



**LINCOLN LEGAL SERVICES (MYANMAR) LIMITED**



**THE NEW MYANMAR COMPANIES LAW**

**19<sup>th</sup> December, 2017**

# THE NEW COMPANIES LAW

- **Pyidaungsu Hluttaw Law No. 29/2017**
- **Passed by parliament on 23 November 2017**
- **Signed into law by the president on 6 December 2017**
- **To enter into force on a date specified by separate presidential notification; according to DICA, this is to be on 1 August 2018**



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# THE NEW COMPANIES LAW

- Contains provisions from the Companies Act 1914 and the Company Regulations 1957 (partly reworded/rewritten)
- Borrows liberally from the Australian Corporations Act 2001
- Contains distinctly own concepts
- In general: Existing companies/rep offices/branches are grandfathered in (S. 469(a) CL)



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# SINGLE SHAREHOLDER/DIRECTOR COMPANIES ALLOWED

- Old CA: Private companies must have at least two members (S. 5 CA) and two directors (administrative practice)
- New CL: One member and one director are sufficient (S. 4(a)(iv), (v) CL)
- However, S. 151(a)(ii): A general meeting will be quorate if at least **two** members are present (or such **larger number** as may be specified in the company's constitution)...  
*(although, to be fair, S. 156 states that a company with one member "need not" have a general meeting)*



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# ONLINE REGISTRATION

- DICA to implement an online company registration system
- “[Existing] companies will have to register online under the new law over the next six months” - DICA Director-General as quoted in The Irrawaddy, 15 Dec 2017
- Timeline possibly a misunderstanding?
- In this context: Corporate data may become public domain (S. 421(e) CL: “Any person may inspect the registers and records kept by the Registrar on payment of such fees as may be prescribed by the Union Minister (if any)”)



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# CORPORATE COMPLIANCE WILL MATTER

- **Old CA:** Fines are insignificant in their amounts and only a court may impose them (S. 278(1), 279 CA); DICA does not sue non-compliant persons in practice.
- **New CL:** Significant penalties which may be imposed multiple times (on the company, on each director, on each officer involved...). DICA may impose penalties through penalty notices without court intervention (S. 439 CL). Penalties may easily reach several hundred thousand or several million kyat.



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# CORPORATE COMPLIANCE WILL MATTER

- **Old CA:** Everybody probably notifies DICA of a share transfer, change of directors, address change and files form E (maybe), but which private company keeps an up-to-date register of members, directors, issues share certificates...?
- **New CL:** Not many new compliance requirements, but compliance requirements which so far almost nobody cared (or knew...) about will matter under the new CL because of stiff penalties.



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# CORPORATE COMPLIANCE WILL MATTER

- Think about getting a company secretary (we offer such services for a very reasonable price 😊 )



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# HARMLESS FOREIGN PARTICIPATION

- Old CA: One foreign shareholder makes a company a “foreign company” (S. 2(2B)(a), (2A)(a) CA)
- New CL: “Foreign company” = a company incorporated in Myanmar 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 35%
- Opens way for foreign minority participation in real estate companies, trading companies, banks, insurances, listed companies... (but administrative practice?)



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# HARMLESS FOREIGN PARTICIPATION

- For local companies wishing to take in foreign capital: Foreign minority participation may be a way, but (i) you may have to tidy up your books first and (ii) taking in a minority shareholder may come at an increased risk under the new CL (see following slides)
- Possible to increase the harmless percentage by the “clever” use of holding companies incorporated in Myanmar or preference shares? Probably not.



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# MINORITY PROTECTION

- Old CA:
  - S. 66(A) CA: At least 10% of the holders of a class of shares may seize the court to cancel a variation of their rights to which they did not consent
  - S. 78(1) CA: At least 10% of the holders of the paid-up capital may request the directors to call an extraordinary general meeting of shareholders
- that's about what there is in terms of minority protection, at least in the CA (cf., however, Specific Relief Act S. 54)



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# MINORITY PROTECTION

- **New CL: Any existing or former member may request the court to make an order if the conduct of the company's affairs or related act is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in that capacity or in any other capacity" (S. 192(e), 194(a)-(d) CL)**
- **Opens the door to blackmailing by minority shareholders?**



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# MINORITY PROTECTION

- In any case, joint venture and/or shareholder agreements should contain a detailed description of what a minority shareholder may expect from its membership in a company; existing agreements should be checked as to whether they should be amended
- Consider amending/drafting a new constitution



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# TAILOR-MADE CONSTITUTION POSSIBLE?

- Tailor-made memorandum and articles already possible under old CA, but DICA has difficulties registering them - this may now change
- In particular important in case of joint ventures (and other settings in which there are different shareholders)



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# CONVERSION LOCAL/FOREIGN COMPANY EASIER

- Old CA and administrative practice:
  - Share transfer, change of directors - “local” department)
  - Amendment of memorandum and articles, reduction of company’s objectives (if required), capital increase (if required) – “foreign” department
  - Takes about 2 months
  - Company gets new (“FC”) registration number
  - Company post conversion a new legal entity?



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# CONVERSION LOCAL/FOREIGN COMPANY EASIER

- **New CL (administrative practice not yet known):**
  - **Share transfer (notice must state if company becomes or ceases to be a foreign company, S. 86(b) CL), change of directors**
  - **Amendment of memorandum and articles (if required), reduction of company's objectives (if required), capital increase (if required)**
  - **Required time?**
  - **Company gets new registration number?**
  - **Company post transfer no new legal entity (not explicitly stated, but may be inferred from S. 59(a)(i) CL)**



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# “PERMIT” ABOLISHED

- Old CA: Foreign-invested company/branch/rep office needs a “permit” formerly known as “permit to trade” (S. 27A(1) CA)
- New CL: No more “permit”, apparently effective 1 Aug 2018
- Effect on visa applications?
- Some investors used the “permit” as proof that they were lawfully operating in the country (although this claim has no basis in administrative practice)



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## **“COMPANY’S OBJECTS” OPTIONAL**

- **Old CA: The memorandum must state the company’s objects (S. 6(1)(iii) CA)**
- **“Ultra vires” doctrine - exists in Myanmar?**
- **Perhaps S. 21 (f) Specific Relief Act: “a contract made by or on behalf of a corporation or public company created for special purposes or by the promoters of such company, which is in excess of its powers,” may not be specifically enforced**



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## **“COMPANY’S OBJECTS” OPTIONAL**

- **“Ultra vires” an issue mainly for foreign-invested companies as Myanmar companies usually have a long list of objects that should cover almost everything**



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## **“COMPANY’S OBJECTS” OPTIONAL**

- **New CL: “At the election of the members, the constitution may set out the objects of the company” (S. 12(b) CL)**
- **Existing companies: Objects deemed to be removed until 31 July 2019 unless a special resolution is passed to the contrary (S. 12(e) CL)**



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## **“COMPANY’S OBJECTS” OPTIONAL**

- **Reasons for (mainly, foreign-invested) companies to keep the objects:**
  - **Showing that the company’s business in Myanmar is “officially approved” (although this claim would have no basis in the law)**
  - **The importer/exporter registration certificate contains a company’s objects**
  - **Certain objects (e.g., “telecom services”, “microfinance services”) a requirement for obtaining licenses**



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# **STRONG POSITION OF DIRECTORS TO CHANGE?**

- **International standard (also included in the CA 1914): Important decisions cannot be made by the directors, but must be made by the shareholders**
- **In practice: DICA requests/accepts “special resolutions of the board of directors” for even the most important decisions**
- **Will this change?**
- **In any case, in the new CL: Broadly worded duties of the directors in line w/international practice (S. 164-172 CL)**



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# RESIDENCE REQUIREMENTS

- **Old CA:**
  - **Public and 100% Myanmar-owned private companies can only have Myanmar citizen directors (administrative practice)**
  - **All directors of foreign-invested companies may be foreigners who need not reside in Myanmar**
  - **Every foreign-invested company, branch and rep office must have an “authorised representative” residing in Myanmar (section 8(1)(c) CR 1957) - not enforced in practice**



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# RESIDENCE REQUIREMENTS

- **New CL:**
  - (Can foreigners become directors of public companies and Myanmar private companies?)
  - A public company must have at least one director who is a resident Myanmar citizen (S. 4(a)(vi) CL)
  - A private company must have at least one director who is “ordinarily resident” in Myanmar (S. 4(a)(v))
  - A rep office or branch must have at least one “authorised representative” who is ordinarily resident in Myanmar (S. 1(c)(iii), 47(b)(iii) CL)



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# RESIDENCE REQUIREMENTS

- **New CL:**
  - Existing entities have until 31 July 2019 to comply (S. 469(b), (c) CL)
  - “Ordinarily resident” (S. 1(c)(xix) CL): Either a (i) permanent resident or (ii) person residing in Myanmar for at least 183 days in each 12 month period commencing from 1 August 2019 (existing entity) or the date of registration (new entity)
  - What happens if the person resigns, leaves the country, dies, disappears... before the 183 days are up???
  - (“Limited liability” gone?)
  - How will this be checked?



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# TAKING SECURITY

- **Transfer of Immovable Property Restriction Law 1987 (English translation): Prohibits any person to “pawn” immovable property to a “foreigner or a foreigner-owned company”**
- **New CL: A mortgage or charge on immovable property registered with DICA does not breach the Transfer of Immovable Property Restriction Law (S. 228(b)(i), 229(a)(iii) CL)**
- **Foreign lenders may take security over immovable property without a local security agent**



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# TAKING SECURITY

- Old CA (S. 109(1)) and new CL (S. 229(a)) require mortgages and charges on immovable and (most) movable property to be registered with DICA
- So far, DICA had difficulties registering mortgages and charges, but this may now change
- On the whole, new CL makes taking security easier and consequently broadens access to financing from (in particular) foreign banks



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# BRANCHES AND REP OFFICES

New CL	Old CA
Overseas corporations (not: individuals!) “carrying on business” in Myanmar must register (S. 43(a) CL)	Companies incorporated outside of Myanmar “with an established place of business” “carrying on business” in Myanmar must obtain a permit (S. 2(2B)(b), 27A(3) CA)
“Carrying in business”: in shorthand, any business that is not finished within 30 days (S. 43(b)) - <b>foreign contractors beware!</b>	In practice, an overseas corporation would establish a rep office, branch or subsidiary if it has, or expects to generate, continuous business in the country
Significant penalties for non-compliance	No penalties for non-compliance



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# BRANCHES AND REP OFFICES

New CL	Old CA
For registration, must (among others) submit copy of foreign articles, Myanmar translation and English summary (S. 47(b)(ix) CL)	For registration, must submit (among others) notarised and legalised copy of foreign articles and Myanmar translation (S. 277EA, 277EB CA, R. 15 CR 1957) <b>In practice English translation sufficient</b>
Must appoint an authorised representative resident in Myanmar (S. 1(c)(iii), 47(b)(iii) CL)	Must appoint an authorised representative resident in Myanmar (R. 8(1)(c) CR 1957) <b>In practice no residence requirement</b>



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# BRANCHES AND REP OFFICES

New CL	Old CA
Must notify within 28 days if (i) the headquarters changes its name, address, articles or directors or (ii) the authorised officer or his address changes (S. 44(b), 52 CL)	Must notify within 2 months if (i) the headquarters changes its articles or directors or (ii) the authorised officer or his address changes (R. 8(1) CR 1957)
Must notify, prior to effecting the change, if the address of the registered office or principal place of business in Myanmar changes (S. 51 (d) CL)	Must notify, within two months, if the address of the registered or principal office in Myanmar changes (S. 8(1) CL)



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# BRANCHES AND REP OFFICES

New CL	Old CA
Name of the overseas corporation and its country of incorporation must be clearly stated in all communication and contracts and prominently displayed at the registered office and principal place of business (S. 50 CL)	Similar obligations (R. 8(3)(b), (c), (4) CR 1957
Must file, within 28 days after the end of the headquarters' financial year, an annual return; must annually file the headquarters' financial statements which must be audited if so requested by DICA (section 53 CL)	Must annually file notarised and legalised financial statements of the headquarters (R 9, 19 CR 1957) and, as a matter of administrative practice, audited financial statements of the branch



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# BRANCHES AND REP OFFICES

New CL	Old CA
Must notify DICA within 21 days if the overseas corporation ceases to carry on business in Myanmar (S. 55(a) CL)	No procedure specified
Must notify DICA within 28 days if an overseas corporation commences to be wound up, or is dissolved, or deregistered, in its place of origin (section 55(f), (i) CL)	No procedure specified



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# CHANGES TO THE CAPITAL STRUCTURE

- Apparently, no more authorised capital, unless specifically provided for by the constitution (S. 63(a) CL)
- No more nominal or par value for a share (S. 60(b) CL)



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# CHANGES TO THE CAPITAL STRUCTURE

- **Explanation: The concept of paid-up and authorised capital -**
  - **Paid-up capital: Funds that the shareholders have actually provided to the company in return for shares (presently shown in form 6 in Myanmar - however, local companies do not seem to have to provide proof of payment to DICA)**
  - **Authorised capital: In other jurisdictions - amount to which the directors can increase the paid-up capital without asking the directors; in Myanmar presently - sort of “statement of intent” (a high authorised capital may be required for an MIC application)**



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# CHANGES TO THE CAPITAL STRUCTURE

- Explanation: nominal or par value of a share -
  - Presently, e.g. “authorised capital of USD 100,000 divided into 10,000 shares of USD 10 each / paid-up capital of USD 50,000 divided into 5,000 shares of USD 10 each”
  - New CL: “share capital of USD 50,000 divided into 5,000 shares”
  - New CL makes it easier to:
    - Reduce the capital (presently, DICA struggles with the concept that a capital reduction requires the reduction of the number of shares)
    - Issue bonus shares; take in new members



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# CHANGES TO THE CAPITAL STRUCTURE

- **When effective for existing companies? Good question - possible answer:**
  - **Abolition of authorised capital: Probably never, unless the shareholders decide to delete the authorised capital from the company's constitution (S. 12(d) CL)**
  - **Abolition of the nominal or par value: Probably immediately on 1 Aug 2018**



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# CHANGES TO THE CAPITAL STRUCTURE

- **What should existing companies do?**
  - **Check contracts (in particular JV agreement governed by foreign law) for reference to nominal or par value and, if necessary, amend**
  - **Public companies may consider checking with their auditor if they have to make amendments to their accounting**



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# FLEXIBLE DESIGN OF SHARES?

New CL	Old CA
<p>Ordinary shares (S. 61(a) CL - one vote, equal share in profit and liquidation proceeds)</p> <p>- DICA will accept</p>	<p>Ordinary shares (S. 145 CA)</p> <p>- DICA accepts</p>
<p>Preference shares (S. 73 CL - more/no vote, more/less/no share in profit and liquidation proceeds)</p> <p>- Will DICA accept?</p>	<p>Preference shares (S. 3 Table A)</p> <p>- DICA accepts?</p>
<p>Partially paid-up shares (S. 6(a)(i) CL)</p> <p>- Will DICA accept?</p>	<p>Partially paid-up shares (S. 5(i) CA)</p> <p>- DICA does not accept</p>
<p>Redeemable shares (S. 62(a)(ii) CL)</p> <p>- Will DICA accept?</p>	<p>Redeemable shares (S. 105B CA)</p> <p>- DICA accepts?</p>



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# OTHER SOURCES OF FUNDING?

New CL	Old CA
Debenture (S. 76 CL) - Relevant in practice?	Debenture (Numerous references) - Relevant in practice?
Options to acquire shares (S. 62(b)(i) CL) - Will DICA accept? Relevant in practice?	Share warrants issued by public companies (S. 43(1) CA) - Relevant in practice?
Convertible loans (“options to acquire shares”; “other securities which convert into shares” S. 62(b)(ii)) - Cross-border loans require Central Bank approval	Convertible loans - No reference in the CA - Cross-border loans require Central Bank approval



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# INSOLVENCY

- A company shall be deemed unable to pay its debts if it has not heeded a creditor's demand notice for three weeks, provided that the debt is due and payable and amounts to at least Ks. 500 (S. 163(1)(i) CA)/Ks. 250,000 (S. 299(a)(i) CL) and may consequently be wound up by the court (S. 162(v) CA / 298(e) CL)
- Means to pressure an unwilling debtor? Probably not as we suppose that the creditor would first have to unsuccessfully sue the debtor for payment, although the CA/CL provide separately for this scenario



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# SMALL COMPANIES

- **New CL introduces the concept of a “small company”: Up to 30 employees and revenue of less than Ks. 50,000,000 in the previous year**
- **Small companies are not required to have an annual meeting (S. 146(e) CL), but probably must annually produce audited financial statements to file with the tax authorities**



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## **OTHER MATTERS**

- **Facilitation of directors' meetings, general meetings of members**
- **Dividends may be paid as long as the company remains solvent (not necessarily out of profits)**
- **PDF copies of signatures to be accepted by DICA?**
- **Execution of documents by a company**



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