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## THE DICA CLARIFIES CORPORATE APPROVAL OF DIRECTOR AND RELATED PARTY TRANSACTIONS

Related party transactions are a frequent occurrence in Myanmar corporate life. When one company transacts with another company with which it has some sort of connection through shareholders, directors, family etc., the possibility exists that this transaction will undergo a special approval procedure under the Myanmar Companies Law 2017 ("MCL"). We often see this with transactions relating to loans, guarantees, sales, services within a corporate group with involvement of a group member.

However, there has been confusion since the MCL's introduction about the approval process. There are two sections (s. 187 and s.188) that address related party transactions, with one approval required from the board of directors and another from the members of the company (which also carries a requirement to register the approval with the Directorate of Investment and Company Administration ("DICA"). DICA has now clarified that only one of the two approval procedure needs to be followed, not both.

### Board approval procedure under s. 187

- The board of a company must pass a resolution in order to authorize every financial benefit given to a director or related party. Directors who vote in favor of authorizing a financial benefit have

### Highlights of this note

- ▶ Board approval procedure under s. 187:
- ▶ Member approval procedure under s. 188:
- ▶ Different interpretations possible
- ▶ Clarification

*to sign a certificate stating that: (i) the transaction is in the best interest of the company, (ii) the transaction is reasonable in circumstances; and (iii) the terms and conditions of the transactions are made on an arm's length basis.*

- Particulars of the related party transaction are entered into the register of interests (s. 189)
- Section 187 (g) mandates that the directors must ensure that the particulars of the financial benefit are disclosed to the members at the next annual general meeting.

### Member approval procedure under s. 188

- A notice for a proposed meeting must be submitted to DICA prior to delivery to the shareholders. Additional to the notice, the company needs to submit

a proposed explanatory statement with all information which are relevant on how to vote on the resolution, details of the benefited director or related party and details of the financial benefit. DICA has 28 days to approve or reject the notice.

- If DICA approves or does not reject the notice, the company can send out the notice to the shareholder, who must approve the financial benefit in the general meeting. The benefited director or related party may not vote in that meeting.
- If the shareholder approved to provide a financial benefit to a director or related party, the company must lodge the resolution with DICA within 14 days the resolution has passed.

### Different interpretations possible

There have been differing opinions regarding whether both approvals are required. A strict reading of the law says that a company may have to use both approval procedures. This is because the text of s. 187 and s. 188 as drafted never actually states that these procedures are alternatives. The law just states that both procedures which results in somewhat less support for the interpretation that s. 187 and s.188 are mutually exclusive.

On its face, s. 188 says that the board of a company may authorise a payment as per s. 187 a) "if it is approved by members under this section" with the caveat of "subject to any restrictions contained in the constitution of the company, applicable provisions of this Law and any

other applicable law". Unfortunately; (i) the same caveat "subject to applicable provisions of this Law" is found in s. 187 a) itself as well, so we still don't know if s. 187 has priority over s. 188 or vice versa and (ii) there is no reference to s. 187 per se within s. 188. In other words, you can read s. 187 as "The board of a company may, subject to any restrictions contained in the constitution of the company, applicable provisions of this Law [being, the member procedure in s.188?] and any other applicable law, authorise..."

Is it at all possible to apply both s.187 and s. 188? Applying both essentially means that member approval is sought and granted before the directors feel that they are on sufficiently solid ground to proceed with the related party transaction. Directors are certainly allowed to do that. Therefore, there is nothing inherently impossible or non-sensical about pursuing a member process before a director decision, even if it is not required for the transaction.

Is there anything in the text that suggests that s. 187 and s. 188 need not both be followed? Possibly. A rare clear clue is s.187 g) which refers to a disclosure to be made at the next annual general meeting ("AGM"). If s.187 and s.188 are both meant to be followed, there would already been an extraordinary member meeting with a vote on this issue before s. 187 was even applied. In that case, why should the directors have to disclose it again? Logically, this would be unusual to say

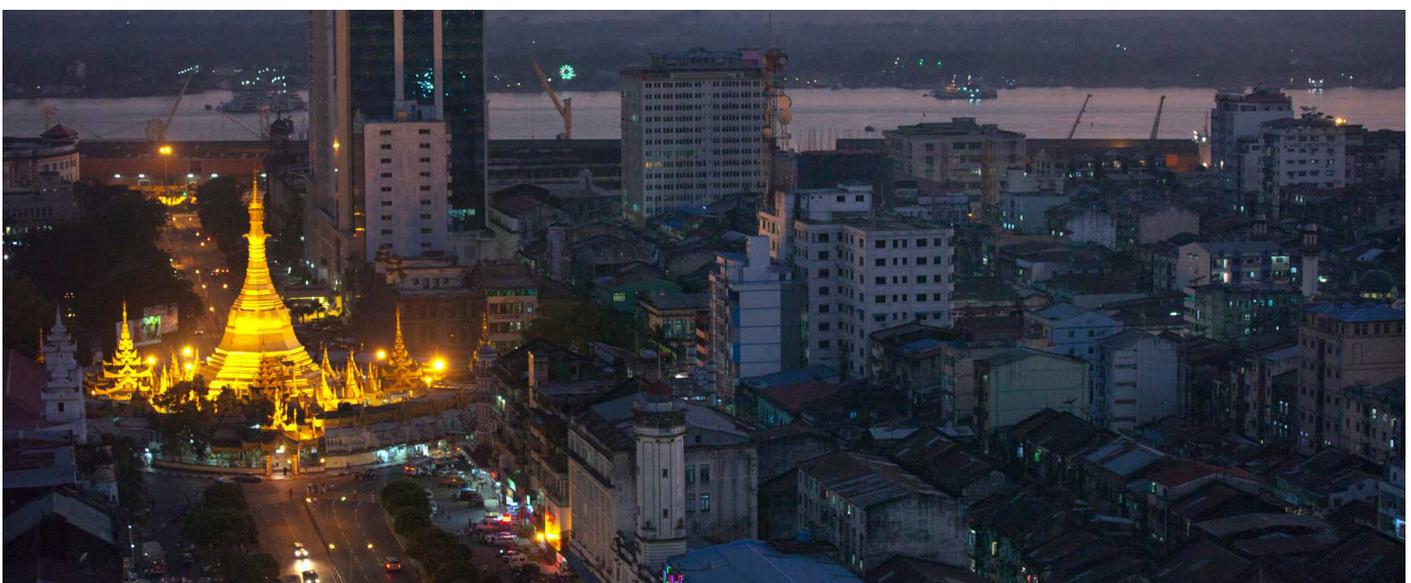
the least. However, there is nothing inherently impossible or manifestly non-sensical about making your directors do a disclosure of the details again at an AGM, perhaps because it is a more regular meeting than the extraordinary one under s.188.

So, to sum up, although the MCL explicitly states that when a board wants to authorise such a transaction, it needs the member's approval, it also states that this is subject to the other applicable rules in the law. The counter argument, s. 187 itself, also states that the board authority is subject to the other applicable rules, possibly s.188 itself. Neither s. 187 nor s. 188 state anything explicit about their relationship to each other. Logically, requiring a disclosure at a member's meeting, again, after it was already approved, does not seem to make sense. However, there is nothing inherently impossible or non-sensical about imposing a requirement for the board to disclose, at the next AGM.

The better interpretation, it seemed to us, is that the procedures are alternatives, but the lack of certainty was problematic. So, a clarification from DICA is very welcome if not necessary.

### Clarification

Now, the DICA's new Notification No.2/2020 dated 3 January 2020 ("Notification") expressly provides that "Approval by members under section 188 is only necessary where board approval is not given under section 187 of the Myanmar Companies



Law", and "Submission of forms on MyCO is not necessary where board approval is given in accordance with section 187 of the Myanmar Companies Law." Thus, submission of DICA prescribed forms (Form D-2A and Form D-2B) to MyCo under DICA is only required when following the procedure for member approval in a related party transaction.

Furthermore, the Notification states that "the board of a company may authorize the payment of remuneration or other benefits to a director, former director or a related party in one of the following circumstances: (a) if the board is satisfied that it meets the criteria set out in sub-section 187(a)(vi) of the Myanmar Companies Law; or (b) if it is approved by members of the company under section 188 of the Myanmar Companies Law."

Moreover, it lays down the steps for board approval and member approval and states that "approval by the board of a company under s. 187(a) (vi) must comply with the requirements set out

in sections 187 (b), (d) and (g)....and "approval by members under section 188 must comply with the requirements set out in sub-sections 188(b)-(g)." The notification is silent on any retroactive effect and there is no specification regarding timing for its application. On this basis, it should be effective immediately and apply going forward.

Therefore, if board approval has been provided, there should be no implications from not complying with the requirement to provide (additionally) member approval or make filings with the DICA.

Please refer to the DICA's Notification regarding related party transaction on its website here.

[[https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/notification\\_english.pdf](https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/notification_english.pdf)]

## DOWNLOADS



<http://bit.ly/2sSXvlp>



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