultra vires” doctrine abolished
 - no requirement for “objects”
 - no Permit to Trade requirement
- In dealing with a company, people can assume it is acting with full power and authority

Who runs the company?

- Companies will be under the control of the Board
 - Powers may be delegated but ultimate responsibility retained
- Directors to be appointed by shareholders
- Private company need only have one director
 - Public companies require three
- One director must be resident in Myanmar
- A company may have a company secretary
- Officers and shadow directors are recognised

Corporate governance

- Directors Duties

- to act with care and diligence
- to act in good faith in the company's best interest
- not to improperly use position or information
- to comply with law and constitution (M&AA)
- to avoid reckless trading
- not to incur obligations unless company can perform them
- to disclose material personal interests

- Penalties: disqualification, fine, personal liability, compensation order, imprisonment

- Shareholder Rights

- Rights to: vote, call meetings and put resolutions, appoint and remove directors, appoint auditors, wind-up the Company
- Approve: changes to constitution, changes of name and company type, changes to share rights and share conversions, capital reductions, buy-backs and consolidations, the company giving financial assistance, remuneration and benefits to directors
- Information: books and records, financial and audit reports
- Take action: derivative actions, injunctions, court orders if corporate oppression

Share capital

- What is a share?
- Flexibility has been introduced
 - Ordinary shares
 - Preference shares and other classes of shares
 - Convertible securities and redeemable securities
 - Options
 - Can denominate shares in currencies exchangeable in Myanmar
- Authorised capital, par value and share premium concepts removed
- Methodology added for valuing “in kind” capital contributions
 - Directors’ must resolve it is fair and reasonable and not less than amount to be credited as paid up
 - Prudent to obtain a valuation
- Pre-emptive rights only if provided in Constitution

Transactions affecting share capital

- How can you change share capital?
- Raising new funds
- Flexibility introduced to allow for efficient capital returns
 - capital reductions and share buy-backs
- Court approval not required
- Strong protections for shareholders and creditors
 - fair and reasonable
 - not prejudicial to ability to pay creditors
 - “solvency test” and director liability
 - full disclosure and shareholder approval
 - DICA must approve disclosures

Dividends

- What is a dividend?
- Conditions for payment clarified
 - must satisfy “solvency test” after payment
 - can pay debts as and when they fall due
 - assets exceed liabilities
 - Must also be
 - fair and reasonable to shareholders as a whole
 - not prejudicial to ability to pay creditors
- Determined by Directors
 - potential liability on insolvency
- May be paid in cash, shares or transfer of assets

Execution of documents (contracts and deeds)

- By a person with express or implied authority
- Without a seal if signed by:
 - if only one director, that director
 - two directors
 - a Director and secretary
- With a seal if seal fixed and witnessed by
 - if only one director, that director
 - two directors
 - a Director and secretary

Assumptions that can be made when dealing with a Company

- Unless knowing or suspecting otherwise, persons dealing with companies may assume:
 - Due appointment and authority of registered directors
 - Due appointment and usual authority of officers and agents held out by the company
 - and any additional authority that is held out
 - Proper performance of duty of director, officer or agent
 - Due execution of documents if signed in manner provided by law

Registrar's role and powers

- DICA continues to be the principal regulator, but shouldn't be a gatekeeper
 - handles incorporations
 - maintains the register (which must be open to inspection)
 - On-line registry and re-registration coming
 - issues guidance
 - monitors compliance
 - takes action
- Power to approve specific matters (e.g. explanatory memoranda for a share capital transaction)
- Power to issue penalty notices, undertake investigations and bring proceedings, and may require persons to assist in prosecutions
- Decisions may be appealed to the Minister
- Provision made for formation of specialist courts and tribunals

Myanmar Companies Law: Company Administration

Incorporation requirements

- Any person may apply to the Registrar
- Complete and sign the form
 - company name; type; applicant, shareholder and director details and consents; registered office and principal place of business address; number, type and denomination of shares and amount paid up; name of ultimate holding company; whether a foreign company
- Confirm use of model constitution or submit constitution to be used
- Pay the fee
- Once assessed as meeting requirements, Registrar must register
 - Registrar may not require any other documents unless prescribed

Overseas company (branch) registrations

- Complete and sign the form
 - Company name; director and “authorised officer” details and consents; registered office and principal business address in Myanmar and place of origin
- Submit incorporation document and constitution (in Myanmar language with English summary)
- Pay the fee
- Once assessed as meeting requirements, Registrar must register
 - Registrar may not require any other documents unless needed to confirm good standing of corporation or if prescribed

Company constitutions

- Replaces the M&AA
- Acts as a contract between members and company
- Sets out rights, powers, duties and obligations of directors and shareholders
 - share capital, share transfers, meeting procedures, Directors' powers and processes, dividends, record keeping etc
- Provides for limited liability of members
- May include anything the company wishes (including objects and pre-emptive rights if desired)
- Must be in Myanmar language, may also be in English
- Requires a special resolution to change

Company meetings and resolutions

- Meeting types:
 - Statutory Meeting: between 28 days and 6 months of incorporation (Public companies)
 - AGM: within 18 months of incorporation
 - Special general meeting as may be called from time to time
- Meeting requirements
 - Must be called for a proper purpose
 - 21 days written notice (28 if a public company), unless consent to short notice, setting out time, place, resolutions,, voting information
 - Quorum of 2 (subject to constitution)
 - Chaired by Chairman / person appointed by Directors
- Calling a meeting:
 - Chairman, Directors or Members with 10% of votes that may be cast
- Voting
 - Proxies and corporate representatives
 - Show of hands unless poll demanded (by Chair, 5 members, or members holding 10%) Ordinary resolution: simple majority of those present at a meeting where notice of resolution duly given
 - Special resolution: majority of not less than three-fourths
- Written resolution – single member or private company (unanimous)

Company registers, records and reports

- Registers to be maintained and open for inspection:
 - Members, directors, consents, securities, charge, seal
- Records to be maintained and open for inspection:
 - Application for incorporation and supporting documents
 - Records for preparation of financial statements (small companies)
 - Contracts for capital in kind contributions

Company filings

- Lots! Including:
 - Annual return
 - Mortgages and charges granted
 - Explanatory memoranda for capital reductions and benefits to be provided to directors
 - Approvals of financial assistance
 - Change of name, type, constitution, director, shareholder, share capital, register it maintains, registered office,
 - Annual financial statements (public company and potentially overseas company)
 - Notice of winding-up or cessation of business in Myanmar (overseas corporation)
- Appoint a secretary!

Exemptions for small companies

- Unless in constitution or Members pass an ordinary resolution, small companies do not need to
- Hold an AGM
- Prepare and file audited financial statements

Myanmar Companies Law: Transition

Transitional provisions

- Existing companies and current processes will continue but be brought under new law
- Re-registration of companies likely to be required on commencement
- “Ordinarily resident” director to be appointed by end of 12 month transition period
- “Objects” clauses to be deemed removed at end of 12 month transition period unless refreshed by special resolution
- Removal of Permit to Trade requirement has effect on commencement
- Existing Managing Agent appointments continue until end of term
- Existing rights and liabilities under MCA continue
- Further transitional provisions, regulations and any other matter to be “prescribed” under the new Law may be issued by the Minister.

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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

