

WHAT DOES THE NEW COMPANIES LAW MEAN FOR YOUR COMPANY IN MYANMAR



In its efforts to make itself a welcoming investment destination Myanmar is pushing ahead with sweeping regulatory reforms of the corporate sector. At the centre of these changes is the recently enacted Myanmar Investment Law and the imminent enactment of the new Myanmar Companies Law. The new Companies Law will replace the current Myanmar Companies Act which was first enacted over a century ago.

The Myanmar Investment Law is expected to be fully implemented by the beginning of the next financial year, 1 April 2017 and the new Companies Law is expected to be approved around June 2017. Members of the BLP team were responsible for the drafting of the new Companies Law and are preparing the detailed rules and regulations under the Investment Law. In doing this we have worked closely with DICA and the MIC, the corporate and investment regulators, as the laws have developed.

The new Companies Law modernises the regulatory framework governing how a company is run, bringing it in line with current practices in other countries. The new law aims to provide more flexibility in how a company operates and provides a detailed governance regime and greater shareholder protections to make sure that their interests are protected.

Changes in the law will affect investors already operating in Myanmar. Investors should not only make themselves familiar with the changes to their company's obligations, but also consider how they can harness the changes to ensure that the company is managed and structured in a way to best serve their business interests.

A number of the provisions relevant to investors are discussed below. Note that this is based on the latest draft of the Companies Law which may still be changed prior to its enactment.

Myanmar and foreign companies

Under the current Companies Act companies are either classified as a Myanmar company or a Foreign company. A Myanmar company has to be 100% owned by Myanmar citizens and the approval of the regulator is required if a company wants to change its classification, which in practice is near impossible to obtain.

While the distinction between Myanmar and Foreign companies remains in the new law, the ownership threshold and effect is very different. Foreign investors will be permitted to obtain an ownership interest in a Myanmar company up to a certain threshold before the company will be considered a Foreign company, with the threshold expected to be 35%.

The new Companies Law will remove the requirement on foreigners wishing to purchase shares in a Myanmar owned company to obtain prior approval from the regulator, instead requiring that the regulator is only notified when a company exceeds the foreign ownership threshold to be classified as a Foreign company (and vice versa).

The new law also removes the requirement for foreign companies to hold a separate "permit to trade", significantly reducing the regulatory burden and levelling the playing field. The 35% ownership threshold is therefore not a cap and shares can be freely exchanged between foreign and local investors.

This change greatly increases the ability of local companies to benefit from foreign investment and access foreign capital. It will potentially also facilitate foreigners buying shares in companies listed on the Yangon stock exchange.

Note that the right of the government to limit foreign investment in specific sectors is retained through restrictions imposed by the negative investment list under the Myanmar Investment Law. Also investors will need to abide by foreign participation restriction in other laws, such as the Transfer of Immoveable Property Restriction Act 1987, which restricts foreigners from owning or entering into long term leases for land.

We expect there to be a more consistent policy approach taken to foreign land ownership across the land, company and investment law over time.

Removal of company objectives

Currently companies are required to state their objectives in the memorandum and articles of association, with these also recorded in a company's form 1 (permit to trade). These limit the company's authority and inhibit corporate activity. Under the new law the form 1 will disappear and companies will no longer need to state their intended objectives – they will have the freedom to engage in any activity (provided of course they are in compliance with the law and have any other permits and licences which may be needed for the relevant activity).

Existing companies will see their objectives fall away after 12 months of the Companies Law being enacted. Companies requiring more flexibility in their activities may wish to remove their objectives earlier. Alternatively companies wanting to retain their objectives, for example as a shareholder protection measure in a joint venture, must do so by passing a special resolution of the shareholders.

Directors' duties

The new Companies Law places more emphasis on directors duties to ensure that the company is properly run and managed in the best interests of the company. The various duties of directors are clearly set out in the law for the first time and set high standards for corporate conduct. A balance is set between encouraging corporate activity and properly considered risk taking behaviour with the need protect shareholder interests.

In some circumstances directors may become individually liable to penalties if they breach their duties. To protect against claims it is advisable that directors seek advice to remain informed of their rights and obligations.

Resident directors

A new requirement under the law is that a company in Myanmar must have at least one resident director. This does not have to be a Myanmar citizen, but, consistent with the test use in taxation laws, the nominee must be resident in-country for at least 183 days in each year.

Minimum number of shareholders

Currently a Myanmar incorporated company requires two shareholders. This requirement will be decreased to one shareholder. Current investors may therefore wish to make their Myanmar company a 100% owned subsidiary.

Corporate group structures

Investors often use a group structure to provide greater flexibility in dealing with their assets and different businesses and as a measure to mitigate risk.

While the current Companies Act does not prohibit group structures, they have not been frequently used due to policy reasons. The new Companies Law expressly recognises the use of them and includes provisions to facilitate the managing of corporate groups.

The minimum number of shareholders has been decreased to one shareholder meaning that it is now possible to have wholly owned subsidiaries.

Directors duties may be modified to permit them to act in the best interests of the shareholder rather than in the best interests of the company itself, similarly these duties can be altered in the case of a joint venture.

Joint venture companies

Under the current practice of the regulator it can be difficult to enshrine the rights and obligations of the shareholders in the company's articles of association. Under the new Myanmar Companies Law it will become easier for a company to amend its constitution (the constitution will be replacing the memorandum and articles of association) to include these.

As further noted below, it will also be possible in practice to use different classes of share to assist with financing and the structuring of the rights of different shareholders.

Directors duties can also be altered to allow directors to act in the best interest of their respective joint venture partner.

Investors should be considering amending their constitutions to fully reflect the commercial intentions of the investors when entering into the joint venture.

Classes of shares

The new Companies Law will expressly permit companies to issue different classes of shares (and issue other types of security as well – such as options and convertible shares). Companies wanting to distinguish the rights certain shareholders have, for example voting rights and dividend entitlements, should explore this option.

The ability to issue preference shares provides the company an additional avenue to obtain financing.

Capital management

More flexible tools for the management of a company's capital structure are included in the new law. These include a streamlined procedure for the buyback of shares and for the making of capital reductions. In each case these can be selective processes or ones which apply to all shareholders. Court approval is not required but clear disclosure and shareholder approval is.

Small companies

Companies with less than 30 employees and annual revenues of less than MMK50m will have a lower

regulatory burden as they are exempted from a number of reporting and meeting requirements.

Minority shareholder protections

Minority shareholders only have minimal protections under the current Myanmar Companies Act. The new Myanmar Companies Law brings protection in line with current best practice found in other countries.

A number of key decisions will now need the approval of the minority shareholders, particularly where they affect the rights of the majority and minority shareholders. Minority shareholders will also get the right to sue on behalf of the company, even if the directors of the company do not approve of the claims. They may also be able to call meetings or put resolutions forward for approval and have enhanced rights to inspect company documentation. Reporting and disclosure standards generally for companies are also improved.

Companies may also provide for additional minority shareholder rights in their constitution.

The above items highlight some of the changes and possibilities that will be brought about upon implementation of the new Myanmar Companies Law. Please contact us to further discuss how the enactment of law will affect your business and what steps you can take to take advantage of the benefits. As the team responsible for its preparation we would be very happy to assist you.

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