



Myanmar's New Companies Law and Investment Framework: Corporate Governance and Stakeholder Protections

Training Series with the Australian and British Chambers

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Corporate Governance

- Company law, common law and policy
- Shift in the policy and regulatory approach
 - DICA to have less of a gatekeeper role but an enhanced advocacy and supervisory role
 - companies have more flexibility and clearer authority to act
 - greater responsibility for compliance with detailed rules and responsibilities on directors
- Supported by stronger shareholder protections and enforcement mechanisms

Outline

- Directors' duties
- Shareholder protections
- Powers of DICA and the courts
- Practical steps to take to prepare

Directors' Duties

- Directors' duties are to ensure loyalty to the company
- There are times where the interests of directors and the company diverge, directors' duties should ensure that they acting in the company's interests
 - director may try sell the company some property at inflated prices
 - director may act with insufficient care or diligence in relation to the business operations of the company
- Duties are owed to the company, not individual members
- Duties are owed by directors and officers

Directors' Duties

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

Directors' Duties: to act with care and diligence

- Duty of care and diligence (s165)
 - the key duty which concerns the way you make company decisions as a director or officer
- It is an objective test – what would a reasonable person do in that position, with those responsibilities
- What standards are applied
 - reasonable care – what level of care would a reasonable person exercise if they were in that position
 - skill – standard of skill will depend on several factors (executive vs. non executive or special skills)

Directors' Duties: to act with care and diligence

- diligence – requires a director to exercise a level of diligence that a director would exercise if they were of a company in similar circumstances
- delegation and reliance – a director cannot delegate their responsibilities, however they are not responsible if they can show they believed:
 - the delegate would exercise the power in conformity with the duties imposed on the directors
 - on reasonable grounds, in good faith and after making proper inquiry the delegate was reliable and competent (s160(f)(ii))

Directors' Duties: to act with care and diligence

- Business judgment rule (s165(b))
 - business has inherent risk – it is not for the court to decide the merits of business judgments
 - director satisfies their duty if:
 - decision is made in good faith and for a proper purpose
 - no material personal interest
 - are appropriately informed
 - rationally believe the decision to be in the best interests of the company

Directors' Duties: to act with care and diligence

- Example
 - the audited financial report of Mohinga Co. Ltd. shows a healthy profit, later it is found that that serious errors were made. In the auditors disclaimer there was a reference to incomplete information The directors approved the financial report, did they breach their duty?
 - Merv is the CFO
 - Uncle Soe is a non-executive director
 - he is an accountant
 - he relied on the company's accountants for advice
 - he relied on nephew Ko Win
 - he relied on a well known accountant
 - he did not have time to read the report

Directors' Duties: to act with care and diligence

- Example
 - Mohinga Co. Ltd. made a large investment to make mohinga using a chicken base, it failed. Did the directors breach their duty?

Directors' Duties: to act in good faith in the company's best interest

- Good faith = to act honestly (s166)
- Company's interests
 - not always the same interests as those of the majority shareholder, directors need to act fairly as between the members of the company
 - other interests may be considered: (s166(e))
 - employees
 - business relationships with customers and suppliers
 - environment
 - reputation
 - might include the interests of creditors if there is a serious loss to the company's creditors (s170)

Directors' Duties: to act in good faith in the company's best interest

- Group companies and JV exception
 - in the case of a 100% owned subsidiary, not wholly owned subsidiary or joint venture company. Directors may act in the best interest of the Holding Company or particular shareholder(s)
 - must be expressly permitted in the company's constitution

Directors' Duties: to act in good faith in the company's best interest

- Example:
 - Dodgy Tea Leaf Salad Co Ltd, proposed a merger, all indications would have been that it would have been an incredible success. The Directors of Mohinga Co., Ltd. turned it down
 - DTLS's major shareholder was the same as the Company
 - DTLS was known to have obtained land for its tea plantations through questionable means and used environmentally damaging farming techniques
 - the Chairman of the Company had a long term feud with the Chairman of DTLS

Directors' Duties: proper purpose

- When making a decision directors need to make decisions for a proper purpose
 - exercise all powers of the company except those reserved for the members (s160)
 - need to check the powers of the directors in the Constitution of the company (Chapter 18 of Draft Model Constitution – DICA website)
 - *Directors will manage or cause the management of the business of the Company and may exercise, or cause to be exercised, all powers, authorities and discretions of the Company that are not, by the Law or by this Constitution, required to be exercised by the Company in general meeting (s113)*

Directors' Duties: proper purpose

- determining whether a decision was made for a proper purpose one should look at:
 - what is the power in question
 - intention of the directors to look at the actual purpose
- Example
 - directors decide to issue shares, which is normally within their powers, was it for a proper purpose
 - to raise capital
 - to employees as an incentive
 - dilute the shareholding of a member, diminishing the shareholding of a minority shareholder

Directors' Duties: use of power and position

- Directors need to act in a manner consistent with their powers and position which (s167)
 - gains an advantage for themselves or someone else
 - causes detriment to the company
- Considerations
 - it is not a defence that it was done for the best interests of the company
 - actual advantage or detriment may not need to be proven
- Example
 - Mohinga Co., Ltd. is given the opportunity to lease a factory

Directors' Duties: use of information

- Directors should not use information to: (s168)
 - gain an advantage for themselves or someone else
 - cause detriment to the company
- Considerations
 - actual advantage or detriment may not need to be proven
- Example
 - Mohinga Co., Ltd. is submitting a bid in a response to a tender to sell mohinga for MMK350 per portion to Myanmar Railways. The company of the director's brother bids MMK330.

Directors' Duties: to comply with law and the constitution

- Director must not contravene the MCL or constitution (s169)

Directors' Duties: avoid reckless trading

- Business should not be allowed to be carried on in a manner if it is likely to create a substantial risk or serious loss to the company's creditors (s170)
- Considerations
 - an objective test – “I was hands off and did not know what was going on”
 - good faith may not be a defence

Directors' Duties: avoid reckless trading

- Example:
 - Mohinga Co., Ltd went into liquidation with big losses after investing in a new factory. Looking at the financials “it was never going to work”. Daw Maw Aye, a non-executive directors had never looked at the financial reports so had no chance of knowing
 - should she have known, did she inform herself
 - did she seek advice and from who
- Protection can be found under the business judgment rule

Directors' Duties: obligations

- A director must not agree for the company to incur obligations if the director believes on reasonable grounds that the company will not be able to perform the obligations (s171)
- Considerations
 - did the director expect at the time of incurring the obligations that the company was able to perform
 - did the director adequately inform themselves
 - objectively should they have known

Directors' Duties: disclosure of interests

- A director with a material personal interest in a matter must disclose it (s172)
- Subject to the company's constitution where a director has a material personal interest the director cannot vote or be present when the matter is being discussed (s163)
 - unless the other directors or members pass a resolution that the director should not be disqualified

Directors' Duties: disclosure of interests

- What is a material personal interest
 - must relate to the affairs of the company
 - matters relating to the business
 - structure of the company or how the company is control
 - business operations of the company
 - material – must look at the advantage the director will gain, would it affect the vote of the director?
 - personal – will the director benefit, it may apply to indirect benefits

Directors' Duties: disclosure of interests

- Exceptions include
 - the director is a shareholder
 - director's remuneration
 - securing the company's loans
 - contracts with group companies
- What can be done
 - a standing notice can be issued to satisfy this duty

Directors' Duties: disclosure of interests

- Subject to the constitution, the draft model constitution
 - must disclose the interest as soon as possible (s111)
 - may vote on the matter once disclosed (s110)
 - must disclose holding any property or assets where the holding might create, directly or indirectly, conflicting duties or interests
- Example
 - The brother of the Myanmar JV partner owns the land which the company leases to build a Mohinga factory

Directors' Duties: penalties

- Every director or officer is liable to a fine of MMK10,000,000 (s190)
- Disqualification as director
- Penalties for oppressive conduct (s193) and derivative actions (s200)
- Specific penalties

Directors' Duties: penalties

Offence	Penalty (MMK)
Not providing updated copies of altered constitutions	100,000
Not providing updated details of overseas corporations or submitting annual filings	250,000
Not confirming in-kind contributions are fair value	250,000
Not properly recording and confirming fair value of convertible securities	250,000
Not updating registers and filing notices of issued shares or other securities	250,000
Not following requirements in relation to redeemable preference shares	250,000
Complying with requirements of issuing shares	150,000
Failing to register a transfer of shares or other registrable security	750,000
Not allowing inspection of registers by members (or public for public company)	250,000
Not maintaining or having registers available	500,000
Dividends are not paid out properly	500,000

Directors' Duties: penalties

Offence	Penalty (MMK)
Company becomes insolvent after paying dividends and the procedure of paying dividends is not followed	Amount owed to creditors and not recoverable with respect to the dividends
Dividends are incorrectly determined (unfair distribution or incorrect procedure in issuing shares in lieu of dividends)	1,000,000
Not registering an alteration of share capital	1,000,000
Not complying with requirements of a capital reduction	5,000,000
Company becomes insolvent after share reduction	Amount owed to creditors where amounts exceed recoverable assets
Not complying with share buy back procedures	5,000,000
Company becomes insolvent after share buy-back	Amount owed to creditors where amounts exceed recoverable assets
Not following procedures in varying rights of members	1,000,000
Not following procedures in providing financial assistance to buy a company's shares	2,500,000

Directors' Duties: penalties

Offence	Penalty (MMK)
Company becomes insolvent after providing financial assistance	Amount owed to creditors where amounts exceed recoverable assets
Not properly displaying company name	50,000
Not using the company name on a seal have the company name on company communications	50,000
Creating a legal obligation without the company name	Personally liable for the obligation
Not following procedures at the AGM	250,000
Not following procedures in holding a statutory meeting	250,000
Not making minutes of general meetings and directors resolutions available to members	150,000
Matters relating to the prospectus of public companies	10,000,000
Not properly registering charges, mortgages and debentures and not allowing inspection of registers	250,000
Not registering an appointed receiver and subsequent required filings	250,000

Directors' Duties: penalties

Offence	Penalty (MMK)
Not correctly maintaining financial records	750,000
Not properly preparing or following procedures in relation to audited reports and financial statements	5,000,000
Not filing financial statements with DICA	250,000
Not providing information requested by DICA	5,000,000
Not providing access to company books and documents to an inspector appointed by the Minister	5,000,000
Not complying with the Auditor General in relation to companies in which the government holds shares	5,000,000 and/or 2 years jail
Not registering an order of a compromise with creditors	150,000
Does not comply with requirements when providing a statement to affairs to a liquidator	1,000,000
Matters relating to the procedure of winding up	250,000
Not providing information to DICA requested information when DICA is investigating the company or obstructing the information	10,000,000
Continuing to breach the law	25,000 per day

Directors' Duties: penalties

Offence	Penalty (MMK)
Falsification of company books	7 years jail
Providing false evidence under oath, by affidavit, deposition or solemn affirmation	7 years jail
Within 12 months of a winding fraudulently removes property of the company	2 years jail
Interferes with the winding up process, defrauds the company	2-5 years jail
Wrongfully withholding or destruction of property	Refund the value of the property

Directors' Duties: de-facto and shadow directors

- Definition of director includes a person:
 - acts as if appointed in the position of director (de facto director)
 - instructs the directors or otherwise exercises or controls the exercise of powers of the board (shadow director)
 - does not apply to professionals advising directors
- Shadow and de-facto directors can be liable for directors duties
- Examples include
 - being an advisor to a start-up, family business
 - joint ventures

Directors' Duties: defences

- Business judgment rule
 - specific to duty to act with care and diligence and reckless trading
- General defence available to directors (s460)
 - reasonable steps were taken to comply with the law
 - or in the circumstances the director could not have been reasonably required to take such steps
- Relief from liability, broad and no specific test (s461)
 - acted honestly
 - considering the circumstances the person ought to be fairly excused for the contravention

Directors' Duties: Indemnity and D&O insurance

- Company is prevented from indemnifying directors (s181)
 - for a liability owed to the company or related body corporate
 - for a liability owed to a third party and the conduct did not arise out of conduct in good faith
- Company is prevented paying for D&O insurance (s182)
 - wilful breach of duty, liability for breach of duty relating to use of position or use of information
- Directors can pay for their own insurance, check exclusions

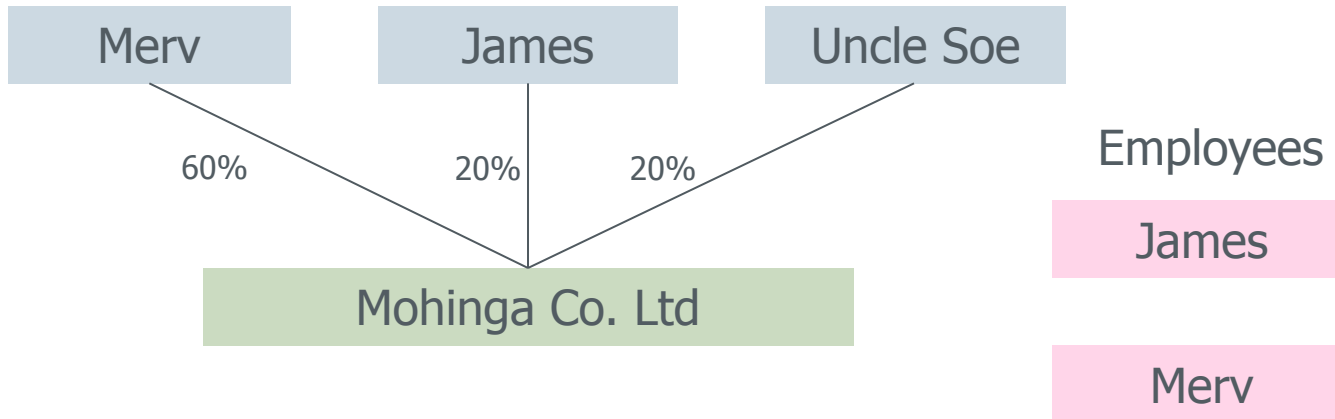
Shareholder Protection: powers

- Shareholder powers (I)
 - rights to:
 - vote
 - call meetings and put resolutions
 - appoint and remove directors
 - appoint auditors
 - wind-up the company

Shareholder Protection: powers

- Shareholder powers (II)
 - 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

Shareholder Protection: oppression remedy



- Is the company treating Uncle Soe fairly?
- Does Uncle Soe have a claim against the Company?
- Is there oppressive conduct (s192)

Shareholder Protection: oppression remedy

- Who can apply (s194)
 - member
 - member who has been removed by a selective reduction
 - a person who has ceased to be a member if it relates to the circumstances in which they ceased to be a member
 - any person DICA thinks appropriate

Shareholder Protection: oppression remedy

- When can the court intervene (s192)
 - conduct of the companies affairs
 - an actual or proposed act or omission by or on behalf of the company
 - a resolution or proposed resolution of members or a class of members
- Is either
 - contrary to the interests of all members
 - unfair against a member or members

Shareholder Protection: oppression remedy

- Actions the court can take, include (s193)
 - wind up the company
 - modify or repeal the constitution
 - regulate the conduct of the company
 - require share transfers and capital reductions
 - requiring or restraining a person from specific conduct
 - damages

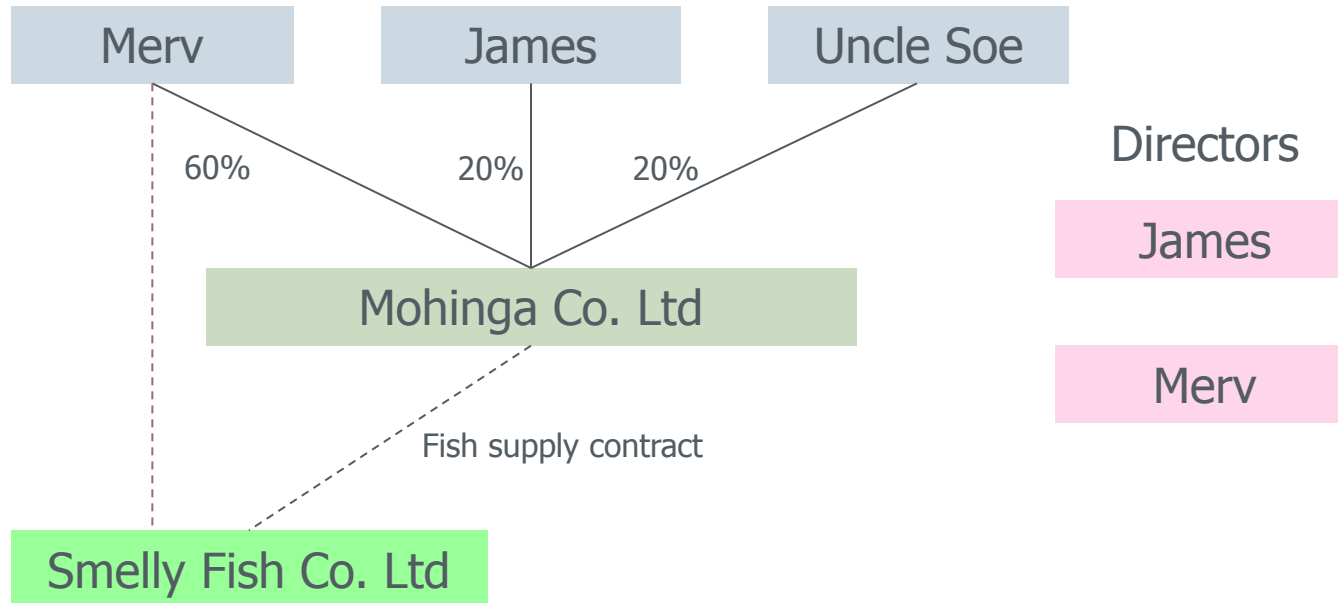
Shareholder Protection: oppression remedy

- Common examples are where a majority shareholder
 - runs the company in their own interests and ignores the interests of minority shareholders
 - improperly issues shares to themselves to out vote other shareholders
 - excludes a minority shareholder from being involved in the management decisions of the company
 - redirects business opportunities from the company to themselves
 - pays themselves excessive salaries at the expense of paying dividends to shareholders

Shareholder Protection: oppression remedy

- Cannot be used just because the member does not like the conduct of the company
 - where a member is forced to sell their shares due to a drag along provision
 - to force a winding up of the company if a member wants to exit

Shareholder Protection: derivative actions



- Breach of directors duties
- The company shall sue in its own name?
- Section 196 MCL – bringing, or intervening in, proceedings on behalf of the Company

Shareholder Protection: derivative actions

- Who can bring a claim (s196)
 - members, former members, or persons entitled to registered as members or of a related body corporate
 - directors, former directors, officer or former officer
- Leave from the court (s197)
 - probable will not bring proceedings itself
 - acting in good faith
 - in the best interests of the company
 - a serious question to be tried
 - company has been given 14 days notice (court may still grant leave if appropriate)

Shareholder Protection: derivative actions

- Proceedings against third parties (s197)
 - company has decided not to get involved in proceedings
 - directors
 - acted in good faith for a proper purpose
 - no material personal interest
 - informed themselves
 - in the best interests of the company
- Effect of ratification (s199)
 - does not prevent bringing an action, court will consider how well informed the members were and whether they were acting for proper purposes

Shareholder Protection: derivative actions

- Powers of the court (s200)
 - interim orders
 - directions on the conduct of proceedings
 - order to do or not do certain acts
 - appointment of an independent investigator
- There is often an overlap between claims of oppression and grounds for a derivative action

Shareholder Protection: derivative actions

- Examples
 - the company allowing executives to use corporate jets and other luxuries not included in their compensation packages
 - favorable credit terms are being offered to certain suppliers some of whom are in default of their obligations with no effort being made to collect outstanding payments. Some suppliers are owned by directors of the company

Shareholder Protection: rights to information

- Members' rights to information
 - books
 - minutes of general meeting or written resolutions
 - registers
 - register of members, option holders debenture holders and any other interests
 - register of mortgages and charges (open to everyone)
 - members can access the registers of a company
 - annual balance sheet, director's report and auditors report
- Any person may inspect the registers and records kept by the registrar (s421(d))

Creditor protections

- Solvency test
 - company can pay debts as they become due
 - company's assets exceed liabilities
- Applies when paying out to members
 - redeeming redeemable preference shares (s74)
 - pay dividends (s107)
 - capital reduction (s115)
 - share buy back (s120)
 - financial assistance (s130)

Creditor protections

- Creditors can claim against directors
 - payment of dividends
 - capital reduction
 - share buy back
 - Providing financial assistance
- Register of charges and mortgages
 - can be inspected by creditors

Creditor protections

- Certain actions cannot prejudice creditors
 - payment of dividends (s107)
 - change of company type (s58(a))
 - reduction of share capital (s115(b))
 - share buy backs (s120)
 - providing financial assistance (s130)
- Can commence proceedings to wind up the company

Powers of the registrar

- Registrar's power of inspection (s426)
 - may require and take possession of relevant documents
- Registrar has power to intervene in proceedings (s437)
 - registrar is taken to be a party with all the duties and liability of such party
- Registrar to issue penalty notices (s439)
 - if not complied with proceedings will be instituted at court
- Compel employees or officers to assist the registrar (s440)

Powers of the registrar

- Decisions of the registrar can be appealed to the Union Minister within 28 days of the decision (s428)

Powers of the court

- With respect to directors duties, court can issue a contravention order (s441)
 - following a contravention order the company may make a compensation order
 - court may issue a penalty order of up to MMK10,000,000 against a person (s442)
 - alternatively a compensation order can be issued to compensate for damages (s443)
- Prohibition order – where a person is being prosecuted it can prevent that person from shifting assets (s444)

Powers of the court

- Grant an injunction where a person is contravening the MCL or attempting to contravene the law (s445)
- 6 years to commence proceedings (s438)

Practical steps to prepare

- Constitution
 - prepare a new constitution which reflects your company
- Directors
 - inform themselves of their new obligations
 - obtain D&O insurance
 - make necessary disclosures
 - obtain professional advice where necessary
 - consider a company secretary
- Record keeping
 - make sure registers and books are properly maintained
 - meeting minutes to include enough details to show decision making process complies with duties

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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.

