



## **The New Draft Myanmar Companies Law**

In 2013 the Department of Investment and Company Administration ('DICA') of the Ministry of National Planning and Economic Development with the assistance of the Asian Development Bank started to draft the Myanmar Company Law ('MCL'). This new law is intended to be consistent with international best practice and replace the old Myanmar Companies Act of 1914 ('MCA'). A consultation process on a first draft was completed in March 2015 and a new revised draft was published in June 2015. The drafting team expects that the MCL will be passed before the Parliament elections in November 2015.

A new draft MCL is built on the foundation of the existing MCA of 1914 and retains basic UK company law concepts. Also the draft includes new developments in company law from the UK, Australia and New Zealand.

### **Remaining Shortcomings**

1. Under section 6.1 (e) at least one director must be ordinarily resident in Myanmar. We do not believe a residence requirement for a director is necessary for 100% foreign-owned companies, and the definition of 'authorized officer' under section 2.3 works well: 'a person ordinarily resident in Myanmar who is appointed by an overseas corporation to act as its representative for the purpose of this Law'. This person would not have to be a director but would serve the purpose of having a responsible official "on the ground".
2. The draft MCL does not include provisions on conversion from private to public company that are in the MCA under section 154, nor any proposed alternative. It is a useful mechanism and needs to be included in the MCL.

### **Improvements**

1. Under section 2.13 "foreign company" means a company in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than the prescribed ownership amount. As explained in section 2.21 the ownership amount should be prescribed by the relevant Minister (of National Planning and Economic Development) and expected to be 50%. According to the last draft's explanatory note: 'a company's designation as a foreign company will simply be a company where a foreign person holds an interest in the relevant proportion of its shares - it will not be a different form of legal entity and this Law will not substantively regulate it any differently to a company which does not have such a proportion of foreign ownership'.
2. Under section 3C (1) (v) of the previous draft at least one director of a company must be a citizen of Myanmar. This provision discriminated against foreign companies. The new draft does not have this requirement.



3. According to section 7.1 (b), subject to the MCL and any other law, a company has, both within and outside Myanmar full legal capacity to carry on any business or activity, do any act, or enter into any transaction. This is a positive provision, however, it should be noted that DICA currently requests new company applications to list its proposed 'permitted activities' in accordance with the Myanmar Companies Regulations of 1957, for checking with relevant Ministries in the application scrutiny process. We assume that those Regulations will be repealed so that no other 'permitted activities' need to be filed by applicants to form a company.
4. The draft MCL abolishes a permit to trade, which was prescribed under section 27A of the MCA.
5. Under section 7.1 (iii) a company can grant a security interest over any of its property. It should be noted that DICA does not currently allow a Myanmar company (under any ownership) to give any security over its assets to secure a loan to a third party (including an affiliate or parent company. To overcome this deficiency, the MCL should include a provision that allows Myanmar companies to give security in relation to loans to other companies (in Myanmar or abroad) for reasons such as 'corporate benefit' or where the relevant companies are part of the same group of companies.
6. Section 28S of the previous draft stated that an instrument of transfer of shares should be executed by the transferor. However, current practice in Myanmar is for both transferor and transferee to execute the share transfer instrument. Logically, section 74.3 of a new draft of the MCL changed this provision to reflect current practice.
7. Par value of shares is no longer required. Under Section 55.1 shares can be valued or paid up at any amount.
8. Section 57 allowed different types and classes of shares: convertible; redeemable; preferential; shares which have special, limited, or conditional voting rights; shares which do not have voting rights etc.
9. Section 102 introduces share buy-backs.
10. Section 42 better defines what constitutes "carrying on business" in Myanmar, which has up to now been an elusive concept which has up to now had no statutory or precedent-based definition.

### **Our Further Suggestions**

1. There is old Myanmar case law that sets the principle that a company is only bound by the constitution (the Memorandum & Articles of Association) and not by any other agreement between shareholders, whether or not the company is a party to that agreement. This is why it is important for shareholders to have the freedom to change the constitution in compliance with (or not inconsistent with) the Law. That freedom, also provided for under the MCA, is not currently given to shareholders by DICA in Myanmar companies who have experienced problems registering amendments to their



Memorandum & Articles of Association. This is a very important principle to be established for foreign investors.

2. Section 19.1 provides the procedure of amending of the Memorandum and Articles of Association: a company should file the notice with the Registrar (DICA) within 28 days from the date of the passing of the special resolution. According to section 19.2, the Court may by order at any time extend the time for the filing of documents with the Registrar under this section for such period as the Court thinks proper. In our opinion, the requirement to obtain Court approval or relief for late filing of documents under the Law should be abolished. If it is retained, it should apply only after the expiry of a given period during which a daily fine will be payable, perhaps rising steeply after a short initial period.
3. Under section 74.4 'the company may, if expressly authorized by its constitution or the terms of the relevant security, or if otherwise permitted under this Law or other applicable law, or if required to ensure compliance with this Law or other applicable law, refuse to register a transfer if the board, within 21 days of receipt of the application for transfer and other documents required by this section, passes a resolution to this effect setting out the reason for refusing the transfer and sends to the transferee and the transferor notice of the refusal, including the reasons for such refusal, within a further 7 days of passing the resolution'. We do not believe that a Board of Directors should have discretion, as implied by this section, to refuse to register a transfer of shares that has been properly executed in accordance with the MCL and the company's constitution, and that the reasons for refusing should be stipulated in the MCL.