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Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia

contents

Significant Changes Introduced by the Myanmar Companies Law 2017

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The much-anticipated Myanmar Companies Bill was passed by the Pyidaungsu Hluttaw and assented to by President U Htin Kyaw on December 6, 2017. The newly enacted Myanmar Companies Law 2017 (MCL 2017) effectively repeals the archaic Myanmar Companies Act 1914 (MCA 1914), and will come into effect at a date to be designated by the president, currently anticipated to be no later than August 1, 2018. In the meantime, the MCA 1914 remains in effect. The main changes introduced by the MCL 2017 are detailed below.

Up to 35% Foreign Shareholding in Local Companies

The most significant change introduced by the MCL 2017 is the new definition of a foreign company. Under the MCA 1914, a locally incorporated entity with any foreign shareholding is considered a foreign company in Myanmar. The MCL 2017 changes this legal definition, allowing companies to have up to 35% of their shares held by foreign nationals before being considered a foreign company. This allows foreign investors to partake in business activities that were previously restricted to companies with 100% of shares held by Myanmar citizens.

Sole Shareholders

Based on the existing practice of the Directorate of Investment and Company Administration (DICA), the principal government body regulating company affairs in Myanmar, locally incorporated companies must have a minimum of two shareholders. The MCL 2017 changes this position, allowing companies to be incorporated with a minimum of one share and a single shareholder. This brings Myanmar's company law practices more in line with international standards, and it allows companies to incorporate wholly-owned subsidiaries in the country.

Number of Directors and Residency Requirements

Under the MCL 2017, only one director has to be appointed for each company. This is different from the current practice of the DICA, which requires locally incorporated companies to have at least two directors. However, the MCL 2017 requires at least one director of the company to be ordinarily resident in Myanmar—that is, resident in Myanmar for at least 183 days in each year (but not necessarily a Myanmar national). Public companies must have at least three directors, one of whom must be a Myanmar citizen ordinarily resident in the country.

Replacement of Memorandum and Articles of Association with a Constitution

The DICA's practice under the MCA 1914 is to require companies to have a memorandum and articles of association in accordance with sample templates provided by DICA during incorporation. The MCL 2017 replaces this requirement with a single company

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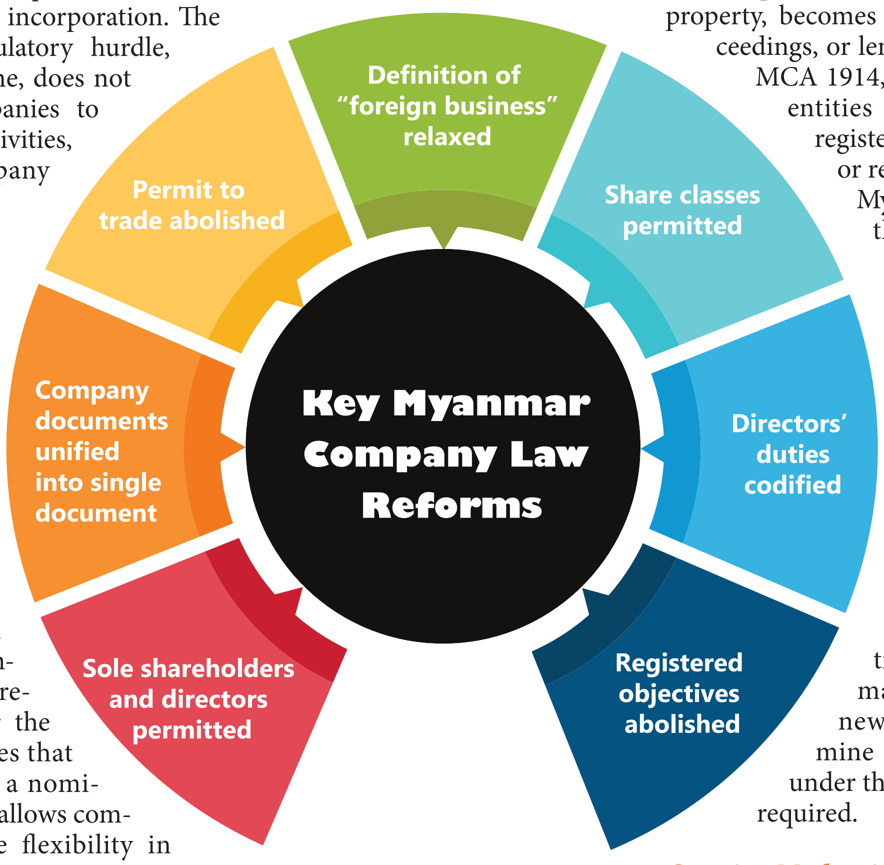
constitution. The memorandum of association, articles of association, and any other constituent documents of an existing company in Myanmar will collectively regarded as its constitution, provided that they are consistent with the MCL 2017.

Abolition of Company Objectives

The MCL 2017 abolishes the requirement for companies incorporated in Myanmar to stipulate their company objectives, which effectively limit the type of business activities that a company can undertake. Under the current MCA 1914 framework, persons wishing to incorporate a company in Myanmar are required to have the intended company objectives approved by DICA before filing a company incorporation application. Registered objectives of existing companies will cease to exist 12 months after the enactment of the MCL 2017.

Removal of Permit to Trade Requirement for Foreign Companies

The MCL 2017 removes the requirement for foreign companies to obtain a permit to trade when applying for company incorporation. The removal of this regulatory hurdle, which, despite its name, does not permit foreign companies to engage in trading activities, expedites the company incorporation process.



Abolition of Authorized Capital and Par Value

The MCA 1914 only allows a company to hold shares up to the amount of authorized capital stated in the memorandum of association, with any capitalization beyond that requiring a formal amendment to the memorandum. This requirement changes under the MCL 2017, which states that shares shall not have a nominal or par value. This allows companies to have more flexibility in pricing shares.

Different Classes of Shares Permitted

The MCL 2017 allows companies to issue different classes of shares and securities, thereby permitting companies to distinguish the rights of different shareholders. Companies can therefore issue preferential shares and shares with weighed voting rights.

Exemptions for Small Companies

Under the MCL 2017, companies with fewer than 30 employees and annual revenues lower than MMK 50 million (approx. USD 38,500) are exempted from certain reporting and meeting requirements. For example, unless required by the company's constitution, the DICA, or an ordinary shareholders' resolution, a qualifying company does not need to hold an annual general meeting or file an annual balance sheet, directors' report, or financial statements.

Directors' Duties Codified

In line with common law principles and modern legislation governing companies internationally, the MCL 2017 lays down a comprehensive set of directors' duties. This includes the duty to act with care and diligence, the duty to act in good faith in the company's best interest, the duty to avoid reckless trading, and more.

Clarification on the Regulation of Overseas Corporations

The MCL 2017 states that all overseas corporations (i.e., foreign-incorporated entities) must register themselves in order to "carry on business" in Myanmar. While the MCL 2017 does not define activities which constitute the carrying on of a business in Myanmar, it states that an overseas corporation is not deemed to be carrying on business in Myanmar merely because it maintains a bank account, conducts an isolated transaction that is completed within a period of 30 days (not being one of a number of similar transactions repeated from time to time), holds property, becomes a party to legal proceedings, or lends money. Under the MCA 1914, foreign-incorporated entities are actually able to register their branch offices or representative offices in Myanmar with the DICA, though neither branch offices nor representative offices are recognized as distinct legal entities from the foreign-incorporated entities, and are regarded as nonresident foreign entities in Myanmar. It is therefore important for foreign businesses with regular business transactions in Myanmar to consider these new provisions to determine whether registration under the MCL 2017 is indeed required.

Ongoing Modernization

The enactment of the MCL 2017 is a much welcomed move as Myanmar strives to modernize its legislative framework, signifying the country's commitment to continuing the liberalization of its economy. The DICA has also indicated that the launch of an online companies' registry is in the pipeline, the introduction of which will certainly boost transparency in the country's company administration framework. The DICA has also announced that all existing companies incorporated under the MCA 1914 will be required to re-register themselves online within six months from the entry into force of the MCL 2017.