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Resident Officers under the Myanmar Companies Law (2017)

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A. Resident Officers under the Myanmar Companies Law (2017)

I. Introduction

On 1 August 2018, the Myanmar Companies Law (2017) came into force, repealing and replacing the previous Companies Act (1914). Under this new law, any corporation registered in Myanmar, either as a company incorporated in Myanmar or registered as an overseas corporation (branch office), is required to appoint an officer who is an ordinary resident of Myanmar.

Ordinarily resident means a person who is either a permanent resident of Myanmar under any applicable law or is resident in Myanmar for at least 183 days in each twelve (12) months' period commencing from:

- in the case of an existing company or body corporate, 1 August 2019; and
- in the case of any company or body corporate registered under the Myanmar Companies Law (2017), the date of registration of the company or body corporate.

II. Overseas Corporations (Branch Office)

An overseas corporation must appoint a person ordinarily resident in Myanmar as authorised officer to act as its representative for the purpose of the Myanmar Companies Law (2017), including being authorised to accept service of documents in Myanmar on behalf of the overseas corporation.

III. Companies incorporated in Myanmar

A private limited company must appoint a minimum of one (1) director who may be foreign, but must be an ordinary resident in Myanmar.

It is important to note that the shareholders are responsible for having a resident director on the board of directors. Hence, in situations where the sole resident director is leaving Myanmar or no resident director is remaining due to other reasons, the shareholders will be duty-bound to appoint a new resident director as soon as possible and within six (6) months at the latest. If no such replacement is made within that period and the business continues to operate after the six (6) months' deadline expires, the shareholders could be held personally accountable for the company's debts and liabilities.

B. Directors' Powers, Duties and Liabilities

I. Directors' Powers

1. Powers of Directors

Pursuant to sec. 160 Myanmar Companies Law (2017), the business of a company shall be managed by or under the direction of the board of directors or, in the case of a single director company, the sole director. In managing the business of the company, the directors (or sole director) may exercise all the powers of the company, subject to any powers which are required to be exercised by members as expressly set out in this Law or the company's constitution.

Subject to the company's constitution, the members or the board may delegate powers to:

- a committee of directors;
- a specific director (or managing director);
- an employee of the company; or
- any other person.

Such delegate must exercise the conveyed powers in accordance with any directions given by the board and the exercise of powers by the delegate is as effective as if the directors had exercised them. If the directors delegate power, they are responsible for the exercise of the power by the delegate as if the

power had been exercised by the directors themselves unless the directors can show they believed:

- at all times and on reasonable grounds that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Myanmar Companies Law (2017) and the company's constitution; and
- on reasonable grounds, in good faith and after making proper inquiry (if the circumstances indicated the need for inquiry) that the delegate was reliable and competent in relation to the power delegated.

2. Access to Information

Pursuant to sec. 161 Myanmar Companies Law (2017), a director may inspect the books and records of the company at all reasonable times.

3. Restrictions of Power of Directors

The directors of a public company, or of a subsidiary of a public company, or, if so provided in its constitution of a private company, shall not, except with the consent of the company concerned in general meeting:

- sell or dispose of the main undertaking of the company; or
- remit any debt due by a director.

4. Restrictions on Voting

Pursuant to sec. 163 Myanmar Companies Law (2017) and subject to the company's constitution, a director must not be present while matters relating to the affairs of the company are being considered or voted on in which the director has a material personal interest. Subject to the company's constitution, a director may be however present and vote, if:

- the director has disclosed the nature and extent of the interest and its relation to the affairs of the company and the other directors pass a resolution that identifies the director and the nature of the interest and states that those directors are satisfied that the interest should not disqualify the director from being present at the meeting or voting;
- a resolution to the same effect as the board resolution is passed at a general meeting; or
- the interest is one that does not need to be disclosed under sec. 172 Myanmar Companies Law (2017).

If the above requirements are satisfied and subject to the company's constitution:

- the director may vote on matters that relate to the interest;
- any transactions that relate to the interest may proceed;
- the director may retain benefits under the transaction even though the director has the interest; and
- the company cannot avoid the transaction merely because of the existence of the interest.

5. Restrictions on Related Party Transactions / Loans

The Myanmar Companies Law (2017) contains a number of restrictions on remuneration of directors and other benefits granted to directors and related parties.

Sec. 187 (a) Myanmar Companies Law (2017) provides that the board of a company may, subject to any restrictions contained in the constitution of the company, applicable provisions of this Law and any other applicable law, authorize remuneration of directors and other benefits to directors and related parties (e.g. making of loans by the company to a director or a related party), if it is **satisfied** that:

- to do so is in the best interest of the company;
- to do so is reasonable in the circumstances; and
- the payment or benefit or loan or guarantee or contract is on made on terms that are no worse than arm's length from the perspective of the company.

The board must ensure that forthwith after authorising the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract, as the case may be, particulars of the payment or benefit or loan or guarantee or contract are entered in the "Register of directors and secretaries" maintained by the company under sec. 189 Myanmar Companies Law (2017).

Further, the directors must ensure that particulars of the payment or benefit or loan or guarantee or contract are disclosed to members at the next annual general meeting of the company.

If the directors are **not satisfied** that the criteria in sec. 187 (a) Myanmar Companies Law (2017) are met, such benefit shall require the approval of the members of the company (sec. 188 (a) Myanmar Companies Law (2017)).

Before the notice convening the relevant meeting is given, the company must file the following documents with the Registrar:

- a proposed notice of the meeting setting out the proposed resolution;
- a proposed explanatory statement setting out all information known to the company that is material to the decision on how to vote on the resolution, including details of the director or related party receiving the payment or benefit or loan or guarantee or contract and details of such the payment or benefit or loan or guarantee or contract; and
- any other document that is proposed to accompany the notice convening the meeting and that relates to the proposed resolution.

The Registrar will have 28 days to determine whether the company may release of the notice of meeting to members. If the Registrar determines that the notice may be sent, or a determination is not issued within this period, then the company may send the notice of meeting. The Registrar may direct the company to clarify or vary any document submitted where this is considered reasonably necessary for the protection of members. Further, the Registrar may determine that the release of the notice of meeting must not occur if satisfied on reasonable grounds that the requirements of sec. 188 (b) (ii) Myanmar Companies Law (2017) have not been met or for similarly significant cause. The director or relevant related party must not vote on the resolution at the general meeting (unless pursuant to a proxy from another person which directs them how to vote). Finally, the company must lodge with the Registrar a copy of the relevant resolution within 14 days after it is passed.

II. Directors' Duties

The duties of a director can be broadly divided into three categories:

- fiduciary duties,
- duties of care, skill and diligence, and
- statutory duties.

The previous Companies Act (1914) contained only few provisions on directors, such as appointment, replacement and limitation of powers. Their duties mostly originated from other Myanmar legislation, Myanmar case law and general common law. The Myanmar Companies Law (2017) provides detailed provisions on duties and responsibilities of directors, including among others remuneration, indemnity, insurance, and focusing fiduciary duty to the company.

1. Fiduciary Duties

The fiduciary duties which a director owes to a company essentially concern the duty to act in good faith.

This duty encompasses:

- acting in the interest of the company; and
- avoiding conflict of interest.

1.1 Acting in the Interest of the Company

This area of a director's fiduciary duties demands that a director only takes decisions or makes transactions which will be of benefit and furtherance to the company's overall interests. In other words, no other interest should ever be held in higher regard than the interests of the company itself.

Example: *A company wishes to find a buyer for a certain product and the director withholds from telling the company that such a buyer exists. The test used to determine, whether the director was acting in the interest of the company, is: 'whether an intelligent and honest man in the position of the director of the company could have, in the whole of the existing circumstances, reasonably believed that the transactions were for the benefit of the company.'*

Therefore, a decision or transaction made by a director which is later found not to have been in the company's interests may nevertheless be considered not to have been a breach of fiduciary duty, if a reasonable person in the director's position would have done the same.

The various interests which a director must consider when making such decisions and/or transactions on behalf of the company, include:

- the company as a corporate entity;
- the different classes of members of the company;
- if the company is insolvent, the interests of its creditors; and
- if there is a group of companies, the interests of all such companies in the group.

1.2 Acting honestly in Conflict of Interest Situations

A director shall not make personal profits out of a transaction through the company in which he is a fiduciary. The only way in which he may do so is via a sufficient disclosure and approval by the company.

The duty to avoid conflicts of interest goes beyond the mere making of profits. For instance, a conflict of interest can also arise where:

- the interests of the company whom the director owes his duties, conflict with any of his personal interests; or
- the interests of the company, whom the director owes his duties, conflict with any other third party whom the director acts for.

Below a non-exhaustive list of situations, in which a conflict of interest may arise:

- director using company property – where a director uses company property to further his own interest and/or making profit, he will have caused a conflict of interest;
- improper use of information by the director – a director shall not use information which he has available to him, as director, to make a profit for himself unless disclosure is so made to the company; or
- competing with the company – A director shall not be in a position where his fiduciary duties to one company are compromised by his acting in the interest of another.

2. Duties of Care, Skill and Diligence

2.1 Duty to be Skilful

The level of skill may vary with regard to the activities of the company, and a distinction may be made between non-executive and executive directors.

2.2 Duty of Care

Establishing, whether a director is careful does not depend on his qualification or the activity of the company. The director should take business decisions after taking all available information into account and act with the standard of care that can reasonably be expected of a person who carries out the particular functions which he has in relation to his company. The necessary standard of care is an objective one. It is determined by looking at a fictive reasonable director in the same position.

It should be noted, though, that directors are allowed to delegate their powers and to trust their delegates as well as other directors to carry on their functions properly. Directors may, in general, especially rely on reports, statements, financial data and other information prepared or supplied, and on expert advice given by employees and professional advisers whom

the directors on reasonable grounds believe to be reliable and competent.

This applies, however, only where there is no sensible reason for suspicion. A director who relies on others has to act in good faith, make proper inquiries where the need for such inquiries is indicated by the circumstances and must not have knowledge that his reliance is unwarranted. Further, directors are not obliged to supervise their co-directors and cannot be held responsible for their acts or omissions.

2.3 Duty to be Diligent

Directors have to exercise reasonable diligence in the discharge of the duties of their office. The term “diligence” does not have a clear-cut definition. What is reasonable may depend on the type of director and the activity of the company.

2.4 Non-Executive Directors

In relation to non-executive directors, the standard to be accorded may be lower:

- a non-executive director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience;
- a non-executive director is not bound to give continuous attention to the company's affairs; i.e., his duties are of an intermittent nature; and
- a non-executive director is entitled to trust an official to perform such duties as can be properly entrusted to him in accordance with the constitution of the company.

3. Statutory Duties

There are numerous statutory provisions in Myanmar's laws and regulations which relate to the duties and liabilities of a company. Generally, the directors as representatives of the company must ensure compliance with all applicable laws and regulations.

Statutory duties of companies to be observed by directors may include:

- obligations under the Companies Law, such as holding of AGMs, preparation of annual accounts, maintenance of records and registers, maintenance of a registered address, etc.;
- obligations under Tax and Social Security Laws concerning the payment of corporate income and commercial tax, with-

holding tax, stamp duty, employee income tax, employee social security, etc.; or

- obligations under Labour Laws, such as execution of proper employment contracts, payment of minimum wage, compliance with leave, medical leave, overtime regulations, etc.

4. Codified Duties under the Myanmar Companies Law (2017)

The Myanmar Companies Law (2017) codifies certain obligations and duties of the board of directors and individual directors:

- duty to act with care and diligence;
- duty to act in good faith and in the company's best interest;
- duty regarding the use position;
- duty regarding the use of information;
- duty to comply with the Companies Law and the constitution;
- duty to avoid reckless trading;
- duty in relation to obligations of the company; or
- duty to disclose material personal interests.

4.1 Act with Care and Diligence

Pursuant to sec. 165 Myanmar Companies Law (2017), directors and officers must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- were a director or officer of the company in the company's circumstances; or
- occupied the office held by, and had the same responsibilities within the company as, the director or officer.

Directors and officers who, in the exercise of their powers and discharge of their duties, make a decision to take, or not take, an action in relation to the operation of the company's business, are taken to meet the requirements of above sub-section, and any like legal or equitable duties, and the duty in sec. 170 Myanmar Companies Law (2017), if they:

- make the decision in good faith for a proper purpose;
- do not have a material personal interest in the subject matter of the decision;
- inform themselves about the subject matter of the decision to the extent they reasonably believe to be appropriate; and
- rationally believe that the decision is in the best interests of the company.

4.2 Act in Good Faith and in the Company's Best Interest

Pursuant to sec. 166 Myanmar Companies Law (2017), directors and officers must exercise their powers and discharge their duties in good faith and in the best interest of the company and for a proper purpose.

A director or officer of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director or officer, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company. A director or officer of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director or officer, if expressly permitted to do so by the constitution of the company and with the prior agreement of the members (other than its holding company), act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company. A director or officer of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

When exercising their powers and discharging their duties, directors and officers may have to regard:

- the likely long-term consequences of the decision, including its impact on the company's employees, company's business relationships with customers and suppliers, environment and company's reputation; and
- the need to act fairly as between members of the company.

4.3 Use of Position

Pursuant to sec. 167 Myanmar Companies Law (2017), directors and officers must not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the company.

4.4 Use of Information

Pursuant to sec. 168 Myanmar Companies Law (2017) directors and officers must not improperly use information obtained

by them as directors or officers to gain an advantage for themselves or someone else or cause detriment to the company.

4.5 Compliance with the Law and Constitution

Pursuant to sec. 169 Myanmar Companies Law (2017) a director or officer must not act, or agree to the company acting, in a manner that contravenes the Myanmar Companies Law (2017) or the company's constitution.

4.6 Avoid Reckless Trading

Pursuant to sec. Myanmar 170 Companies Law (2017) directors and officers must not cause or allow the business of the company to be carried on, or agree to the business being carried on, in a manner likely to create a substantial risk of serious loss to the company's creditors.

4.7 Duty in Relation to Obligations

Pursuant to sec. Myanmar 171 Companies Law (2017), directors and officers must not agree to a company incurring an obligation unless that director or officer believes at the time on reasonable grounds that the company will be able to perform the obligation when required to do so.

4.8 Disclose Interests

Pursuant to sec. Myanmar 172 Companies Law (2017), a director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless:

- the interest:
 - arises because the director is a member of the company and is held in common with the other members of the company;
 - arises in relation to the director's remuneration as a director of the company;
 - relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members;
 - arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company;
 - arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to above sub-paragraph;
 - relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of

the company (but only if the contract does not make the company or a related body corporate the insurer);

- relates to any payment by the company or a related body corporate in respect of an indemnity permitted under sec. 181 Myanmar Companies Law (2017) or any contract relating to such an indemnity; or
- is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate;
- the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company in accordance with this section and the notice remains valid; or
- the company only has one director and that director, and any related parties of the director, are the only shareholders of the company. If the sole director company has additional shareholders, then a notice required to be given under the above sub-section must be given to those shareholders.

Notice of an interest may be given from time to time as required or the director of a company who has an interest in a matter may give the other directors standing notice of the nature and extent of the interest. The standing notice may be given at any time and whether or not the matter relates to the affairs of the company at the time the notice is given, provided that if a new director is appointed to the board any standing notices that have been previously given must be refreshed at a new meeting of the board. A standing notice will also cease to be valid if the nature or extent of the interest materially increases above that disclosed in the notice.

Any notice must:

- give details of the nature and extent of the interest; and
- be given at a board meeting and recorded in the minutes.

4.9 Duties regarding Qualification of Directors

- Pursuant to sec. 175 (a) Myanmar Companies Law (2017) it shall be the duty of every director who is by the company's constitution required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after the director's appointment, or such shorter time as may be fixed by the constitution.

4.10 Duties regarding Registration of Directors

- Pursuant to sec. 189 (b) Myanmar Companies Law (2017) each director must provide the company with the required particular information such as name in full, date of birth, usu-

al residential address, nationality, business occupation (if any) and any other directorships.

4.11 Non-Compliance

Pursuant to sec. 190 Myanmar Companies Law (2017), in case of non-compliance, every director and any other person who is a party to a default shall be liable to a fine of 10,000,000 kyats. Without limiting the liability to a fine, every director and any other person who is knowingly and wilfully a party to the default may also be:

- subject to such additional penalty as a Court may determine in accordance with this Law if the default has involved dishonesty on the part of the director or other person; and
- on the application of DICA disqualified from acting as a director or other officer of a company for such period as may be determined by a Court.

Additional fines may apply to directors in respect of responsibilities of the company under other laws, such as tax and labour laws.

5. Reliance on Information

Exemptions from liability for non-compliance may apply if the director or officer relied on information or professional or expert advice. Pursuant to sec. 191 Myanmar Companies Law (2017), a director or officer shall be presumed not to have breached his or her duties if the director or officer acted on the reasonable reliance of information or advice, prepared/given by:

- an employee of the company believed on reasonable grounds to be reliable and competent in the relevant matters;
- a professional adviser or expert believed on reasonable grounds to be competent in their area of expertise;
- another director/officer within the director's/officer's scope of authority; or
- a committee of directors on which the director did not serve in respect of matters within the committee's authority;

and the reliance was made:

- in good faith; and
- after an independent assessment of the information or advice given, having regard to the directors knowledge of the company and the complexity of the structure and operations of the company.

This presumption may be rebutted if the person bringing the proceedings is able to prove otherwise.

6. Indemnities and Insurance

Pursuant to sec. 180 Myanmar Companies Law (2017), provisions, whether contained in the constitution of a company or in any contract with a company or otherwise, for exempting any director or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor, from any liability to the company which by virtue of this Law or any other applicable rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void.

A company or a related body corporate must not, directly or indirectly, indemnify a person against any of the following liabilities incurred as a director, officer or auditor of the company:

- a liability owed to the company or a related body corporate; or
- a liability that is owed to someone other than the company.

It may, however, indemnify a person for a liability against legal costs incurred in defending an action for a liability incurred as a director, officer or auditor of the company unless the costs are incurred:

- in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under above sub-section;
- in defending or resisting criminal proceedings in which the person is found guilty;
- in defending or resisting proceedings brought by the Registrar or a liquidator for a Court order if the grounds for making the order are found by the Court to have been established; or
- in connection with proceedings for relief to the person under this Law in which the Court denies the relief.

Pursuant to sec. 182 (a) Myanmar Companies Law (2017), a company or a related body corporate must not pay, or agree to pay, directly or indirectly, a premium for a contract insuring a person who is or has been a director, officer or auditor of the company against a liability (other than one for legal costs) arising out of:

- conduct involving a wilful breach of duty in relation to the company; or
- a contravention regarding use of position or use of information.

C. Nominee Officer Services

For the provision of a nominee resident officer, we charge a fee of USD 300 (net) per month. We may ask for a standard indemnity from our clients covering the strict personal liability of our nominees for certain corporate obligations of the company in Myanmar.



Alexander Bohusch
Rechtsanwalt/Attorney-at-law (Germany)
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
alex.bohusch@luther-lawfirm.com



Fabian Lorenz, M.A.
Rechtsanwalt/Attorney-at-law (Germany)
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
fabian.lorenz@luther-lawfirm.com



Fanny Tatin
Avocat/Attorney-at-law (France)
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
fanny.tatin@luther-lawfirm.com



Thi Ha
Higher Grade Pleader
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
thi.ha@luther-lawfirm.com



Maung Maung Min Khaung
Higher Grade Pleader
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
maungmaung.minkhaung@luther-lawfirm.com



Saw Thaw Tu Htoo
Higher Grade Pleader
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
saw.thaw.tu.htoo@luther-lawfirm.com



Nang Kay Si Kham
Higher Grade Pleader
Luther Law Firm Limited
Myanmar
Phone +95 1 500021
nang.kay.si.kham@luther-lawfirm.com

Imprint

Luther Rechtsanwaltsgesellschaft mbH, Anna-Schneider-Steig 22,
50678 Cologne, Phone +49 221 9937 0, Fax +49 221 9937 110,
contact@luther-lawfirm.com

Editor: Alexander Bohusch, Rechtsanwalt/Attorney-at-law (Germany),
Luther Law Firm Limited, Luther Corporate Services Limited, Uniteam Marine Of-
fice Building, Level 8, Unit #1, 84 Pan Hlaing Street, Sanchaung Township
11111 Yangon, Myanmar, Phone +95 1 500 021, Fax +95 1 502 852,
HP (MM): +95 9 425 0136 00, HP (SG): +65 9 829 1829, alexander.bohusch@
luther-lawfirm.com

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contact@luther-lawfirm.com

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