

KELVIN CHIA YANGON

LOCAL KNOW-HOW WITH INTERNATIONAL EXPERTISE

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Kelvin Chia Yangon Ltd. (KCY) has been in active operation in Myanmar since 1995, currently with offices in Yangon and Mandalay. KCY is the firm of choice for those seeking to navigate, where we have gained extensive experiences and expertise across all the fast-changing legal and regulatory landscape in Myanmar areas of commercial practice.

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THE MYANMAR COMPANIES LAW HAS BEEN ENACTED, REPLACING THE CENTURY-OLD MYANMAR COMPANIES ACT

The Myanmar Companies Law was enacted on 6 December 2017 as Pyidaungsu Hluttaw Law No. 29/2017

The recently enacted Myanmar Companies Law (2017) (the “**Companies Law**”) replaces the post-centennial Companies Act (1914) (the “**Companies Act**”). It is not yet certain how and when the regulators will fully implement the provisions of the Companies Law in lieu of the Companies Act. There is speculation that, until the planned electronic platform goes live, implementation will be deferred. In the meantime, here are some of the key changes.

Foreign Companies

A company is now only designated foreign if it has a foreign ownership interest of more than 35 percent. As such, it should become possible for a foreigner to purchase and own shares in a local Myanmar company, including listed companies.

Companies in Myanmar will be required to have a constitution. Until now, they have been required to have both Articles of Association and a Memorandum of Association (“**MOA**”), which, together, both define and limit the scope of a company’s investment activities. Unlike a MOA, it is not a strict requirement that a constitution have a stated objects clause. Previously, a company was limited to business activities contained within its stated objects.

The express requirement that a foreign company obtains a permit, referred to as a Form of Permit, before being permitted to carry on business in Myanmar no longer appears under the Companies Law.

Overseas Corporations

The term “branch office” is no longer used under the Companies Law. In its place is the classification “overseas corporation”, which is defined as a body corporate incorporated outside of Myanmar that may be registered under the Law.

The Companies Law provides a catalogue of activities that are not, on their own, sufficient to deem an overseas corporation or other body corporate to be carrying on business in Myanmar. These include, among others, holding meetings of directors or shareholders, maintaining a bank account, and making investments or holding property in Myanmar.

Exemptions for small companies

Small companies are exempted under the Companies Law from requirements relating to preparing an annual balance-sheet and directors' report, appointing an auditor at an annual general meeting, and forwarding financial statements to the Directorate of Investment and Company Administration ("DICA").

A small company is a private company that has 30 or fewer employees and an annual revenue in the previous financial year of less than MMK 50,000,000 (est. USD\$36,500), in aggregate. How the exemptions will operate in practice is not yet clear as the Companies Law gives DICA discretion to determine whether they should be extended to a company.

Directors and Directors' Duties

A private company is now permitted to operate with only one director, and a public company with three. It is also required that all companies registered under the Companies Law have a director ordinarily resident in Myanmar, meaning resident at least 183 days per year. In the case of a public company, the director must also be a Myanmar citizen. The year period is measured from the law's commencement for extant companies, and the date of registration for new companies.

The Companies Law specifies that only natural persons 18 years and over are eligible for appointment as a director.

Directors' duties have been expanded to expressly include, among others, the duty to act with care and diligence, the duty to act in good faith in the company's best interest, and the duty to avoid reckless trading, which requires not carrying on the business of the company in a manner that is likely to create a substantial risk of serious loss to the company's creditors.

Shares and Shareholders

Under the Companies Law, a company can have a sole shareholder. Shareholder rights have also been expanded. A shareholder, no matter their shareholding, may seek action against a company for oppressive conduct, which is constituted by acts, omissions, or conduct of the company, or a resolution of shareholders, that is either contrary to the interests of all shareholders or oppresses, prejudices or discriminates against one or more shareholders. Additionally, a shareholder may now bring a derivative

action on the company's behalf, subject to certain conditions being met.

There are also detailed provisions governing share issues and introducing various classes of shares and other securities, such as redeemable shares, shares with preferential or restricted rights to distributions of capital or income, and shares with special, limited, or conditional voting rights or without voting rights. Companies no longer need to have an authorised capital and shares are no longer deemed to have a nominal or par value.

While previously allowed in practice, the Companies Law expressly provides for contributions in kind for shares and other securities, subject to a number of clearly expressed conditions. Among them, the board of directors must resolve that the present cash value of the consideration is not less than the value of the shares or other securities to be issued.

Taking security over property

Finally, the Companies Law provides that companies can grant mortgages and charges, including over land. The Transfer of Immoveable Property Restriction Act (1987) ("TIPRA") generally prohibits the sale, transfer, or exchange of land to a foreigner or foreign company. However, under the Companies Law, TIPRA is not taken to apply any restriction, nor to be breached, by the grant of a mortgage or charge under these provisions. The same exception to TIPRA applies in the exercise of any rights of the mortgagee or chargee to realise the value of the property that is secured by the mortgage or the charge. As such, a foreign company may, under the appropriate circumstances, be able to take security over immovable property.



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