



GUIDE TO THE MYANMAR COMPANIES LAW

“Their advice is practically reasonable and also their response is very prompt. In addition to their service, their attitude is very client-oriented.”

Chambers Asia Pacific, 2017

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A GUIDE TO THE MYANMAR COMPANY LAW

In late November 2017, the Myanmar Parliament approved the new Myanmar Companies Law (the “New Companies Law”) which is now awaiting the President’s signature to become law. It will be one of the key pieces of legislation providing the foundations for an attractive investment climate in Myanmar. The New Companies Law modernises the regulatory framework governing how a company is run and governed, bringing it in line with current practices in other countries.

Members of the SCM team were responsible for drafting of the New Companies Law and were involved in the public consultation and revision of the drafts over the past three years or so. Drawing from our involvement in the drafting process and our expertise in corporate laws in other common law jurisdictions, we are ideally placed to advise you on the impact of the New Companies Law.

This guide seeks to provide guidance to some of the key changes and possibilities arising from the implementation of the New Companies Law and recommends steps you can take to maximise the benefits brought about by the new law.

1 REGULATION OF FOREIGN COMPANIES

Under the Companies Act 1914, companies incorporated in Myanmar are either classified as a “Myanmar company” or a “foreign company”. A Myanmar company has to be 100% owned and controlled by Myanmar citizens and the approval of the regulator, the Directorate of Investment and Company Administration (“DICA”), is required if a company wants to change its classification, which in practice is near impossible to obtain.

While the distinction between a “Myanmar company” and a “foreign company” remains in the new law, a number of the proposed changes will lead to deregulation of foreign ownership (to an extent) from a company law perspective. Investors should note that foreign investment in specific sectors is regulated through other laws such as the Myanmar Investment Law 2016 and laws on property ownership.

1.1 New ownership ratios



Under the New Companies Law, foreigners are permitted to obtain ownership in a “Myanmar company” (up to 35%) and the company will still be categorised as a “Myanmar company”.

The primary significance of this change is that companies (with such permitted minority foreign ownership) will now qualify as a Myanmar Investor as defined under the Myanmar Investment Law 2016. A number of investment activities (set out in paragraph 1(b) of Myanmar Investment Commission Notification 15/2017) will now be open for minority investment by foreign investors.

Other economic activities currently restricted to “Myanmar companies” – such as ownership of land or listing on the Yangon Security Exchange – should also become accessible to foreigners to the extent of them being able to take this 35% ownership interest in a “Myanmar company”.

1.2 Share transfers



The New Companies Law removes the requirement on foreigners wishing to purchase shares in a “Myanmar company” to obtain prior approval from the regulator. Instead the regulator only needs to be notified when foreign ownership exceeds the prescribed limit which leads to the relevant company being classified as a “foreign company” (and vice versa).

The 35% ownership threshold is therefore not a cap and shares can be freely exchanged between foreign and local investors.

1.3 Abolition of permit to trade

The new law also removes the requirement for foreign companies to hold a separate “permit to trade”, significantly reducing another regulatory burden and levelling the playing field.

1.4 Overseas corporations carrying on business in Myanmar



The New Companies Law clarifies the position on its regulation of overseas incorporated corporations who transact in Myanmar. The general position is that an overseas corporation would be required to register under the New Companies Law in order to carry on business in Myanmar. There are certain actions which are not deemed as “carrying on business” and they include: (i) becoming a party to legal proceedings; (ii) maintaining bank accounts; (iii) lending money and securing of and collection of debts; and (iv) conducting an isolated transaction that is completed within a period of 30 days (not being one of a number of similar repeated transactions).

Any overseas corporation with regular business activity and transactions in Myanmar needs to consider these new regulations to see whether registration is required.

2 CHANGES TO THE CONSTITUTION

The relevant provisions on a company’s constitution will bring about significant changes regarding how members of a company may regulate themselves. The memorandum of association and articles of association (“**M&A**”) will be replaced by a single document, the company’s constitution, and the requirement to have objects will also be removed.

2.1 Constitution



The existing M&A of a company takes effect as its constitution following the commencement of the new law provided that the constitution has no effect to the extent that it is inconsistent with the New Companies Law (for a discussion on a company’s objects please see paragraph 2.2 below).

Our recommendation is that a company amends its constitution to take advantage of the modern and flexible procedures introduced by the New Companies Law. More specifically, a company should consider the following:

- a) where provisions of the New Companies Law are expressly stated to be subject to a company’s constitution:
 - i. the regulations in the existing M&A concerning the same area would override the new law and such regulations should be reviewed carefully (e.g. regulations on declaration of dividends – please see paragraph 4 below (Dividends)); and/or
 - ii. a company may wish to include its own provisions to cater for its needs (e.g. inclusion of pre-emption rights for share issue or notice provisions for board meetings);
- b) there may be regulations contained in the existing M&A which are no longer desirable or necessary (and they continue to apply as they are not inconsistent with the New Companies Law); and
- c) a company may also wish to adopt a new constitution to ensure that its constitution has provisions and terminology that are consistent with the New Companies Law.

DICA has also confirmed to us that it will become easier for a company to amend its constitution as it wishes (and companies are no longer required to use standard articles prepared by the authorities).

2.2 Objects



Under the Companies Act 1914, a company is required to state its objects in its memorandum of association (which are also recorded in Form 1, where applicable) and such objects restrict a company's activities.

Any company incorporated under the New Companies Law, and, after the end of the transition period provided in the law, any company incorporated in Myanmar, will no longer have objects unless its shareholders elect to set them out in the constitution. A company without objects is free to engage in any activity as long as they are in compliance with the law and have the requisite permits and licences.

For a company incorporated under previous company laws in Myanmar, the objects take effect as part of its constitution during the transition period (of 12 months) unless they are removed by amending the constitution. At the end of the transition period, the objects of such a company will automatically fall away.

In line with international practice, we do not expect to see the majority of companies engaging in commercial activities electing to maintain objects in their respective constitutions, and we would recommend removing them at the earliest opportunity.

3 Directors

3.1 Directors' Duties



The New Companies Law includes a comprehensive set of directors' duties to ensure that a company is properly run and managed in the best interests of the shareholders as a whole. The various duties of directors are clearly set out in the law for the first time and set high standards for corporate conduct. A balance is set between encouraging corporate activity and properly considered risk taking behaviour with the need to protect shareholder interests.

The main duties imposed on directors are set out in Sections 165 to 172:

- a) duty to act with care and diligence;
- b) duty to act in good faith in the company's best interest;
- c) duty regarding use of position;
- d) duty regarding use of information;
- e) duty to comply with the New Companies Law and constitution;
- f) duty to avoid reckless trading;
- g) duty in relation to obligations (of a company); and
- h) duty to disclose certain interests.

In some circumstances directors may become individually liable to penalties if they breach their duties. To protect against claims it is advisable that directors seek advice to remain informed of their rights and obligations. Indemnity and insurance protection is also permitted, as set out below.

3.2 Regulation of indemnities and insurance for directors



The New Companies Law sets out the position that any provision (whether contained in the constitution or a contract) which exempts a director from any liability to a company which attaches to him in respect of any negligence, default, breach of duty or breach of trust is void. A company or a related body is also prohibited from indemnifying (for a director's benefit) against: (i) a liability owed to the company or a related body corporate; and (ii) liabilities which did not arise out of conduct in good faith.

The law permits a company or a related body corporate to fund premiums to insure a director against liabilities other than: (i) wilful breach of duties in relation to a company; and (ii) contravention of directors' duties regarding use of position and information.

3.3 Resident Directors

A new requirement under the New Companies Law is that a private company in Myanmar must have at least one director (who need not be a Myanmar citizen) ordinarily resident in Myanmar (i.e. present in Myanmar for a minimum of 183 days in a relevant 12-month period). A public company is required to have a Myanmar citizen director who is ordinarily resident in Myanmar.

Companies registered under the Companies Act 1914 only need to meet these requirements at the end of the transition period (which is 12 months).

4 DIVIDENDS

4.1 Dividends

Under the New Companies Law, a company may not declare dividends unless:



- a) the company will, immediately after the payment of the dividend, satisfy the solvency test;
- b) the making of the dividend is fair and reasonable to the company's shareholders as a whole; and
- c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

The solvency test looks at the cash flow as well as the balance sheet of a company i.e. the company is able to pay its debts as they become due in the normal course of business and the company's assets exceed its liabilities (in each case as determined in accordance with the accounting standards applicable to such companies or prescribed from time to time).

How the solvency test is applied will depend on the specific facts and practice in Myanmar will inevitably develop over time. As a director may incur personal liability in certain scenarios, our suggestion is that the directors consult professional advisers prior to declaring dividends under the new law.

Declaration of dividends is also subject to a company's constitution. Therefore, a company which uses the standard memorandum and articles prepared by DICA would also need to follow paragraph 16 which states that dividends may only be paid out of the profits of the year or any other undistributed profits. We would recommend modifying this provision to increase flexibility.

5 SHARES, SHARE CAPITAL MANAGEMENT AND SHAREHOLDER RIGHTS

5.1 Share Classes

The New Companies Law expressly permits companies to issue different classes of shares (and issue other types of security such as options and convertible shares). Companies wanting to distinguish the rights of shareholders, e.g. voting rights and dividend entitlements, should explore this option.

The ability to issue preference shares provides the company an additional avenue to obtain financing.

5.2 Share Capital Management



The new law introduces new procedures which can be used by a company to reduce its share capital and to purchase its own shares (each a "**Relevant Action**"). These

procedures are out-of-court procedures and give companies additional tools to deal with its capital and returning value to shareholders.

In order to carry out a Relevant Action, the following conditions must be satisfied:

the company will, immediately after the Relevant Action, satisfy the solvency test;

the Relevant Action is fair and reasonable to the company's shareholders as a whole;

the Relevant Action does not materially prejudice the company's ability to pay its creditors; and

the company obtaining the requisite shareholder approval and complying with the procedures set out in the New Companies Law.

The Relevant Action may be equal (applying to all shares) or selective (only applying to certain shares). As a director may incur personal liability for non-compliance, our suggestion is that the directors consult professional advisers prior to pursuing share capital reductions or share buy-backs under the new law.

5.3 Abolition of par value



Under the New Companies Law, shares of companies in Myanmar no longer have nominal values or par values. The abolition of the concept of par values has a number of consequences.

Concepts related to par value such as share premium and discounted issue are no longer necessary and are abolished. We recommend that companies with share premium accounts or capital redemption reserves consult their advisers to transfer such relevant premiums and reserves to the share capital account. Going forward, under the new regime all the proceeds of raised from a share issue will be credited to share capital.

The concept of paid up capital and partly paid shares will continue to be relevant under the new law. They will relate to the total consideration paid or agreed to be paid for the shares issued, and not to par value.

5.4 Non-cash consideration for share issues

The New Companies Law enables the board to determine the form of consideration for share issue. For non-cash consideration, the board is required to follow a procedure set out in the law. Firstly, the board must record the consideration in sufficient detail. Secondly the board must determine the reasonable present cash value of the consideration as well as recording the basis for assessment.

The Board must also resolve that: (i) consideration for and the terms of the issue are fair and reasonable to the company and its existing members; and (ii) the relevant present cash value not less than the amount credited for the issued shares.

5.5. Minority shareholder protections



Minority shareholders only have minimal protections under the current Companies Act 1914. The New Companies Law brings protection in line with current best practice found in other countries.

A number of key decisions would need the approval of the minority shareholders, particularly where they affect the rights of the majority and minority shareholders. Minority shareholders may also obtain the right to sue on behalf of the company, even if the directors of the company do not approve of the claims. They may also be able to call meetings or put resolutions forward for approval and have enhanced rights to inspect company documentation. Reporting and disclosure standards generally for companies are also improved.

Companies may also provide for additional minority shareholder rights in their constitution (e.g. providing for pre-emption rights on share issue).

6 COMPANY ADMINISTRATION AND STRUCTURES

The New Companies Law brings about a number of changes which should assist in administration of companies.

6.1 New forms and online services



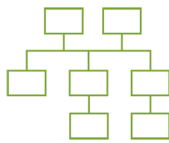
Secondary legislation under the law will be introducing sets of new forms to be used for filing with/notifying DICA and these forms must be used as soon as the New Companies Law is passed.

We are also expecting a transition to a system where filing and other administration services are available online.

6.2 Minimum number of shareholders

Under the Companies Act 1914, a Myanmar incorporated private company requires two shareholders. This requirement is decreased to one shareholder under the New Companies Law. Current investors may therefore wish to make their Myanmar company a 100% owned subsidiary.

6.3 Corporate group structures



Investors often use a group structure to provide greater flexibility in dealing with their assets and different businesses and as a measure to mitigate risk.

While the Companies Act 1914 does not prohibit group structures, they have not been frequently used due to policy reasons. The New Companies Law expressly recognises the use of them and includes provisions to facilitate the managing of corporate groups.

Directors' duties may be modified to permit directors of a subsidiary to act in the best interests of the shareholder rather than in the best interests of the company itself, and similarly these duties can be altered in the case of a joint venture.

6.4 Execution of documents

The New Companies Law introduces new and more flexible methods of executing documents. A contract as well as a deed may now be executed without using a seal as follows:

- a) if the company has only one director - that director;
- b) any two directors of the company; or
- c) a director and a company secretary of the company.

Companies should consider the existing signing authorisations in light of the changes.

6.5 Small companies

A company with less than 30 employees and annual revenues of less than MMK50m will have a lower regulatory burden as it is exempted from a number of reporting and meeting requirements.

7 CHARGES AND SECURITY

7.1 Registration of charges



Under the current Companies Act 1914, security granted by a Myanmar incorporated company must be registered in order for such security to be effective against third parties. However, in practice such registrations were not always accepted by DICA.

The New Companies Law is expected to introduce a prescribed form for registration and DICA has also confirmed this position that registration will be accepted.

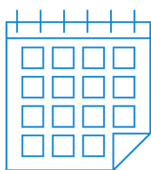
7.2 Charges on Immovable Property



The Transfer of Immovable Property (Restrictions) Law 1987 prevents the mortgaging of immovable property in favour of a foreigner or foreign company. This is an impediment to lending by foreign banks as they are unable to take security over property and property interests.

The New Companies Law states that granting of security is permitted under the law and the exercise of such security does not breach, or is not restricted by, the Transfer of Immovable Property (Restrictions) Law 1987 (or laws with similar effect). This confirmation will no doubt facilitate secured lending transactions with foreign banks aiding Myanmar companies' access to foreign capital.

8 KEY DATES AND TRANSITION PERIOD



The vast majority of the provisions of the New Companies Law becomes effective on the commencement date of the law. Thus, companies in Myanmar need to prepare and be ready for the implementation.

The law also provides transitions for certain provisions as outlined below.

Day 1 - Commencement of the New Companies Law

- An existing company with a valid registration will continue to be recognised under the new law (such registration will take effect as if it were a registration for the corresponding type under the New Companies Law). DICA will continue to fulfil the role of Registrar under the New Companies Law.
- In terms of secondary legislation, (i) Rules 8 to 30 (inclusive) of the Myanmar Companies Rules 1940 and Form 1 to 9 (inclusive); and (ii) Myanmar Companies Regulations 1957 are repealed.
- Other than (i) and (ii) above, regulations that were made for the provisions of the Companies Act 1914 which substantially correspond to the provisions of the New Companies Law apply with all necessary changes as if they were made under the new law. (Section 471).
- A private company (incorporated under the New Companies Law) must have least one director who is ordinarily resident in Myanmar and a public company (incorporated under the New Companies Law) must have registered under previous Act must have at least one Myanmar citizen director who is ordinarily resident in Myanmar (Section 4(a)(v) and (vi)).
- An overseas corporation carrying on business in Myanmar must register under the New Companies Law and appoint an authorised officer who is ordinarily resident in Myanmar (Section 43).
- Unless relief has been sought, all managing agent appointments come to an end and a managing agent will be deemed to be a director of the company (Section 476(a)).

Within 28 days of Day 1

- Deadline for a company with a managing agent to apply to ensure that the managing agent arrangement continues. Extension may be granted up to the end of the transition period. (Section 476(b)).

End of the transition period (12 months from Day 1)

- A private company registered under the previous Act must have at least one director who is ordinarily resident in Myanmar and a public company registered under the previous Act must have at least one Myanmar citizen director who is ordinarily resident in Myanmar (Section 4(a)(v) and (vi) and section 469).
- Existing objects are automatically removed unless a notice in the prescribed form has been served (Section 12(e)).
- Existing share warrants are deemed to be surrendered and cancelled unless an extension has been applied for during the transition period (Section 82(a)).
- All managing agent arrangements that were extended come to an end by the end of the transition period (Section 476(a)).

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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About SCM Legal

SCM Legal is Myanmar's newest independent law firm, owned and operated by the team who prepared Myanmar's new Companies Law and Investment Rules.

Yangon based Partners Chris Hughes, Stefan Chapman and Rebecca Mohr have over a decade of combined FDI, corporate, finance, commercial and regulatory experience in Myanmar and 50 years in total across Asia, Australia and Europe in almost every sector.

Expertise

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