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Myanmar News

New Companies Law (2017)

August 2018

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Update on the most relevant changes under the new Companies Law (2017)

I. Introduction

On 23 November 2017, after several years of discussions and numerous drafts, the Myanmar Parliament passed the bill for the new Companies Law. On 6 December 2017, this bill was signed into law by the President of the Republic of the Union of Myanmar. The long-awaited Companies Law (2017) will replace the Companies Act, which was introduced in 1914 by the British when Myanmar was under colonial rule. However, with the Myanmar authorities working on the necessary by-laws and procedures to implement the new law, no date of implementation was initially announced, and the Companies Act (1914) was to remain in effect until further notice.

On 21 June 2018, the President’s Office published Notification 48/2018, according to which the Companies Law (2017) will come into force on 1 August 2018. In preparation of the new law and the establishment of the Myanmar Companies Online electronic registry system (MyCO), the company affairs divisions of DICA will be temporarily closed from 23 July 2018 to 31 July 2018. All company registration and filing processes will be suspended until 1 August 2018.

Please find below a short summary of the most important changes.

II. Implementation

1. Enforcement Date

On 1 August 2018, the new Companies Law (2017) will come into force, repealing and replacing the previous Companies Act (1914). Following its repeal, anything done or in process under the previous Companies Act (1914) shall be taken to be done or in process under the new Companies Law (2017).

2. Re-Registration

Any company, overseas corporation (Branch of Representative Office) or other entity registered under the Companies Act (1914) or the Special Company Act (1950) will be required to re-register within six (6) months from the date of implementation of the new Companies Law (2017).

As the Companies Law (2017) will come into force on 1 August 2018, companies must re-register by **31 January 2019** at the latest.

> ***Comment Luther:*** *Re-registration can be completed electronically online or in person at DICA, using the prescribed forms for re-registration. We will assist our Corporate Secretary clients with the re-registration process free of charge.*

In the event that a company fails to re-register within the stipulated period, its name may be struck off the register and the company may be dissolved, provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved (sec. 4 (c) Draft Companies Regulations (2018)).

Under the previous Companies Act (1914), foreign companies were able to register a Representative Office in Myanmar. In future, this option will not be available any more for foreign investors.

3. Electronic Registry System

Under the previous Companies Act (1914), the application for the establishment of a corporate set-up and the filing of corporate changes with DICA was a rather cumbersome and time consuming process. The applicant (or his representative) had to visit DICA in person and submit original hardcopies of the application. In future, applications may be done online through the newly established MyCO.

In preparation for the commencement of this new electronic registry system, DICA will be temporarily closed from 23 July 2018 to 31 July 2018. During this period, any registration and filing processes will be suspended. Registration and filing processes will re-commence on 1 August 2018.

> ***Comment Luther:*** *In preparation for the launch of MyCO, DICA published a set of prescribed forms for the statutory filings required under the Companies Law (2017).*

Pursuant to sec. 3 (f) Draft Companies Regulations (2018), a company shall ensure that all forms and documents filed or lodged through the electronic system are properly executed and kept together with the company's registers and indexes at the registered office.

> ***Comment Luther:*** *The new law provides that persons may make certain assumptions when dealing with companies in Myanmar. Pursuant to sec. 31 (b) Companies Law (2017), a person may for example assume that anyone who appears from information on the Register to be a director or a secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director or secretary (as applicable). It should be noted, though, that the registration process will be purely self-conducted and that DICA will not check each and every document. Information published in the online register may therefore not be up to date or correct.*

III. Corporate Changes

1. Foreign Shareholding

The previous Companies Act (1914) distinguished between Myanmar-owned companies and foreign-owned companies, which also affects ownership, leasing and use of land and immovable property. Under the Companies Act (1914), a company was defined as "foreign" if even one (1) share was held by a foreigner or foreign-owned entity.

The new Companies Law (2017) maintains the distinction between a Myanmar-owned company and foreign-owned company. In future, a company would however only be considered "foreign" if 35% or more of the ownership interest is controlled directly or indirectly by foreign shareholder(s).

> ***Comment Luther:*** *Consequently, foreigners are permitted to obtain ownership interest in a "Myanmar company" (up to 35%) and the company will still be categorised as a "Myanmar company". It should be noted, that based on the current wording of the law, a foreign shareholder may participate economically with more than 35% in a Myanmar company, as long as the ownership interest as defined in the law does not exceed 35% (e.g. through shares bearing a higher dividend entitlement compared to the shares of the Myanmar shareholders).*

2. Abolishment of Form-1 Trade Permit

Under the previous Companies Act (1914), the registration of any foreign entity (either a foreign-owned Limited Company or a Branch Office/Representative Office of a foreign company) consisted of two (2) main steps:

- application for Form-1 Trade Permit; and
- registration with the Company Registration Office of DICA.

Any foreign investor conducting business in Myanmar was required to obtain Form-1, the so called "Trade Permit", which stipulated the approved business activities of the registered foreign enterprise. Approval of the application for such Trade Permit was subject to certain conditions imposed by law or ministerial policy.

The new Companies Law (2017) removes the requirement to apply for a Trade Permit.

> ***Comment Luther:*** *This change should significantly simplify and expedite the process of registering a corporate entity with DICA, since DICA will no longer review and approve the business activities of the enterprise.*

3. Constitution

In the past, most companies were incorporated using the template "Memorandum and Articles of Association" issued by DICA. The requirement to have a Memorandum of Association and Articles of Association was replaced under the Companies Law (2017) with a constitution.

> ***Comment Luther:*** *At the time of re-registration, existing companies may re-adopt the model constitution issued by DICA, or a customized constitution.*

If a company proposes to use a constitution which differs substantially from the model constitution, an application for registration must be accompanied by a copy of the proposed constitution certified by at least one applicant.

> ***Comment Luther:*** *The Memorandum and Articles of Association of existing companies shall take effect as the constitution following the commencement of the Companies Law (2017), provided that at all times the provisions of the Memorandum and Articles of Association shall have no effect to the extent that they are inconsistent with the Companies Law (2017).*

4. Business Objectives

Under the Companies Act (1914), the business objectives of a company had to be specified in the company's Memorandum of Association, as well as the aforementioned Trade Permit.

> ***Comment Luther:*** *This requirement effectively restricted certain business activities for foreign investors in Myanmar due to DICA's refusal to register certain business objectives.*

In future, this requirement will be abolished. Pursuant to sec. 5 Companies Law (2017), a company has full legal capacity to carry on any business or activity within the confines of the law. A company may contain a provision relating to the capacity, rights, powers, or privileges of the company if these are restricted, but does otherwise not have to stipulate these items.

Comment Luther: *A company without any business objectives 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 example, a foreign-owned company will in future be allowed to conduct trading activities in Myanmar, subject to a trading license from the Ministry of Commerce (for more information, please refer to our news alert "New Terms & Conditions for Retail / Wholesale Activities in Myanmar" from May 2018). In certain cases, it may nevertheless be useful when liaising with Myanmar authorities, if the business activities are explicitly mentioned in the DICA-approved constitution.*

The business objectives expressed in the Memorandum of Association of an existing company will – unless removed by the members voting to amend the constitution in accordance with the requirements of Companies Law (2017) – continue to apply until the end of the transition period of twelve (12) months. The business objectives will be deemed to have been removed after this time unless a notice in the prescribed form confirming the passing of a special resolution to maintain them is filed with DICA.

5. Shareholders of a Company

Under the Companies Act (1914), a Limited Company had to have a minimum of two (2) shareholders, whether natural persons or corporate entities.

Pursuant to the new Companies Law (2017), companies may be incorporated with a minimum of one (1) shareholder.

6. Directors of a Company

Previously, a Limited Company had to have a minimum of two (2) directors. While the directors of a foreign company were allowed to be foreigners, Myanmar companies were in practice not allowed to appoint foreign directors.

Pursuant to the new Companies Law (2017), companies must in future have a minimum of one (1) director, who may be a Myanmar citizen or a foreigner. Kindly note, that at least one (1) director will however have to be an ordinary resident of Myanmar. (Additional rules apply for public companies.)

7. Authorised Capital and Par Value

Under the previous the Companies Act (1914), a company was permitted to issue shares only up to the amount of authorised capital as stated in its Memorandum of Association. Any capitalisation exceeding the registered authorised capital required an increase of the authorized capital and amendment of the constitutional documents.

The Companies Law (2017) abolishes the requirement of an authorized capital. Similarly, the principle of par value for shares has been abolished. The nominal value of each share will, irrespectively of its issue price, be determined by the issued capital and number of issued shares within the same class.

8. Types of Shares and other Securities

Pursuant to sec. 62 (a) Companies Law (2017), a company may issue the following shares and securities:

- shares of different classes;
- shares which may be redeemable;
- shares which have preferential or restricted rights to distributions of capital or income;
- shares which have special, limited, or conditional voting rights;
- shares which do not have voting rights;
- options to acquire shares;
- other securities which convert into shares; and
- other interests.

Comment Luther: *The issuance of such shares and securities was already possible under the Companies Act (1914), but may in future become more common, particularly to structure the maximum 35% foreign shareholding in Myanmar companies.*

9. Overseas Corporations

In general, as in almost every other country, foreign persons or entities are not allowed to carry on business activities in Myanmar without having registered a legal presence in Myanmar.

Accordingly, no foreign corporation was allowed to carry on or continue to carry on its business in Myanmar unless it had obtained a permit under sec. 27A (1) Companies Act (1914). Consequently, any foreign organization that intended to do business in Myanmar on a long-term basis was required to register a branch office with the corporate authorities in Myanmar.

Comment Luther: *As the term "carry on business" was not clearly defined in the Companies Act (1914), this requirement resulted in some ambiguity.*

The new Companies Law (2017) provides for additional certainty. Pursuant to sec. 43 Companies Law (2017), an overseas corporation shall not carry on any business in Myanmar unless it is properly registered, provided that a corporation shall not be deemed to carry on business merely because:

- 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;
- is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute;
- holds meetings of its directors or shareholders or carries on other activities concerning the management of its internal affairs;
- maintains a bank account;
- effects a sale of property through an independent contractor;
- solicits or procures an order that becomes a binding contract only if the order is accepted outside the Union;
- lends money, creates evidence of a debt or creates a charge on property;
- secures or collects any of its debts or enforces its rights in relation to securities relating to those debts; or
- invests its funds or holds property.

Comment Luther: *Pursuant to sec. 12 of the Companies Regulations 2018, the term "carrying on business" includes activities carried on without a view to any profit. The law thus no longer distinguishes between Branch and Representative Offices. Rather, any overseas corporation shall be properly registered, irrespectively of whether the business activity in Myanmar is profit-generating or not.*

Overseas corporations intending to register in Myanmar are required to appoint an authorized officer, who must be ordinarily resident in Myanmar.

10. Annual Return

Under the previous Companies Act (1914), every company having a share capital had to file an annual return within 18 eighteen months from its incorporation and thereafter at least once in every year.

In future, every company must file a return of its particulars within two (2) months from its incorporation and thereafter at least once in every year (but no later than one (1) month after the anniversary of its incorporation).

Comment Luther: *Pursuant to sec. 8 Draft Companies Regulations (2018), an existing company or body corporate which is required to file an annual return shall not be required to file an annual return which falls due during the re-registration period from 1 August 2018 to 31 January 2019.*

11. Small Companies

Under the new Companies Law (2017), "small company" is defined as a company, other than a public company or subsidiary of a public company, which satisfies the following conditions:

- it and its subsidiaries have no more than 30 employees (or such other number as may be prescribed under this Law); and
- it and its subsidiaries had annual revenue in the prior financial year of less than 50,000,000 Kyats in aggregate (or such other amount as may be prescribed under this Law).

Comment Luther: *Small companies will enjoy simplified statutory requirements, such as exemptions from appointment of external auditors, filing of financial reports and holding of Annual General Meetings.*

IV. Directors' Powers

1. Powers of Directors

Pursuant to sec. 160 Companies Law (2017), the business of a company shall be managed by or under the direction of the board of directors or, in the case of a single director company, the sole director. In managing the business of the company, the directors (or sole director) may exercise all the powers of the company, subject to any powers which are required to be exercised by members as expressly set out in this Law or the company's constitution.

Subject to the company's constitution, the members or the board may delegate powers to:

- a committee of directors;
- a specific director (or managing director);
- an employee of the company; or
- any other person.

Such delegate of powers must exercise such powers in accordance with any directions given by the board and the exercise of powers by the delegate is as effective as if the directors had exercised them. If the directors delegate power, they are responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves unless the directors can show they believed:

- at all times and on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Companies Law (2017) and the company's constitution; and
- on reasonable grounds, in good faith and after making proper inquiry (if the circumstances indicated the need for inquiry) that the delegate was reliable and competent in relation to the power delegated.

2. Access to Information

Pursuant to sec. 161 Companies Law (2017), a director may inspect the books and records of the company at all reasonable times.

3. Restrictions of Power of Directors

The directors of a public company, or of a subsidiary of a public company, or, if so provided in its constitution of a private company, shall not, except with the consent of the company concerned in general meeting:

- sell or dispose of the main undertaking of the company; or
- remit any debt due by a director.

4. Restrictions on Voting

Pursuant to sec. 163 Companies Law (2017) and subject to the company's constitution, a director must not be present while matters relating to the affairs of the company are being considered or voted on in which the director has a material personal interest. Subject to the company's constitution, a director may be however present and vote, if:

- the director has disclosed the nature and extent of the interest and its relation to the affairs of the company and the other directors pass a resolution that identifies the director and the nature of the interest and states that those directors are satisfied that the interest should not disqualify the director from being present at the meeting or voting;
- a resolution to the same effect as the board resolution is passed at a general meeting; or
- the interest is one that does not need to be disclosed under sec. 172 Companies Law (2017).

Subject to the company's constitution, if the above requirements are satisfied:

- the director may vote on matters that relate to the interest;
- any transactions that relate to the interest may proceed;
- the director may retain benefits under the transaction even though the director has the interest; and
- the company cannot avoid the transaction merely because of the existence of the interest.

5. Restrictions on Related Party Transactions / Loans

The new Companies Law (2017) contains restrictions on remuneration of directors and other benefits granted to directors and related parties.

Sec. 187 (a) Companies Law (2017) provides that the board of a company may authorize remuneration of directors and other benefits to directors and related parties (e.g. making of loans

by the company to a director or a related party), if it is satisfied that:

- to do so is in the best interest of the company;
- to do so is reasonable in the circumstances; and
- the payment or benefit or loan or guarantee or contract is on made on terms that are no worse than arm's length from the perspective of the company.

Pursuant to sec. 188 (a) Companies Law (2017), such benefit granted to a director or other related party shall however require the approval of the members of the company. Before the notice convening the relevant meeting is given, the company must file the following documents with the Registrar:

- a proposed notice of the meeting setting out the proposed resolution;
- a proposed explanatory statement setting out all information known to the company that is material to the decision on how to vote on the resolution, including details of the director or related party receiving the payment or benefit or loan or guarantee or contract and details of such the payment or benefit or loan or guarantee or contract; and
- any other document that is proposed to accompany the notice convening the meeting and that relates to the pro-posed resolution.

The Registrar will have 28 days to determine whether the company may release of the notice of meeting to members. If the Registrar determines that the notice may be sent, or a determination is not issued within this period, then the company may send the notice of meeting. The Registrar may direct the company to clarify or vary any document submitted where this is considered reasonably necessary for the protection of members. Further, the Registrar may determine that the release of the notice of meeting must not occur if satisfied on reasonable grounds that the requirements of sec. 188 (b) (ii) Companies Law (2017) have not been met or for similarly significant cause. The director or relevant related party must not vote on the resolution at the general meeting (unless pursuant to a proxy from another person which directs them how to vote). Finally, the company must lodge with the Registrar a copy of the relevant resolution within 14 days after it is passed.

> ***Comment Luther:*** *It should be noted, that the definition of "related party" as provided in the new Companies Law (2017) is ambiguous, providing for an insufficient determination of the relevant addressees, being persons related to a director and entities in which the director (or a related person) has a controlling interest.*

V. Directors' Duties

The duties of a director can be broadly divided into three categories:

- fiduciary duties,
- duties of care, skill and diligence, and
- statutory duties.

The previous Companies Act (1914) contained only few provisions on directors, such as appointment, replacement and limitation of powers. Their duties mostly originated from other Myanmar legislation, Myanmar case law and general common law. The new Companies Law (2017) provides detailed provisions on duties and responsibilities of directors, including among others remuneration, indemnity, insurance, and focusing fiduciary duty to the company.

1. Fiduciary Duties

The fiduciary duties which a director owes to a company essentially concern the duty to act in good faith.

This duty encompasses:

- acting in the interest of the company; and
- avoiding conflict of interest.

1.1 Acting in the Interest of the Company

This area of a director's fiduciary duties demands that a director only takes decisions or makes transactions which will be of benefit and furtherance to the company's overall interests. In other words, no other interest should ever be held in higher regard than the interests of the company itself.

> ***Example:*** *A company wishes to find a buyer for a certain product and the director withholds from telling the company that such a buyer exists. The test used to determine, whether the director was acting in the interest of the company, is: 'whether an intelligent and honest man in the position of the director of the company could have, in the whole of the existing circumstances, reasonably believed that the transactions were for the benefit of the company.*

Therefore, a decision or transaction made by a director which is later found not to have been in the company's interests may nevertheless be considered not to have been a breach of fiduciary duty, if a reasonable person in the director's position would have done the same.

The various interests which a director must consider when making such decisions and/or transactions on behalf of the company, include:

- the company as a corporate entity;
- the different classes of members of the company;
- if the company is insolvent, the interests of its creditors; and
- if there is a group of companies, the interests of all such companies in the group.

1.2 Acting honestly in Conflict of Interest Situations

A director is prohibited from making personal profits out of a transaction through the company in which he is a fiduciary. The only way in which he may do so is via a disclosure of the profits to all of the members of the company, which is approved at a general meeting.

The duty to avoid conflicts of interest goes beyond the mere making of profits. For instance, a conflict of interest can also arise where:

- the interests of the company whom the director owes his duties, conflict with any of his personal interests; or
- the interests of the company, whom the director owes his duties, conflict with any other third party whom the director acts for.

Below a non-exhaustive list of situations, in which a conflict of interest may arise:

- director using company property – where a director uses company property to further his own interest and/or making profit, he will have caused a conflict of interest (furthermore, he may be held liable for criminal breach of trust);
- improper use of information by the director – a director must not use information which he has available to him, as director, to make a profit for himself unless disclosure is so made to the company; or
- competing with the company – A director cannot be in a position where his fiduciary duties to one company are compromised by his acting in the interest of another.

2. Duties of Care, Skill and Diligence

2.1 Duty to be Skilful

The level of skill may vary with regard to the activities of the company, and a distinction should be made non-executives and executive directors.

2.2 Duty of Care

Establishing, whether a director is careful does not depend on his qualification or the activity of the company. The director should take business decisions after taking all available information into account and act with the standard of care that can reasonably be expected of a person who carries out the particular functions which he has in relation to his company. The necessary standard of care is an objective one. It is determined by looking at a fictive reasonable director in the same position.

It should be noted, though, that directors are allowed to delegate their powers and to trust their delegates as well as other directors to carry on their functions properly. Directors may, in general, especially rely on reports, statements, financial data and other information prepared or supplied, and on expert advice given by employees and professional advisers whom the directors on reasonable grounds believe to be reliable and competent.

This applies, however, only where there is no sensible reason for suspicion. A director who relies on others has to act in good faith, make proper inquiries where the need for such inquiries is indicated by the circumstances and must not have knowledge that his reliance is unwarranted. Further, directors are not obliged to supervise their co-directors and cannot be held responsible for their acts or omissions.

2.3 Duty to be Diligent

Directors have to exercise reasonable diligence in the discharge of the duties of their office. The term “diligence” does not have a clear-cut definition. What is reasonable may depend on the type of director and the activity of the company.

2.4 Non-Executive Directors

In relation to non-executive directors, the standard to be accorded may be lower:

- a non-executive director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience;
- a non-executive director is not bound to give continuous attention to the company's affairs; i.e., his duties are of an intermittent nature; and
- a non-executive director is entitled to trust an official to perform such duties as can be properly entrusted to him in accordance with the articles/constitution of the company.

3. Statutory Duties

There are a number of statutory provisions in different Myanmar laws and regulations which relate to the duties and liabilities of a company. Generally, the directors as representatives of the company must ensure compliance with all applicable laws and regulations.

Statutory duties of companies to be observed by directors may include:

- obligations under the Companies Law, such as holding of AGMs, preparation of annual accounts, maintenance of records and registers, maintenance of a registered address, etc;
- obligations under Tax and Social Security Laws concerning the payment of corporate income and commercial tax, withholding tax, stamp duty, employee income tax, employee social security, etc; or
- obligations under Labour Laws, such as execution of proper employment contracts, payment of minimum wage, compliance with leave, medical leave, overtime regulations, etc.

4. Codified duties under the new Companies Law (2017)

The new Myanmar Companies Law 2017 codifies certain obligations and duties of the board of directors and individual directors:

- duty to act with care and diligence;
- duty to act in good faith and in the company‘s best interest;
- duty regarding the use position;
- duty regarding the use of information;
- duty to comply with the Companies Law and the constitution;
- duty to avoid reckless trading;
- duty in relation to obligations of the company; and
- duty to disclose material personal interests.

4.1 Act with Care and Diligence

Pursuant to sec. 165 Companies Law (2017), a director or officer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- were a director or officer of the company in the company's circumstances; or
- occupied the office held by, and had the same responsibilities within the company as, the director or officer.

A director or other officer who, in the exercise of their powers and discharge of their duties, makes a decision to take, or not take, an action in relation to the operation of the company's business, is taken to meet the requirements of above sub-section, and any like legal or equitable duties, and the duty in sec. 170 Companies Law (2017), if they:

- make the decision in good faith for a proper purpose;
- do not have a material personal interest in the subject matter of the decision;
- inform themselves about the subject matter of the decision to the extent they reasonably believe to be appropriate; and
- rationally believe that the decision is in the best interests of the company.

4.2 Act in Good Faith in the Company's Best Interest

Pursuant to sec. 166 Companies Law (2017), a director or officer must exercise their powers and discharge their duties in good faith and in the best interest of the company and for a proper purpose.

A director or officer of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director or officer, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

A director or officer of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director or officer, if expressly permitted to do so by the constitution of the company and with the prior agreement of the members (other than its holding company), act in a manner which he or she believes is in the best interests

of that company's holding company even though it may not be in the best interests of the company.

A director or officer of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

When exercising their powers and discharging their duties, a director or officer may have to regard:

- the likely long-term consequences of the decision, including its impact on the company's employees, company's business relationships with customers and suppliers, environment and company's reputation; and
- the need to act fairly as between members of the company.

4.3 Use of Position

A director or officer must not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the company.

4.4 Use of information

A director or officer must not improperly use information obtained by them as a director or officer to gain an advantage for themselves or someone else or cause detriment to the company.

4.5 Compliance with the Law and Constitution

A director or officer must not act, or agree to the company acting, in a manner that contravenes this Law or the company's constitution.

4.6 Avoid Reckless Trading

A director or officer must not cause or allow the business of the company to be carried on, or agree to the business being carried on, in a manner likely to create a substantial risk of serious loss to the company's creditors.

4.7 Duty in Relation to Obligations

A director or officer must not agree to a company incurring an obligation unless that director or officer believes at the time on reasonable grounds that the company will be able to perform the obligation when required to do so.

4.8 Disclose Interests

Pursuant to sec. 172 Companies Law (2017), a director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless:

- the interest:
  - arises because the director is a member of the company and is held in common with the other members of the company;
  - arises in relation to the director's remuneration as a director of the company;
  - relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members;
  - arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company;
  - arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to above sub-paragraph;
  - relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer);
  - relates to any payment by the company or a related body corporate in respect of an indemnity permitted under sec. 181 Companies Law (2017) or any contract relating to such an indemnity; or
  - is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate;
- the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company in accordance with this section and the notice remains valid; or
- the company only has one director and that director, and any related parties of the director, are the only shareholders of the company. If the sole director company has additional shareholders, then a notice required to be given under the above sub-section must be given to those shareholders.

Notice of an interest may be given from time to time as required or the director of a company who has an interest in a matter may give the other directors standing notice of the nature and extent of the interest.

The standing notice may be given at any time and whether or not the matter relates to the affairs of the company at the time the notice is given, provided that if a new director is appointed to the board any standing notices that have been previously given must be refreshed at a new meeting of the board.

A standing notice will also cease to be valid if the nature or extent of the interest materially increases above that disclosed in the notice.

Any notice must:

- give details of the nature and extent of the interest; and
- be given at a board meeting and recorded in the minutes.

4.9 Non-Compliance

Pursuant to sec. 190 Companies Law (2017), in case of non-compliance, every director and any other person who is a party to a default shall be liable to a fine of 10,000,000 kyats.

Without limiting the liability to a fine, every director and any other person who is knowingly and wilfully a party to the default may also be:

- subject to such additional penalty as a Court may determine in accordance with this Law if the default has involved dishonesty on the part of the director or other person; and
- on the application of DICA disqualified from acting as a director or other officer of a company for such period as may be determined by a Court.

Additional fines may apply to directors in respect of responsibilities of the company under other laws, such as tax and labour laws.

Exemptions may apply if the director or officer relied on information or professional or expert advice (see sec. 191 Companies Law (2017)).

4.10 Reliance on Information

A director/officer shall be presumed not to have breached his duties if the director/officer acted on the reasonable reliance of information or advice, prepared/given by:

- an employee of the company believed on reasonable grounds to be reliable and competent in the relevant matters;
- a professional adviser or expert believed on reasonable grounds to be competent in their area of expertise;
- another director/officer within the director's/officer's scope of authority; or
- a committee of directors on which the director did not serve in respect of matters within the committee's authority;

and the reliance was made:

- in good faith; and
- after an independent assessment of the information or advice given, having regard to the directors knowledge of the company and the complexity of the structure and operations of the company.

This presumption may be rebutted if the person bringing the proceedings is able to prove otherwise.

4.11 Indemnities and Insurance

Pursuant to sec. 180 Companies Law (2017), provisions, whether contained in the constitution of a company or in any contract with a company or otherwise, for exempting any director or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor, from any liability to the company which by virtue of this Law or any other applicable rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void.

A company or a related body corporate must not, directly or indirectly, indemnify a person against any of the following liabilities incurred as a director, officer or auditor of the company:

- a liability owed to the company or a related body corporate; or
- a liability that is owed to someone other than the company.

It may, however, indemnify a person for a liability against legal costs incurred in defending an action for a liability incurred as a director, officer or auditor of the company unless the costs are incurred:

- in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under above sub-section;
- in defending or resisting criminal proceedings in which the person is found guilty;
- in defending or resisting proceedings brought by the Registrar or a liquidator for a Court order if the grounds for making the order are found by the Court to have been established; or
- in connection with proceedings for relief to the person under this Law in which the Court denies the relief.

Pursuant to sec. 182 (a) Companies Law (2017), a company or a related body corporate must not pay, or agree to pay, directly or indirectly, a premium for a contract insuring a person who is or has been a director, officer or auditor of the company against a liability (other than one for legal costs) arising out of:

- conduct involving a willful breach of duty in relation to the company; or
- a contravention regarding use of position or use of information.

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