

General Corporate

New Myanmar Companies Law Enacted

On 6 December 2017, President U Htin Kyaw gave presidential assent to the Myanmar Companies Bill approved by the Myanmar Parliament, ushering this highly anticipated legislation into law in Myanmar. Although the Myanmar Companies Law (“MCL”) will only be coming into effect at a later commencement date designated by the President, there are a number of key changes which the MCL seeks to overhaul from the current century old legislation, Myanmar Companies Act 1914 (“MCA”). In the interim period till commencement date, the MCA remains in effect.

Local companies can have up to 35% foreign shareholding

Previously, the MCA defined a foreign company as any company which has at least one or more shares owned and controlled by foreign persons. In practice, that meant that foreign companies are precluded from acquiring shares in local companies unless the acquirer initiates a conversion of the local company into a foreign company, which is an arduous process. However, under the MCL, a company would only be characterised as a foreign company if foreign shareholding in the company exceeds 35%. Effectively, this means that foreign companies can invest up to 35% interest in a local company, without changing the characterisation of the company from a local to foreign company and may thus, indirectly undertake activities that are currently restricted to wholly-owned Myanmar entities, such as trading (i.e. importation and distribution of finished goods).

Minimum number of shareholders reduced to one

At present, the Companies Registration Office (“CRO”) and Directorate of Investment and Company Administration (“DICA”) require companies incorporated in Myanmar to have at least two shareholders. This effectively bars companies from establishing wholly-owned subsidiaries in Myanmar. However, under the MCL, a company can be incorporated with a minimum of one share, and can correspondingly have one shareholder.

At least one director to be ordinarily resident

Under the current practice of the CRO, a company registered in Myanmar must have at least two directors, although they need not be resident in Myanmar. However, under the MCL, a private company is only required to have one director but he/she must be ordinarily resident in Myanmar (i.e. resident in Myanmar for at least 183 days in each 12-month period, commencing from the commencement date of the MCL or the date of incorporation for companies incorporated under the MCL). If a private company decides to have more directors, only one director needs to fulfil this residency requirement. In the case of public companies, a company must have at least three directors, one of whom must be a Myanmar citizen who is ordinarily resident in Myanmar.

Objects clause abolished

Under the MCA, all companies incorporated in Myanmar are required to set out business objects in the memorandum of association. These objects limit the type of business activities which a company can undertake. However, this requirement is removed under the MCL which expressly states that companies are free to undertake any business, activity or transaction, subject to any restrictions which may be provided for in its Constitution, and

General Corporate

compliance with applicable laws and regulations. This would mean that existing restrictions under other laws, including sector-specific restrictions on foreign ownership will continue to apply. For companies enacted under the MCA, the objects clauses within their memorandum and articles of association (“**M&AA**”) will continue to apply until the end of the transition period (i.e. 12 months from the commencement date of the MCL).

Foreign companies no longer required to obtain Permit to Trade

Under the MCA, foreign companies are required to obtain a Permit to Trade when applying for a certificate of incorporation. The Permit to Trade, notwithstanding the name, is a general business licence for all foreign companies in Myanmar and does not actually permit foreign companies to undertake trading activities in Myanmar. This requirement is removed under the MCL, which may well simplify and expedite the existing incorporation process.

Memorandum and articles of association replaced by Constitution

Under the MCL, the constitutive document of a company will be referred to as the “Constitution”, as opposed to M&AA under the MCA. This is no doubt a change that Singapore companies will be familiar with. The existing M&AAs of companies incorporated under the MCA prior to commencement of the MCL will be deemed to be the Constitution, to the extent it is consistent with the MCL.

Requirement for authorised capital and par value abolished

Under the MCA, a company is permitted to hold shares only up to the amount of authorised capital stated in its memorandum of association registered with the CRO. Any capitalisation beyond the authorised capital requires the company to amend its memorandum of association, a process which typically takes up to five weeks. However, the MCL expressly states that a share will not have a nominal or par value. This removes the authorised capital requirement as well as concept of share premium, thus reducing administrative hurdles in respect of capital raising by companies.

Preference shares, shares with weighed voting rights, convertible securities and options

In keeping up with the changing times, the MCL also clarified the types of shares and securities which a company may issue. These include (i) shares of different classes; (ii) shares which may be redeemable; (iii) shares which have preferential or restricted rights of distributions of capital or income; (iv) shares which have special, limited or conditional voting rights; (v) shares with no voting rights; (vi) options to acquire shares; and (vii) securities convertible into shares. Naturally, the ability of a company to do so is subject to any restrictions in its Constitution and compliance with applicable laws on the issuance.

Pre-emptive rights may be removed from the Constitution

Under the MCA, existing shareholders have a pre-emptive right to purchase shares in proportion to their existing shareholding in the event of new share issuance. Under the MCL, this pre-emptive right no longer applies unless the company has decided to incorporate such a right within the Constitution.

General Corporate

Dividends may be made other than in cash

The MCL also clarified that dividends can be payable in cash, shares, options or assets. In addition, the MCL enhanced the previous requirement under the MCA that payments of dividends must be made out of profits by introducing the following additional requirements: (i) the company will, immediately after the payment of the dividend, satisfy the solvency test; (ii) the making of the dividend is fair and reasonable to the company's shareholders as a whole; and (iii) the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

Court approval no longer required for capital reduction

Under the MCA, reduction of share capital requires sanction from the Court, which may be applied by way of petition. However, under the MCL, the Court's approval of the capital reduction is no longer required. Instead, the MCL prescribes the level of shareholders' approval required depending on the type of capital reduction. For example, if the capital reduction is an equal reduction (i.e. ordinary shares, applied to each shareholder in proportion, on the same terms and conditions), only an ordinary resolution at a general meeting of the company is required.

Directors' duties codified

The MCL also prescribed a set of directors' duties, which largely reflects common law principles on director's duties and broadly include: (i) duty to act with care and diligence; (ii) duty to act in good faith in the company's best interest; (iii) duty to not abuse position or misuse information; (iv) duty to abide by law and Constitution of the company; and (v) duty to avoid reckless trading. This is considerably more extensive than what is currently set out in the MCA.

Removal of concept of managing agent

The MCL also removed the concept of managing agent. To elaborate, a managing agent is defined under the MCA as "a person, firm or company entitled to the management of the whole affairs of a company, by virtue of an agreement with the company and under the control and direction except to the extent, if any, otherwise provided for in such agreement and includes any person, firm or company occupying such position by whatever name called". This concept is removed as the MCL now makes it clear that all managing agent arrangements must be terminated from the commencement date of the MCL, and any such person shall be deemed to be a director of the company.

Concluding remarks

The passing of the MCL is a momentous milestone in Myanmar's journey of legal reforms and seeks to modernise an archaic legislation that is ill-suited to present day commerce and needs of international businesses. It also paves the way for tremendous fund-raising opportunities by Myanmar companies and potentially allows foreign investors to access the Yangon Stock Exchange which is currently limited to local investors. The lifting of restrictions on investing in local companies (albeit limited to a minority 35% stake) is clearly welcomed.

Importantly, the passing of this important legislation sends a positive signal to foreign investors amidst a challenging economic environment for Myanmar, alongside an ongoing humanitarian crisis in Rakhine State. In short, it

Client Update: Myanmar

2017 DECEMBER

General Corporate

demonstrated to the world that Myanmar is still open for business. Alongside the reforms to the foreign investment regime introduced last October and this April, the MCL further opens up restricted sectors to foreign participation and could well be the catalyst needed to stimulate the economy of Myanmar, which remains heavily dependent on foreign investment.

Lastly, as a sign of Myanmar moving with the times, the MCL grants DICA the power and duty to maintain a company registry and prescribes a procedure in respect of registration of corporate documents. In this respect, DICA has announced that it intends to launch an online registry and electronic filing system for companies before implementation of the MCL. Therefore, it may take several months before the MCL can be put into effect, considering the internal administrative changes which DICA and CRO will need to put in place in order to effectively implement the MCL.

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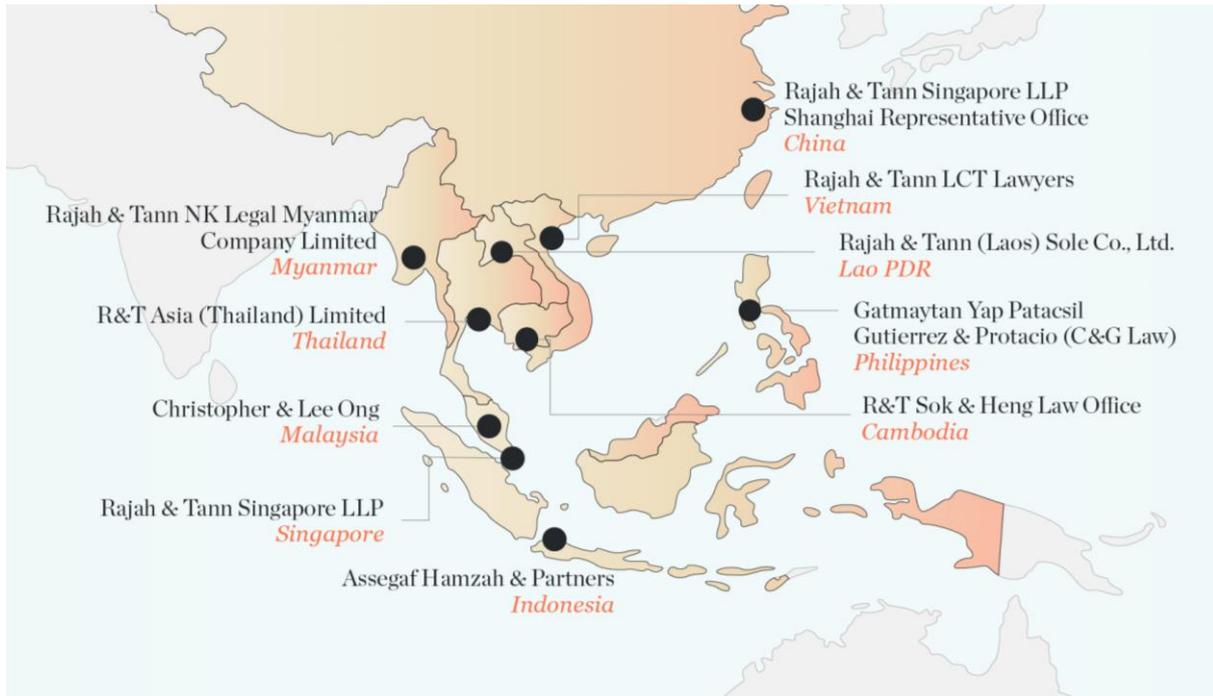
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Client Update: Myanmar

2017 DECEMBER

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