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Employment

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Kelvin Chia Yangon Ltd

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Law and Practice

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Kelvin Chia Yangon Ltd. (Yangon) is an international commercial law firm that has been in active operation in Myanmar since 1995 and has close to 50 experienced lawyers, paralegals and business researchers based in Yangon and Mandalay. KCY is a subsidiary of Kelvin Chia Partnership (KCP) in Singapore and is a member of the KCP network of offices across the Asian region. We have advised and acted on behalf of marquee international clients and significant Myanmar businesses for their legal and regulatory requirements. We are client-focused, solution-driven and are committed to adding value to our clients' businesses by helping them achieve their commercial goals. The firm's

main practice areas are foreign investments, incorporation and company maintenance, general corporate and commercial due diligence, mergers and acquisitions, joint ventures and production-sharing agreements, investment funds, energy: oil and gas, natural resources/mining, banking, project and project financing, manufacturing, education, agriculture, real estate, infrastructure, construction, telecommunications, compliance/regulatory, licensing and permits, labour and employment, immigration, taxation, insurance, international arbitration, intellectual property, and special economic zones.

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1. Terms of Employment

1.1 Status of Employee

There is no overarching labour legislation or employment code in Myanmar. As such, the laws and regulations governing employment are scattered through several laws, notifications and sample employment contracts that are issued from time to time by the labour authorities (such as the Ministry of Labour, Immigration and Population (“MLIP”). Further, as the labour law framework is relatively inadequate, loose or ambiguous, the labour authorities are able to assert a fair amount of authority and control in terms of determining and deciding the applicable conditions for employment.

We have thereby prepared our responses based on the laws and regulations of Myanmar that are available to the public as of the date hereof. There may be laws, decrees, regulations or notifications that exist but which are not published or that are not generally available to the public, and the existence of the same may affect the advice herein. Furthermore, many of Myanmar’s labour regulations are also driven by internal government policies, which may not necessarily be codified and which may not be implemented uniformly across various ministries or regions. It is possible that there are prevailing policies, or changes to such policies, which are not known to us, and which might affect our responses hereunder.

Blue-Collar and White-Collar Workers

There is no statutory or regulatory definition of who would be considered “blue collar” versus “white collar” workers, although there are differing labour standards that govern the employment of persons in “offices, shops and establishments” under the Shops and Establishments Law (2016) (“SEL”) and persons employed in factories under the Factories Act (1951) (the “Factories Act”).

For example, there are different permissible maximum working hours and overtime work for employees covered under the SEL and for those covered under the Factories Act. These differences will be discussed below.

Other Statuses

Myanmar law recognises the following employment statuses:

Probationary Employment

While the Employment and Skills Development Law (2013) (“ESDL”) allows employers and employees to agree upon a probation period (in effect recognising probationary employment), there are no laws which specifically govern probationary employment.

In Myanmar it is customary to provide for a probation period up to three months (this being the maximum period prescribed under the standard employment contract tem-

plate issued by the MLIP (the “SECT”) when a probationary period is agreed, see our discussion below), but it is not mandatory to offer a probation period.

Probationary employees are entitled to the same statutory benefits and rights accorded to permanent employees, subject to the terms and conditions of applicable laws (eg same wages and pro-rated benefits as available to permanent employees).

Employers are generally free to set their own requirements and standards of work according to the nature of work for purposes of evaluating a probationary employee’s fitness for confirmation. If the probationary employee completes the probationary period while meeting the stipulated requirements and standards of work to the satisfaction of the employer, then the expectation is that the probationary employee shall be confirmed as a “permanent employee” (see our discussion below). Should the probationary employee fail to meet those requirements and standards, the employer is entitled to dismiss the probationary employee upon one month’s written notice or payment of one month’s salary in lieu of such notice.

Pre-Employment Trainees

Similarly, while the ESDL recognises that an employer may require an employee to attend a training course, there are no laws that specifically govern pre-employment trainees. As there is no distinction, pre-employment trainees are entitled to the same statutory benefits and rights accorded to permanent employees, subject to the terms and conditions of applicable laws (eg same wages and pro-rated benefits as available to permanent employees). The training course is for a certain period of time whereby the pre-employment trainee receives pre-employment training, on-the-job training, skills training or the like, to enhance the pre-employment trainee’s qualifications and skills.

Apprentices

The ESDL allows employers to employ persons who have attained 16 years of age as apprentices in accordance with the regulations stipulated by the Skills Development Agency and train them in various skilled occupations. As there is no distinction, apprentices are entitled to the same statutory benefits and rights accorded to permanent employees (eg same wages and pro-rated benefits as available to permanent employees), subject to the terms and conditions of applicable laws (eg special rights and privileges afforded child workers under the Child Law (1993)).

Permanent Employees

Technically, there is no legal concept or definition of “permanent employees” under the Myanmar labour laws, since all employees are, in strict point of law, subject to employment periods agreed between employer and employee under

the standard employment contract template or (“SECT”). Such employment term is required to be indicated in the SECT (see our discussion in **1.2 Contractual Relationship**). Nonetheless, the SECT provides an option of renewing the SECT upon mutual agreement of the employer and the employee. Further, the SECT provides that the employer shall not refuse to extend the term of the contract without a valid reason. For further information, please see **1.2 Contractual Relationship**.

Child Workers

The Child Law (1993) (the “**Child Law**”) provides that children have the right to work voluntarily in accordance with Myanmar laws. Child workers enjoy special rights and privileges such as shorter working hours, more leaves and special allowances. The Child Law categorises workers from the age of 14 to 18 as young workers and only permits them to work with a valid certificate of fitness for work from a licensed medical practitioner. Employers are prohibited from employing children under the age of 14.

Independent Contractors/Consultants

Independent contractors and consultants are generally understood as working for their own benefit and therefore not considered employees of the principals that engage them. However, because of the absence of any specific legal recognition of independent contracts under Myanmar law, and the fact that the definition of “worker” in the ESDL is broad enough to cover even independent contractors and consultants, there is a risk that Myanmar authorities will, especially upon dispute, consider such independent contractors and consultants as employees of the principal, rendering the latter liable for employment-related benefits and obligations. To minimise this risk, it is necessary for principals entering into independent contractor or consultancy arrangements to provide clear contractual provisions setting forth the nature of the independent contractor’s or consultant’s relationship with the principal.

1.2 Contractual Relationship

There is only one type of employment contract – and that is the standard employment contract template, or SECT – required for all types of employees in Myanmar. The MLIP prescribed the first SECT in 2015 and updated it in 2017. With the effect of Notification No 140/2017, employment contracts must be executed in the prescribed employment contract form – ie the SECT – within 30 days from the commencement of employment.

The SECT is technically a fixed-term contract as the term of employment has to be included. Nonetheless, the SECT provides flexibility for the employer and the employee to agree to set the term of the SECT at a longer period than the prescribed term of two years.

However, in practice, the Township Labour Offices (“**TLOs**”) only approve SECTs up to the prescribed term of two years. Additionally, the SECT stipulates that the employer shall not refuse to extend the term of the SECT arbitrarily should the employee not have breached any of the provisions of the SECT. Therefore, it is possible that the employment would continue for an indefinite term, provided that the employer and the employee are able to agree to terms.

Requirement to Execute an SECT

Generally, the execution of an SECT is required for all types of employment with the exception of probationary employees, pre-employment trainees, and companies with fewer than five employees.

The SECT must be in writing and registered with the relevant TLO. The failure to sign an SECT may result in imprisonment of up to six months or a fine, or both.

Employment Contracts for Probationary Employees, Pre-Employment Trainees, and Workers at Companies with Five or Fewer Employees

For probationary employees, the ESDL states that employers are not required to execute an SECT with an employee during the probation period; however, the employer may do so if it so desires. Alternatively, employer and employee can decide to enter into tailor-made employment contracts or opt not to enter into any written contract at all, provided that the working conditions do not breach minimum standards provided under the Myanmar labour laws. If the probationary employee successfully completes the probationary period, the probationary employee shall be confirmed as a permanent employee and an SECT will be entered into with the employer within 30 days.

As for pre-employment trainees, the ESDL and Myanmar laws neither require employers to enter into a written employment contract with pre-employment trainees during the training period nor provide a duration of the training. By implication, this has been understood to mean that employers have the liberty to adopt a different employment contract with respect to pre-employment trainees similar to probationary employees. However, once a trainee successfully completes the required training, he or she shall be deemed a permanent employee and the employer and employee will enter into an SECT within 30 days.

The law does not exempt from entering into the SECT with regard to apprentices; thus, employers must execute an SECT within 30 days of employment.

Finally, the MLIP issued Notification No 140/2017 which provides that the obligation to adopt the SECT only covers enterprises with more than five employees (whether full-time, temporary, etc) which must be registered. For those

not yet covered by the requirement, there is no obligation to adopt, and it is theoretically possible to enter into any type/form of employment contract, although the best practice is, of course, to adopt the SECT.

Matters to be Covered Under the SECT

The employment contract consists of two parts: the SECT and, if agreed by the parties, an appendix. The SECT (*sans* the appendix) must be strictly adhered to and cannot be modified. However, additional conditions which are not covered in the SECT can be incorporated in the contract through annexes provided that none of the conditions are less than the minimum protections provided in the law. In practice, the TLOs will consider any provision which is less favourable to workers than the minimum standards provided in the relevant laws void upon registration.

The SECT includes the following fundamental terms and conditions of employment:

- Type of employment;
- Wages/salary, including information for piece rate and temporary work;
- Location and contact information for employment location;
- Meals programme or arrangements;
- Worker accommodation;
- Transportation to and from work site;
- Working hours and overtime hours;
- Days off, holidays and leave;
- Medical treatment;
- Terms to be complied with by the employees;
- Terms for resignation, dismissal or termination of service;
- Responsibilities of employer;
- Responsibilities of employee;
- Length of contract for employment; and
- Employee skill development training, if any.

Registration of SECTs

SECTs must be registered with the relevant TLO having jurisdiction over the workplace of the employee. As a general rule, the employee should appear before the TLO and execute the SECT in the presence of the labour officer. An exception, however, may be made by the relevant TLO considering the number of employees to be registered and other logistical constraints.

1.3 Working Hours

Maximum Working Hours

There are differing maximum working hours for employees working in offices, shops and establishments and for those working in factories. The SECT also provides that after negotiations between the employer and the employee the working hours shall be altered by seeking permission from the

authority concerned, provided that the working hours do not exceed the maximum hours provided by the law.

The SEL

For employees covered under the SEL – ie employees working in offices, shops and establishments – the normal working hours are up to eight hours per day and six working days per week, and shall not exceed 48 hours per week in total. Employers and employees may agree on a flexible holiday arrangement that any day in a week agreed by employer and employee shall be granted as a paid rest day.

The Factories Act

The Factories Act permits employees in factories to work up to eight hours per day and 44 hours per week in total. The rest day shall be Sunday unless the manager of the factory sends notice of his or her intention to require the workers to work on the Sunday and of the day to be substituted therefor. Nonetheless, no employee shall be required to work more than ten consecutive days without a rest day in between. The Factories Act further stipulates that an employee shall be granted a break of at least half an hour after five continuous hours of work.

Part-time Contracts

There is no distinction between full-time and part-time contracts under law. Both full-time and part-time employees, subject to the discussion above, are required to execute SECTs and all the basic terms will be the same, including the working hours as discussed above.

Overtime

The SEL

Any work beyond eight hours of work per day or 48 hours per week shall be considered as overtime work for employees working in offices, shops and establishments. They shall not be required to work more than 48 hours per week. The law permits employees to perform overtime work for a maximum of 12 hours in a week. In the case of a special matter requiring overtime work, it shall not exceed 16 hours for any one week and overtime work shall not extend beyond 12 midnight.

Moreover, the SEL does not exempt employees in managerial and confidential positions who were previously regarded as managers from being entitled to overtime compensation. Notwithstanding the foregoing, an employer can annex the provision in the SECT that a manager shall not be entitled to payment of extra remuneration for overtime work. Further, it is also a common practice in Myanmar that only non-managerial employees are entitled to overtime pay.

The Factories Act

Under the Factories Act, any work beyond eight hours of work per days or 44 hours of work per week shall be considered as overtime work.

Laws Governing Specific Industries

Overtime work for specific industries such as oilfield work and other sectors are governed by sector-specific laws such as the Oilfields (Labour and Welfare) Act (1951).

Overtime Payment Rate

Although the SEL stipulates that payment for overtime work shall be calculated in accordance with the law, the law does not specifically provide for overtime rates. However, the MLIP's present policy is to require overtime pay to be double the rate of ordinary wages.

Overtime wage rates for workers in factories can be found in the Factories Act and Directive No 615/2 under the Factories Rules (1935). The overtime rate provided in the Factories Act and the aforementioned directive is twice the ordinary wage.

1.4 Compensation**Minimum Wage**

The Minimum Wage Law (2013) ("MWL") governs the minimum wage requirements for all employees including probationary employees and trainees, except civil service personnel, seafarers and employers' close relatives and dependants.

As per Notification No 2/2018 issued on 14 May 2018, the current minimum wage for all business types shall be MMK600 per hour or MMK4,800 per day for eight working hours per day excluding break time. This minimum wage, however, shall not apply to small enterprises with fewer than 15 employees and family businesses with fewer than ten employees.

Bonuses

There is no prescribed scheme of bonuses and other additional remunerations under Myanmar laws. It is, however, a usual practice to incorporate a clause for payment of bonuses in the SECT. Employers can pay bonuses to employees, decided at their own discretion from time to time.

While bonuses are discretionary on the employer to give, there is basis to state that, if such bonuses have been enjoyed for a long period of time, then the same can ripen into a demandable benefit. Both the SEL and the Leaves and Holidays Act (1915) ("LHA") recognise the right of the employee to receive more favourable terms and conditions of employment if the same has been provided for at the time of the issuance of the SEL or the LHA.

Government Intervention

The Payment of Wage Law (2016) ("PWL") confers power on investigation officers from the Department of Factory and Labour Law Inspection to intervene in the case of unreasonable deduction or failure to pay wages. The employees concerned may directly co-ordinate with the employer or via a registered Labour Organisation or the in-house Workplace Coordinating Committee. If the employer takes no action, the employee can present the case to the relevant inspector from within six months from the date of dispute and the inspector shall issue a decree after reviewing the case. Upon hearing the outcome, the unsatisfied party shall be entitled to appeal the case to the Chief Inspector within 30 days of the issuance of the decree and the Chief Inspector's decision shall be final.

With regard to remuneration, employers and employees are free to fix salary with mutual agreement provided that salary is not less than the minimum wage stipulated in the MWL. The PWL stipulates the time and manner to pay wages and permissible deductions from wages. The salary payments must adopt the prescribed format provided by the MLIP. Salary shall be increased at the employer's sole discretion.

1.5 Other Terms of Employment**Vacations and Vacation Pay**

The LHA is the framework for leave covering all employees except family members in small family enterprises, shareholders, domestic workers and government workers who are not employed in government factories. The employer and the employee can agree upon different numbers of leaves and holiday arrangements provided that it will not be less than the following number of days.

Public Holidays

Employees are entitled to rest with full wage during the public holidays determined by the Union Government through annual notifications. Customarily, government-published lists provide for approximately 26 public holidays. This varies from year to year depending on the discretion of the Union Government. The public holidays for 2019 are as follows: *

- International New Year's Day (January 1st)
- Independence Day (January 1st)
- Karen New Year Day (January 1st)
- Union Day (February 12th)
- Peasant's Day (March 2nd)
- Full Moon of Tapaung (March 20th)
- Armed Forces Day (March 27th)
- Thingyan Festival (April 13th to April 17th, inclusive)
- Labour Day (May 1st)
- Full Moon of Kasong (May 18th)
- Full Moon of Waso (July 19th)
- Martyrs' Day (19 July)
- Eid Al-Adha (one day)**

- Deepavali (one day)**
- Full Moon of Thadingyut (October 12th to October 14th, inclusive)
- Full Moon of Tazaungmone (November 10th to November 11th, inclusive)
- National Day (November 21st)
- Christmas Day (December 25th)
- Karen New Year's Day (December 26th)
- International New Year's Eve (December 31st)

* *The exact dates of the Burmese New Year and traditional festivals vary, based on the Myanmar Buddhist calendar. The dates provided above are based on the list of public holidays announced under Notification No 58/2018 issued by the Union Cabinet on 1 June 2018.*

** *Date to be announced in the newspapers.*

Casual Leave

Employees are entitled to enjoy six days of casual leave. Casual leave cannot be taken more than three days at a time and in combination with any other type of leave. Casual leave entitlement not used in a year may not be carried forward into the subsequent year.

Earned Leave

Employees are entitled to ten days of earned leave and all earned days of leave can be taken continuously at one time, provided that the employee has been in service for 12 continuous months and has worked for at least 20 days in a month. A day of earned leave shall be deducted from the entitled earned leave days for each month in which the employee has worked for less than 20 days. Earned leave may be accumulated for up to a period of three years.

Required Leave

Medical Leave

Workers can enjoy 30 days of medical leave annually, with full pay, if they can provide a medical certificate and have rendered six months of service. Notwithstanding the foregoing, employees can take an unpaid leave if they have not rendered service for six months. Additionally, employees covered by the Social Security Law (“SSL”) shall enjoy services from government hospitals and other benefits as granted under the law.

Maternity Leave

Pregnant mothers are entitled to take six weeks of pre-natal leave and eight weeks of post-natal leave with basic wage, provided that the employee has rendered six months of service. Maternity leave and medical leave can be taken together provided that the requirements for medical leave are met – ie a medical certificate can be provided and the employee has rendered six months of service. In addition, the SSL provides that employees covered by the SSL may further enjoy an ad-

ditional four weeks in the case of twins or up to six weeks in the case of a miscarriage. The employees in question may receive part of their salary from the Social Security Fund. Similarly, fathers may enjoy 15 days of paternity leave with full wage.

Confidentiality and Non-Disparagement

There are no statutory limitations on confidentiality and non-disparagement requirements.

The SECT stipulates that employees shall keep work-related information confidential and prevent it from being leaked to the public. Employees shall also abstain from quoting, copying, removing, getting rid of or carrying away documents, accounts and records related to work without permission.

There is no specific non-disparagement requirement in the SECT but employer and employee can annex one in the appendix by mutual agreement upon the approval of the TLO. Furthermore, the Competition Law (2015) prohibits broadcasting false information directly or indirectly in order to damage the reputation, financial situation or business operation of other businesses.

Employee Liability

The SECT imposes the following duties and responsibilities on employees:

- To comply with workplace safety instructions issued by employers as required by the nature of the work;
- To wear properly the safety equipment prescribed by the employer as required by the nature of the work, before entering into the workplace;
- To abstain from taking narcotic drugs, disturbing fellow employees or harassing them physically during working hours and at the workplace;
- To keep work-related information confidential;
- To comply with the regulations issued from time to time and agreed to by employers and employee representatives; and
- To pay taxes due under existing laws according to the prescribed rates.

Failure to comply with the stipulated regulations may lead to termination of the SECT without any severance pay or to being charged under the penal code if it is criminal conduct.

In addition, the parties shall agree on terms and conditions to be complied with by the employees and annex these in the SECT. For discussion on annexing additional responsibilities of employees in appendices, see **1.2 Contractual Relationship**.

2. Restrictive Covenants

2.1 Non-Competition Clauses

The Contract Act (1872) (the “**Contract Act**”) invalidates any agreement restraining someone from exercising a lawful profession, trade or business of any kind. Thus, post-contractual non-compete clauses may be deemed as being in restraint of trade and void. Nonetheless, non-compete clauses prohibiting employees from securing interest, directly or indirectly, in any company or business carrying on business in competition with the employer, without prior consent of the employer, during the term of employment may not be considered as being in restraint of trade.

While there is no non-competition clause in the SECT, employers may nonetheless incorporate these clauses in the SECT’s appendix by mutual agreement between workers and employers with the approval of the authorities concerned.

Enforcement of non-compete clauses presents a significant challenge for employers as there are no precedents for enforcement of these clauses. In reality, it is very difficult to enforce these clauses in courts.

2.2 Non-Solicitation Clauses - Enforceability/Standards

Employees

While there is no non-solicitation clause for other employees in the SECT, employers and employees can, with mutual agreement, incorporate restrictive clauses prohibiting resigning or terminated employees from enticing away the employer’s other employees in the SECT’s appendix. While there are no jurisprudential standards for non-solicitation clauses, the enforceability of these clauses is uncertain.

Customers

Similarly, there is no non-solicitation clause for the employer’s customers in the SECT. Nevertheless, it is possible for employers and employees to insert, with mutual agreement, prohibitive clauses restraining resigning or terminated employees from soliciting or enticing away the employer’s clients and customers either for the employee’s own account or on behalf of another person or company in the SECT’s appendix. Likewise, the enforceability of these non-solicitation clauses is very uncertain.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

There are no specific legal provisions protecting employees’ privacy and data protection rights. The Competition Law generally prohibits disclosing confidential information with the purpose of disrupting others’ businesses. Laws in specific sectors protect the privacy of interested parties. For exam-

ple, the Telecommunications Law (2013) imposes a duty on service licensees to keep the information and contents that are transmitted or received through their telecommunications services and the personal information of individual users confidential and not to disclose it to third parties. In the absence of such protections explicitly mandated for employees, employees may face difficulties in respect of privacy and data protection.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers Employment of Foreign Workers in Companies Registered with the Myanmar Investment Commission (“MIC”) and Under the Special Economic Zones (“SEZs”)

Subject to the registration requirements of the foreign employees as discussed in **4.2 Any Registration Requirements**, there is no limitation on the number of expat workers for MIC and SEZ registered companies. Investors are permitted to appoint any qualified person as senior manager, technical and operational expert, or adviser in the investment within Myanmar.

As a proviso, the Myanmar Investment Law (2016) requires employers to appoint only Myanmar citizens for work which does not require skill.

Employment of Foreign Workers in Wholly Owned Myanmar Companies

Previously, the Directorate of Investment and Company Administration (“**DICA**”) issued a notification requiring that either prior permission be obtained from DICA or that DICA be informed in advance of the hiring of a foreigner for a directorship or for C-level positions (ie, CEO, CFO, COO, etc) in a 100% Myanmar owned company. While there is no official notification repealing the foregoing requirement, it appears that DICA has recently relaxed this requirement.

ASEAN Economic Community

Workers in specific professions from the ASEAN region enjoy privileges conferred upon them. The ASEAN Economic Community was founded in 2015 with an objective of close economic collaboration between Southeast Asian countries. Through Mutual Recognition Arrangements, practitioners in eight professions – doctors, dentists, nurses, engineers, architects, accountants, surveyors and the tourism industry – are allowed to practise in all the ASEAN member states. However, prospective practitioners will not be exempted from being required to secure work permits and stay permits. Furthermore, the terms and conditions of the employment of these practitioners will also be governed by the Myanmar labour laws just like other foreign employees.

This has yet to be implemented in Myanmar.

4.2 Registration Requirements

Obtaining a Business Visa

A foreigner engaged to work in Myanmar is required to apply for a business visa, which is valid for 70 days. Applications for business visas are usually made at the Myanmar embassy or consulate in the applicant's home country or the nearest available Myanmar embassy or consulate. The MLIP has also recently made eVisas for business available online.

While the exact requirements and application fees may vary for each Myanmar embassy or consulate in each different country, an application for an employment visa must generally be supported by an invitation letter or appointment letter from the employer and must be submitted together with a passport with at least six months' validity and documentation evidencing the registration of the inviting entity and a completed application form.

Alternatively, foreigners may opt to apply for a visa-on-arrival at Yangon International Airport, instead of applying for the business visa at their respective Myanmar embassy or consulate. The requirements for such visa-on-arrival include: (a) an invitation letter; (b) the certificate of incorporation or registration of the inviting entity; (c) two passport-sized photos; and (d) a completed visa-on-arrival application form. Currently, we understand that the visa-on-arrival is limited to arrivals by air at Yangon International Airport.

Work Permit/Stay Permit

At present time, a stay permit operates as a work permit, which enables foreigners to reside and work in Myanmar for protracted periods of time. A stay permit essentially removes the 70-day or 90-day exit requirement for foreigners that have a single or multiple entry visa, respectively. A stay permit, however, does not operate as a visa, and foreigners who are granted a stay permit and exit the country must still obtain a new visa either prior to or upon their return.

Stay Permit for Employees Employed Under Entities Operating Under an MIC Permit

The Implementing Rules of the Myanmar Investment Law (2017) require that companies registered with the MIC shall register and apply for MIC approval when hiring foreigners for senior management, technical experts and consultants whether it be short-term or long-term employment. According to the announcement issued by the Investment Monitoring Division of MIC which came into effect starting from 21 October 2017, it is required to apply for the approval of MIC for foreign employees working for MIC companies, within seven working days after the date of arrival of such foreign employees.

The application for the approval of MIC is to be submitted to the Investment Monitoring Division of MIC ("IMD") and the validity of the approval of IMD varies from six months

to one year. Upon expiry, an extension can be applied for at MIC One Stop Service ("MIC OSS").

To apply for the approval of IMD the following documents must be submitted to IMD:

- application letter (including name, passport number, position, duration, qualification);
- Form (12-A) (application form for the permission of work);
- invoice for the service fee MMK5,000 for the appointment of each foreigner;
- copy of passport;
- number of proposed employees (local, foreign);
- number of existing employees (local, foreign) including each employee name, expertise level and position;
- copy of latest quarterly performance report of the company;
- foreigner's name, passport number, evidence of expertise or degree and profile; and
- power of attorney (if investors cannot come to the office, including name, national registration certificate number and phone number).

Upon issuance of the approval of IMD, the same documents listed above must be submitted along with the approval of IMD to MIC OSS to secure the approval of MIC OSS. The approvals of IMD and MIC OSS serve in combination as recommendation for the issuance of a stay permit in favour of the foreigner.

After registration of the foreign employees with the MIC, the company must apply for work permits with a recommendation of the MIC (ie the approvals of IMD and MIC OSS) to the MLIP. The stay permit will be valid for up to one year and can be extended subject to application by the necessary parties and payment of the relevant application fees.

Stay Permit for Employees Working Under Companies Registered Under the Companies Registration Office

To obtain a stay permit, a foreigner must be employed by a company established in Myanmar and must also be travelling to or working in Myanmar with a valid business visa. Foreign employees employed by companies without an MIC permit must obtain a letter of recommendation from the Ministry of Planning and Finance. After the recommendation is obtained, the foreigner may apply, to the MLIP, for a stay permit valid for up to one year. Stay permits may be extended subject to application by the necessary parties and payment of the relevant application fees.

Foreigner Registration Certificate ("FRC")

Additionally, foreigners residing in Myanmar for more than 90 days consecutively are required to apply for an FRC within one month of their arrival. The validity of all FRCs expires

on November 30th of every year, and the FRCs have to be renewed during the month of December annually.

5. Collective Relations

5.1 Status of Unions

The Labour Organisation Law (2011) permits Labour Organisations to form at a factory with the approval of 10% of the workers provided that there are at least 30 factory workers. These duly formed Labour Organisations have authority to negotiate with employers in case employees complain that they do not enjoy rights conferred under existing labour laws. Further, they can also demand that the employer reappoint an employee who was dismissed if there is cause to believe that the reason for termination was not in accordance with laws or the dismissal was due to membership of Labour Organisations. In the case of dispute settlement between the employer and employees, the Labour Organisations are entitled to send representatives to the conciliation body to represent the employees.

5.2 Employee Representative Bodies - Elected or Appointed

Enterprises with 30 or more employees are required to form a Workplace Co-ordinating Committee, consisting of an equal number of representatives from both the employer and the employee in accordance with the Settlement of Labour Dispute Law. The objectives of these workplace committees are to co-ordinate on the terms and conditions of employment and to negotiate and conclude collective agreements. As said previously, the Labour Organisation shall send representatives on behalf of workers. If there is no Labour Organisation, workers can elect two representatives and the employer can elect two to the working committee. The term of these working committees is one year and if there is a vacancy, the party whose representative resigned can fill the vacancy.

5.3 Collective Bargaining Agreements

Labour Organisations are entitled to lead collective bargaining and propose terms and conditions better than the minimum requirements. The Workplace Co-ordinating Committees shall negotiate and conclude collective agreements. The SECT permits employers and workers to negotiate and make amendments and additions to the SECT in accordance with the existing labour laws. If such amendments or additions are made, the updated SECT is required to be registered at the relevant Labour Exchange Offices.

6. Termination of Employment

6.1 Grounds for Termination

There is no specific law or regulation which specifically deals with the procedural and substantive requirements for ter-

mination of employment in Myanmar. However, the SECT provides for guidelines on termination of employment and dismissal of employees. Although the SECT is not a law or formal regulation, the MLIP (as discussed above) does not allow amendments to the SECT, save for instances discussed above. Therefore, its provisions, including guidelines for termination of employment and dismissal of employees, will usually be required to be observed by employers.

The SECT only provides for specific instances under which employment may be terminated, namely: (a) expiry of the contract, (b) factory closure, (c) discontinuation of the business due to unexpected event, (d) non-compliance by either the employer or employee with the terms and conditions of the SECT, (e) death of the employee, and (f) punishment of the employee for committing an offence(s).

In view of the foregoing, generally, there must be a basis for the employment to be terminated (eg committing an offence) and employers cannot terminate employment "at will".

There are different procedures for resignation, mutual termination, termination with cause and termination without cause.

Resignation

An employee desirous of resigning from his or her job shall send a resignation letter to the employer or through responsible personnel of the employer at least one month in advance. No compensation shall be made to the employee for his or her own resignation.

Mutual Termination

The SECT permits employer and employee to cancel the SECT by mutual agreement. Should employment be terminated by mutual agreement, neither a notice nor severance payment shall be required.

Termination for Authorised Cause

In the case of factory closure, discontinuation of business, and the like, an employer may dismiss an employee by giving at least one month's notice and settling the relevant severance payments based on the employee's duration of employment in accordance with the ESDL. Alternatively, an employer may dismiss an employee paying one month's salary in lieu of notice on top of any severance payment. A severance payment is required to be paid if the termination of employment is not due to the employee's fault.

The foregoing one month's notice with severance payment or payment of one month's salary in lieu of notice and severance payment is not required if the reason for the termination of employment is the expiry of the term of the SECT, death of the employee or resignation of the employee.

Nonetheless, termination shall not be arbitrary or based on one of the prohibited grounds discussed in **6.5 Protected Employees**.

In the case of redundancy, the employer shall co-ordinate with the representative of the Labour Organisation or with the Workplace Co-ordinating Committee in the absence of a Labour Organisation, and severance payments shall be made to terminated employees.

Termination with Cause

The procedure for termination with cause shall differ depending on whether the reason for termination is for committing a common offence or major offence. In this regard, the list of common and serious offences must be indicated in the annexes of the SECT. The MLIP has provided a sample list of offences which can be referred to and which list may be amended according to the nature of work of the employee as may be necessary.

Common Offences

Should a worker fail to comply with principles or breaches any internal regulation, the employer shall give a written admonition for the first and second incidents. For the third incident, the employee shall be required to sign an undertaking that he or she will not commit these offences again. Notwithstanding the undertaking, if the employee commits a breach or offence for the fourth time within 12 months after signing the said undertaking, the employer shall be entitled to dismiss the employee immediately without compensation or severance pay.

Major Offences

The ESDL permits the employer to dismiss an employee immediately without paying compensation or severance pay if the employee is found to have committed a major offence. See also **6.3 Dismissal for (Serious) Cause (Summary Dismissal)**.

Collective Redundancies

The SECT provides that in the case of termination of employees due to a reduction of its labour force, employers shall co-ordinate with the Workplace Co-ordinating Committee if there is no Labour Organisation. However, should there be a Labour Organisation, the representatives from the Labour Organisation shall co-ordinate with the Workplace Co-ordinating Committee.

6.2 Notice Periods/Severance Required Notice Periods

The SECT provides that either an employee desirous of resigning or an employer desirous of terminating the employment shall serve the other party with a written notice 30 days at least in advance.

Severance

A severance payment is required to be paid if the termination of employment is not due to the employee's fault. However, severance is not required if the reason for the termination of employment is the expiry of the term of the SECT, death of the employee or resignation of the employee.

As provided under Notification No 84/2015, no severance payment is required to be paid in the case of the employee having rendered service for less than six months. For those who have rendered service for more than six months, the severance payments have to be made as follows:

6 months < x < 1 year = ½ month's salary

1 year < x < 2 years = 1 month's salary

2 years < x < 3 years = 1½ months' salary

3 years < x < 4 years = 3 months' salary

4 years < x < 6 years = 4 months' salary

6 years < x < 8 years = 5 months' salary

8 years < x < 10 years = 6 months' salary

10 years < x < 20 years = 8 months' salary

20 years < x < 25 years = 10 months' salary

x > 25 years = 13 months' salary

Specific Procedures

As discussed above, there is no specific law or regulation which specifically deals with the procedural and substantive requirements for termination of employment in Myanmar, but the SECT's guidelines for termination of employment and dismissal of employees will usually be required to be observed by employers.

The SEL stipulates that any employer of a shop or establishment shall notify the inspector concerned about the hiring or changing of staff and submit the notification together with the copy of the licence granted and issued by the Factories and General Labour Laws Inspection Department.

While no such requirement is stipulated under the Factories Act, out of an abundance of caution some employers in practice still provide notification for hiring or termination of employees in factories.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

The MLIP has provided a sample list of grave misconducts which can be referred to, and additional major offences may be added as an annex to the SECT. The sample list of grave misconducts includes:

- theft;
- intentionally destroying property of the employer;
- bringing arms and explosive materials to the workplace without permission;

- intoxication, unruliness, entering into fights or seriously harming or physically abusing someone in the workplace;
- moral infringement;
- bribery; and
- gambling in the workplace.

Upon finding the employee committed a grave misconduct, the employer may dismiss the employee summarily without giving any notice or severance payment.

The employee who committed a serious offence shall be dismissed summarily.

6.4 Termination Agreements

Termination agreements are not formally recognised in Myanmar. Nonetheless, employees may by explicit agreement of employers execute releases and quitclaims upon termination of the employment. To avoid falling foul of the provisions of the Contract Act, termination agreements cannot restrain a terminating employee from exercising a lawful profession, trade or business, as discussed in **2.1 Non-competition Clauses**.

Aside from the payment of stamp duties on the relevant agreements, no formal procedures such as registration are required theoretically to enforce the releases. Notably, however, as termination agreements are not formally recognised under Myanmar labour laws, government offices may decline to register the documents even on a voluntary basis.

6.5 Protected Employees

The Labour Organisation Law prohibits dismissing those who are:

- opposing an illegal lock-out;
- members of a Labour Organisation for the exercise of organisational activities; or
- participating in a strike in accordance with the law.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

There are two major grounds for a wrongful dismissal claim: unfair dismissal and arbitrary dismissal. Employers are prohibited from dismissing employees unfairly for their membership of an organisation, race, religion, gender or age. The Labour Organisation Law also prohibits employers from dismissing employees arbitrarily without a reason.

In the event of wrongful dismissal, the employee may bring a claim to the relevant body to seek damages for the breach of contract. In the case of collective disputes, the Labour Organisation of the enterprise can demand the wrongfully dismissed worker be reinstated to his or her position. If a

collective dispute cannot be settled internally, parties shall resort to the arbitration procedure provided under the Settlement of Labour Dispute Law, as discussed in **8.1 Judicial Procedures**.

7.2 Anti-Discrimination Issues

The SECT prohibits discrimination on the basis of race, religion, gender, age or being a member of an organisation.

The burden of proof will fall on the claimant, who will need to show upon a balance of probabilities that he or she was dismissed under the invalid ground in accordance with Myanmar Civil Procedure.

There is a wide latitude given in respect of the relief and damages that may be awarded; however, the claimant will likely be restored to his or her original position or alternatively awarded compensation if restoring him or her to his or her original position is not practicable due to the breakdown of the relationship between the claimant and the defendant. Furthermore, breach of the SECT can result in fines or imprisonment.

8. Dispute Resolution

8.1 Judicial Procedures

The Settlement of Labour Dispute Law (2012) (“SLDL”) provides for the labour dispute resolution system in Myanmar. Employers with more than 30 employees are required to form a Workplace Co-ordinating Committee which initially helps resolve disputes in the workplace. If the dispute is not settled by the committee, the parties may elevate the dispute to the township conciliation body and thereafter to the relevant court if the dispute is an individual dispute, or the regional or state dispute settlement arbitration body if the dispute is a collective dispute. If the collective dispute is not resolved by the dispute settlement arbitration body then either party may refer the dispute to the relevant regional or state settlement arbitration council which will form an arbitration tribunal.

Myanmar law does not specifically provide for or prohibit class action claims.

The SLDL allows employees to appear in court in person or via their legal representatives.

8.2 Alternative Dispute Resolution

While it is unclear if the dispute resolution system provided for under the SLDL has exclusive jurisdiction over labour disputes, the Arbitration Law (2016) does not prohibit arbitration as a mode of settlement of labour dispute.

Therefore, while untested, in the case of individual disputes it is theoretically possible for employers and employees to incorporate an arbitration clause in the SECT and resort to arbitration in the case of dispute.

Notably, arbitration is the principal method of settling collective labour disputes. The state/regional dispute settlement arbitration bodies, formed under the SLDL, shall be the authority to settle collective labour disputes.

Theoretically, pre-dispute arbitration agreements should be enforceable, but these are untested in the context of labour disputes.

8.3 Awarding Attorney's Fees

Employers and employees can stipulate in the contract that in the case of dispute the prevailing party be awarded attorney's fees. Myanmar labour laws do not provide any rules for the award of attorney's fees, but neither do they prohibit the award of attorney's fees. The Code of Civil Procedure confers power on the court to award the costs of an incident in all suits in the discretion of the court. The judge usually directs that the prevailing party be awarded all costs including that of attorney's fees.

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