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State of Emergency in Myanmar – Six Months On

Overview

On 1 February 2021, the military-nominated then Vice President U Myint Swe (who is now the current President of Myanmar) declared a state of emergency for a period of one year ("**Declaration**") pursuant to Article 417 of the Constitution of the Republic of the Union of Myanmar 2008 ("**2008 Constitution**"). The Declaration was issued after the military detained government leaders including the State Counsellor Daw Aung San Suu Kyi, President U Win Myint and other senior government officials from the National League for Democracy ("**NLD**") in the early morning of 1 February 2021.

In connection with the Declaration, the legislative, executive and judicial powers of Myanmar were transferred to the Commander-in-Chief of Defence Services, Senior General Min Aung Hlaing, who in turn established the State Administration Council ("**SAC**") as the governing authority during the state of emergency. Since then, the military authorities have replaced the NLD government, removing NLD appointed ministers and deputies while naming replacements under the military's new administration. Some of these replacements include top officials aligned with the military, while others are former ministers and officials from the previous Thein Sein administration.

Six months to the day after the Declaration, a new caretaker government was established on 1 August 2021 pursuant to Order No. 152/2021 issued by the SAC, with the military pledging to hold elections by August 2023. Under the caretaker government, Senior General Min Aung Hlaing has assumed the role of the Prime Minister. At the same time, the intensifying COVID-19 situation has to date posed considerable challenges for the healthcare sector and the broader business community in Myanmar.

Against the backdrop of the unstable political situation and fragile healthcare system in the country, we discuss below the legal and regulatory developments that have taken place in the country over the past six months since the Declaration.

New Legislation and Legislative Amendments Enacted by the SAC

Legislative power has been vested with the Commander-in-Chief of the Defence Services since the Declaration, which means that the enactment of legislation can be expedited without having to pass through the usual legislative processes. In the paragraphs below, we discuss some of the key legislative changes that have been initiated by the SAC since the Declaration.

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Law Amending the Ward or Village Administration Law ("Administration Amendment Law")

The Administration Amendment Law is primarily aimed at restoring the reporting requirement for overnight guests at residential places. Any person who is living in a ward or village must report any overnight guest who is not a member of his household list to the township administration office, and that person's departure must also be reported accordingly. Failure to comply with this requirement can attract a fine of MMK10,000 (approximately USD7).

Law Amending the Law Protecting the Privacy and Security of Citizens ("Privacy Amendment Law")

The Privacy Amendment Law suspends the operation of Sections 5, 7 and 8 of the Law Protecting the Privacy and Security of Citizens 2017 ("**Privacy Law**"). By way of background, the Privacy Law was introduced by the NLD administration to guarantee the right of privacy and security of Myanmar citizens. The Privacy Amendment Law empowers the police to conduct arrests, searches and seizures, intercept telecommunications, and request for disclosure of information from telecommunications operators without a warrant.

Law Amending the Penal Code ("Penal Code Amendment Law")

The Penal Code Amendment Law introduces amendments to the Penal Code 1861 ("**Penal Code**"), which are primarily targeted at protestors and those who rally against the military (whether online or offline) and also include a newly introduced offence of genocide. That being said, the amendments are vaguely worded and risk granting the courts broad powers to interpret them.

Law Amending the Code of Criminal Procedure ("CPC Amendment Law")

In summary, the CPC Amendment Law provides that newly introduced Sections 124C, 124D, 311A and 505A of the Penal Code are non-bailable offences, and in particular Sections 124C and 124D are offences for which an arrest warrant is required, whereas Sections 311A and 505A are offences for which the suspect may be arrested without a warrant. Some consider these amendments as an indication of the regression in the rule of law in the country.

Law Amending the Electronic Transactions Law ("ETL Amendment Law")

The Posts and Telecommunications Department ("**PTD**") under the Ministry of Transport and Communications ("**MOTC**") circulated a draft Cybersecurity Law 2021 ("**Draft CSL**") on 9 February 2021 for consultations with the mobile network operators and licensed telecoms service providers in Myanmar. The Draft CSL targeted cyber related activities, including e-signatures, and the provision of online services, and was intended to repeal the existing Electronic Transactions Law 2004 ("**ETL**").

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However, owing to denouncements to the Draft CSL from many quarters as expected, the ETL Amendment Law was passed by the SAC on 17 February 2021, amending the ETL instead (the revised legislation being referred to as the "**Amended ETL**").

In particular, the personal data protection obligations found in Sections 13 and 14 of the Draft CSL, as well as the exemptions in Section 15 of the Draft CSL have by and large been incorporated into the Amended ETL (along with the definitions of "Personal Data", "Personal Data Management Officer", "Cyber Space" and "Cyber Resources"). However, these personal data provisions appear to have been inserted into the ETL, without much consideration as to how they will be implemented and/or enforced; neither do these provisions specify who is required to abide by them. Concerns have been raised over how these provisions will be interpreted and applied.

Law Amending the Counter Terrorism Law ("CT Amendment Law")

The CT Amendment Law introduces harsher penalties for supporting anti-regime activities. Under the CT Amendment Law, the jail term for an offence of exhortation, persuasion, propaganda, recruitment of any person to take part in any terrorist group or activities of terrorism has been extended from three years to seven years. The SAC has also announced that indicating "*ACCEPT NUG, REJECT MILITARY*" status on one's social media is an offence under Section 52(a) of Counter Terrorism Law 2014 ("**CT Law**"), which is punishable with a fine or imprisonment for a term ranging from three years to seven years or both.

To this end, it is also crucial to note that the Counterterrorism Central Committee, which has been formed under Sections 6(5) and 72(b) of the CT Law with the approval of the SAC, has declared the National Unity Government ("**NUG**"), the Committee Representing Pyidaungsu Hluttaw ("**CRPH**")¹, and the People's Defence Force ("**PDF**")² as terrorist groups.

Dismissal of Ongoing Criminal Cases

In addition, the SAC issued Order No. 172/2021 dated 11 August 2021 to dismiss the on-going criminal cases pending before the courts which were filed on or before 1 February 2021, unless:

- (a) the relevant offence relates to an offence in any of the specified laws;³

¹ The CRPH was established by the civilian politicians to form a parallel government named the National Unity Government ("**NUG**") which was later launched on 16 April 2021, reinstating Daw Aung San Su Kyi as the State Counsellor and U Win Myint as the President and appointed other ethnic leaders as ministers for respective ministries. On 31 March 2021, the CRPH abolished the 2008 Constitution and introduced the Federal Democratic Charter ("**FDC**") on its end although the legitimacy of both the NUG and the FDC remains in question.

² The PDF was established for the purpose of creating the Federal Union Army to defend the civilians.

³ The specified laws are: (a) CT Law; (b) Anti-Money Laundering Law 2014; (c) Anti-Trafficking in Persons Law 2005; (d) Narcotic Drugs and Psychotropic Substances Law 1993, subject to the exception contained under Paragraph 29(f) and (g) of the SAC Order No. 147/2021; (e) Unlawful Association Act 1908; (f) Section 122 of the Penal Code; (g) Section 124(a) of the Penal Code; and (h) an arrest for a runaway.

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- (b) the complaint has been directly submitted to the court;
- (c) the plaintiff has submitted a complaint stating the reasonable ground for the continuance of the case before 30 September 2021 in the relevant court; or
- (d) if the offence relates to murder, rape, causing grievous hurt, or causing financial or property loss, the complaint has been submitted by the relevant plaintiff for the continuance of the case before 30 September 2021.

Court Processes

The courts are not closed other than due to the SAC declared public holidays to contain the COVID-19 pandemic but the number of hearings is limited. The Union Supreme Court of Myanmar ("**Supreme Court**") has also published an announcement dated 12 April 2021 regarding the conduct of hearings through video conferencing with effect from 3 May 2021.

On 15 February 2021, the Supreme Court issued an announcement, suspending the writ applications under Article 296(b) of the 2008 Constitution, Section 3(b) of the Law on the Application for Writ, and Section 19(b) of the Union Judiciary Law during the state of emergency. Given that the aforementioned writ applications are typically required for the Supreme Court to make a ruling on whether or not a detention or a decision made by any governmental organisation is lawful, this presents a significant obstacle to the bringing of administrative challenges.

Sectoral Legal and Regulatory Developments

Financial Sector

The participation of a significant number of employees of the Central Bank of Myanmar ("**CBM**") (which is the regulatory authority of the financial sector in Myanmar) and employees of private banks in the Civil Disobedience Movement ("**CDM**"), coupled with the Internet and electricity blackouts, have resulted in considerable challenges to the operation of the banking system in Myanmar.

To address the limited capacity of the banking sector, the following measures which are aimed at ensuring continued operations of the banks have been imposed by the CBM, namely:

- (a) imposing financial penalties on the banks that fail to operate their business;
- (b) imposing daily and weekly limits on the withdrawal of cash at the banks and at the ATMs, which are currently set at MMK500,000 per day, and MMK2 million per week for individuals and MMK20 million per week for companies; and

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- (c) requiring the banks to maintain the minimum reserve requirement at a rate of 3.5% of the total deposit made by customers in Myanmar Kyats until 30 September 2021, although this was later reduced to 3% for the two periods of (i) 28 February 2021 to 25 May 2021 and (ii) 15 September 2021 to 12 October 2021 respectively.

In addition, on 2 August 2021, CBM issued Letter No. MaBaBa/ MP/ FIR/ Bank Si Sit/ 1 (4/2021) which sought to restrict and regulate the employment of foreign citizens in licensed Myanmar banks. These measures include, among others, the requirement to obtain approval of the CBM prior to the appointment of a foreign employee and limiting the number of foreign employees in such banks.

Import/Export Sector

The border restrictions in light of the COVID-19 pandemic have also significantly affected the imports and exports of Myanmar. To this end, a number of measures have been introduced, which are aimed at facilitating the border trade in respect of certain essential goods. These measures include:

- (a) amending the import licence fees to a flat rate of MMK30,000 for a period of seven months up till 31 May 2021. It is our understanding that the aforementioned period has not been extended to date;
- (b) exempting certain imported goods, such as flour, food commodity, cement, gasoline, and pharmaceuticals etc. from the requirement to obtain an import licence up till 7 June 2021. It is our understanding that this period has not been extended to date;
- (c) even after expiration of the exemption period referred to above, permitting the importation of certain prescribed medicine and medical equipment, such as oxygen concentrator, PPE and masks for the treatment and prevention of COVID-19, without the requirement to obtain an import licence for an additional three months;
- (d) exempting certain exported goods, such as refined sugar, natural rubber and cotton, from the requirement to obtain an export licence up till 7 June 2021. It is our understanding that the aforementioned period has not been extended to date; and
- (e) permitting importation of medicines and vitamins notwithstanding the expiration of the Drug Importation Approval Certificate and the Drug Registration Certificate issued by the Food Drug Administration.

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What Does It Mean for the Investors Moving Forward?

Companies Administration

In recognition of the difficulties experienced by many companies owing to the pandemic and the continuing travel restrictions⁴, the Directorate of Investment and Company Administration ("**DICA**") has introduced certain measures that are aimed at easing the compliance burden of companies in Myanmar.

The DICA has issued Notification No. 110/2021 dated 27 April 2021 and Notification No. 115/2021 dated 29 May 2021, providing relief against the late lodgment of Annual Return⁵ by suspending penalties for late lodgments of the Annual Return, for the period from 1 February to 31 May 2021.

To provide financial assistance to the businesses affected by the COVID-19 pandemic, the Ministry of Planning, Finance and Industry ("**MOPFI**") has previously issued Notification No. 1/2021 dated 18 March 2020, which provides for extension of loans to qualified companies. The qualification requirements for the loan include that: (a) the company must be owned by a Myanmar citizen, currently in operation and be incorporated prior to 31 March 2018; (b) the company must utilise the loan for payment of salaries to the staff and its operational expenses; and (c) such loan is guaranteed by the board of directors of the company. It is also our understanding that hotel and tourism companies and small and medium enterprises would be afforded priority for the aforementioned loan. The interest rate is fixed at 1% per annum and the tenure of the loan is one year but has recently been extended for an additional six months by way of the MOPFI Announcement 1/2021 dated 17 March 2021.

Difficulties in Performing Contracts

Most business operations have been severely affected (if not completely halted) due to the lengthy public holidays declared by the SAC. Nationwide public holidays have been declared pursuant to Section 25 of the Negotiable Instruments Act, on a weekly basis for up to eight weeks until 10 September 2021 as at the time of writing in order to contain the spread of COVID-19 infections. Only a limited number of categories of business operations have been exempted from these public holidays, such as medical institutions, private banks, and telecommunications companies.

In light of intensifying COVID-19 pandemic, 74 townships in Myanmar, which include almost all townships in Yangon, have been placed under stay-at-home orders and the inter-state travel restrictions have continued with additional security checks particularly at the entry points into the capital, Nay Pyi Taw.

⁴ The Yangon International Airport's website indicates that the suspension of operation of international flights has been extended until 31 August 2021 in light of the COVID-19 pandemic.

⁵ As part of its corporate compliance requirements, every company in Myanmar is required under the Myanmar Companies law 2017 ("**MCL**") to file an Annual Return within two months of incorporation and then within one month of the anniversary of its incorporation.

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The above measures introduced by the authorities along with Internet and telecommunications disruptions could mean that contracts involving performance in Myanmar may be delayed, disrupted or hindered.

The doctrine of frustration is recognised in Myanmar pursuant to Section 56 of the Contract Act 1872. A contract is frustrated when unforeseen events occur which, outside the fault of either party, render the performance of the contract fundamentally different from what the parties intended such that the contract is incapable of being performed, in which case the parties may be discharged from further obligations under the contract.

On the other hand, a *force majeure* clause is a common contractual clause providing for what should happen upon the occurrence of certain events beyond the reasonable control of either party. The party affected by the *force majeure* event could rely on the *force majeure* clause in order to suspend or discharge its obligations arising from the contract or terminate the contract.

The question of whether either or both of the above doctrines would apply depends on the terms of your contract and the underlying circumstances and facts.

For Existing Investors: Chartering the Way Forward

A number of countries have imposed targeted sanctions against certain military generals as well as individuals and entities associated with them.

Specifically, the Biden administration has frozen U.S.-based assets belonging to 22 individuals connected to the military regime which include current and retired high-ranking leaders in the Myanmar military, including Senior General Min Aung Hlaing, and his deputy, Soe Win, as well as their children and spouses. The European Union has adopted travel bans and asset freezes against 11 individuals linked to the military, including Senior General Min Aung Hlaing and President U Myint Swe. New Zealand has suspended all high-level contact with Myanmar and has imposed a travel ban on Myanmar military leaders. Other military conglomerates, such as Myanmar Economic Corporation and Myanmar Economic Holdings Ltd., were sanctioned by the US and UK. In addition, Myanmar Timber Enterprises and Myanmar Pearl Enterprise, which are both state owned enterprises, were also sanctioned by the US.

In light of the imposition of such targeted measures, foreign investors would inevitably need to re-assess their plans in the country, and take the appropriate actions depending on a number of factors, including the nature of its relationship with the military or military-affiliated entities (whether or not such relationship is apparent), and their own internal company policy on business integrity or ESG.

Foreign investors which have been involved in projects with a sanctioned entity or individual have sought to manage the associated risks, with some opting to terminate the relevant relationships. For example,

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Japanese brewer, Kirin Holdings, has announced that it will seek to end its partnership with the military-controlled state-owned enterprise, MEHL, over Myanmar Brewery and Mandalay Brewery.

Where the relationship with the military or military-controlled entity is more apparent than real, it is crucial for the foreign investor to consider their stakeholders' perception of this relationship. It is also important for such businesses with operations on the ground to manage security risks arising from unprovoked attacks by pro-democracy forces against the businesses' premises, assets and employees.

On the other end of the spectrum, foreign investors, such as Telenor and Australian-listed Myanmar Metals Limited, have taken the proactive step of exiting the country as part of their corporate responsibility principles, even though they have not been directly or indirectly linked to the military or any military-affiliated entities. It has recently been reported that Telenor has refused to comply with a confidential order that was issued by the PTD in June 2021 which required telecoms companies to fully implement intercept technology that would enable the authorities to intercept calls, messages and web traffic of the users by themselves. Shortly after, Telenor inked a deal for the sale of Telenor Myanmar to Lebanon's M1 Group.

Prospective Investors: Heightened Alert?

With mounting pressure from both within and outside of Myanmar, it has become all the more important for the prospective investors looking to invest in or acquire a target in Myanmar to conduct their due diligence exercise with a greater degree of caution, with a particular emphasis on business sustainability and responsibility.

This does not necessarily mean a radical change in the scope of legal due diligence that a purchaser would typically be expected to conduct on the target. However, it does mean a more detailed and focused review of the responses received and documents disclosed may be necessary. Social and corporate governance due diligence would also be increasingly important, as public or official information becomes more difficult to obtain with the country under the military rule.

Conclusion

Myanmar businesses and foreign investors alike have started to consider the impact of the state of emergency. While many have adopted a "wait and see" approach, parties should be mindful of the fluid situation and its impact on their business operations and contracts. Rajah & Tann Myanmar has been advising clients since the country was under the Tatmadaw's rule back in the 1990s, and we have a depth of experience that we are able to tap on to help clients navigate the challenges brought about under the new regime. With general elections still a number of years away and doubts over whether such elections would truly be free and fair, companies are well advised to consider how best to restructure their businesses to deal with the new normal.

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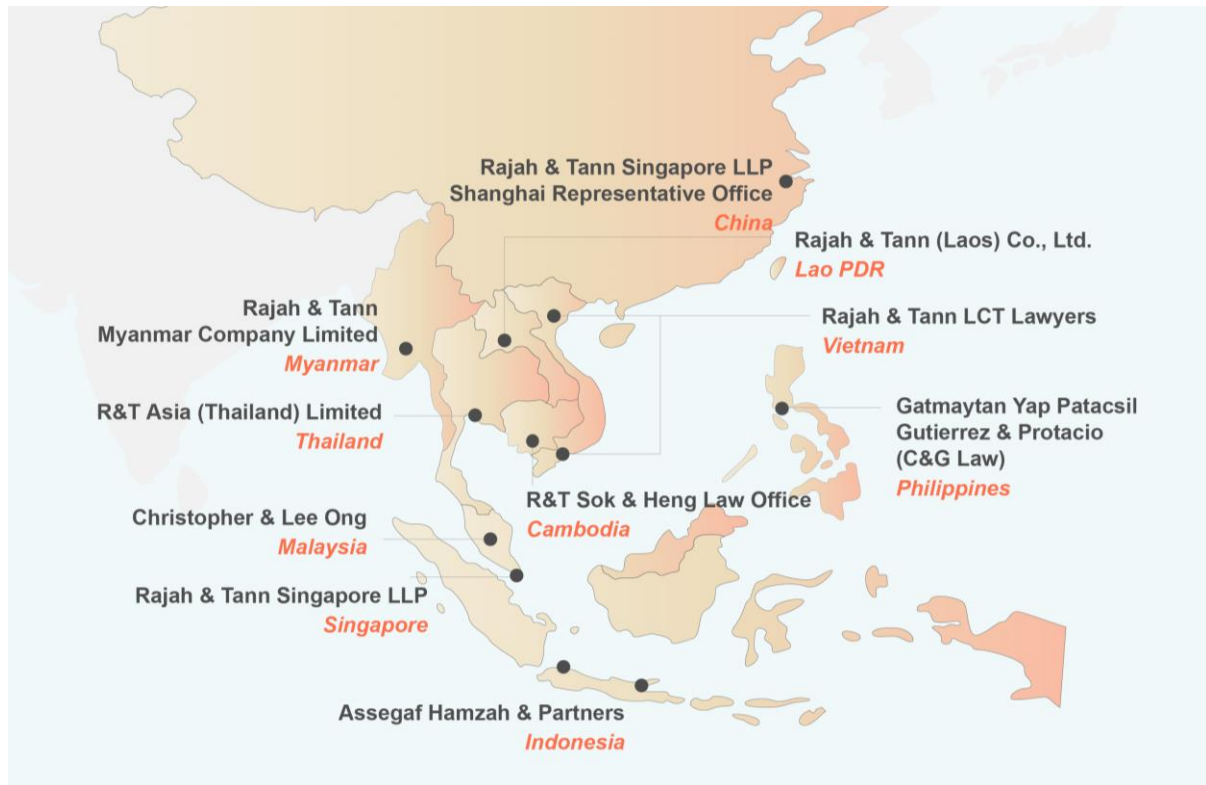
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