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NO&T Asia Legal Review 創刊のご案内

長島・大野・常松法律事務所（NO&T）は、日々目まぐるしく移り変わるアジア各国の法実務に関する最新の情報をお届けするべく、今般 NO&T Asia Legal Review（月刊英文ニュースレター）を創刊いたしました。NO&T Asia Legal Review は当事務所の各国アジアオフィスに所属するアジアの弁護士が執筆しており、日本人の皆様だけではなく、貴社内でご勤務されている日本人以外の方にもお読みいただけるよう英文で作成しております。ご関心のある方には是非ご転送いただき、今後直接ご送付できるようこちらからご登録いただければ幸いです。

Issue of "NO&T Asia Legal Review"

We, Nagashima Ohno & Tsunematsu ("NO&T"), are pleased to inform that we have launched a monthly English newsletter, "NO&T Asia Legal Review", to share updates on the rapidly changing laws and legal practices in Asian countries. The articles in the NO&T Asia Legal Review are written in English by Asian qualified lawyers, who are working in our Asian offices, not only for the Japanese expatriates but also for non-Japanese speakers who are interested in this kind of legal information. Please kindly forward this NO&T Asia Legal Review to your colleagues and ask them to register here if they are interested to receive this newsletter so that we can directly send it to them hereafter.

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This issue covers the following topics:

India

KEY AMENDMENTS TO THE ANTI-CORRUPTION LAW

インドの汚職防止法が 30 年ぶりに改正され、本年 7 月 26 日に施行された。改正汚職防止法では、これまで収賄側だけが処罰の対象とされていた贈収賄規制の枠組を変更し贈賄側も処罰の対象にするとともに、法人も贈賄罪の主体となり得る旨の規定を追加した。今後、民間企業が贈賄で摘発される事案が発生することが予想され、インドでの事業展開においてはより一層贈収賄規制に留意する必要がある。

Background

India's primary anti-corruption legislation, the Prevention of Corruption Act, 1988 ("**PCA**") has been significantly amended by the Prevention of Corruption (Amendment) Act, 2018 (the "**Amendment Act**"). The Amendment Act has been brought into force with effect from 26 July 2018.

The Amendment Act attempts to bring India's anti-corruption law in compliance with the United Nations Convention against Corruption 2005, which was ratified by India in 2011. For the first time, provisions relating to prosecution of a bribe giver and corporate liability whereby commercial organizations and officials can be held accountable for bribery related offences, have been introduced.

Key Amendments

1. Offering or Giving of Undue-Advantage:

Prior to the Amendment Act, the PCA only penalized the acceptance of bribery by a public servant and did not contain a specific provision for punishing a person who gives or promises to give an undue advantage to a public servant. A person giving a bribe could only be held accountable for abetting an offence; however this option was used rarely exercised. The Amendment Act has now introduced a distinct section that makes the promising or giving of undue advantage to a public servant or to any other person with the intention of inducing a public servant to improperly perform his public duty, a cognizable offence, punishable by 7 (seven) years imprisonment or fine, or both. The section covers both active and passive bribery i.e. not just the actual giving but also promising or offering an undue advantage would constitute an offence. To establish guilt of the person committing the offence, it is immaterial whether or not the public servant accepted such undue advantage. The Amendment Act also clarifies that it is immaterial, for a person to be prosecuted under this provision, whether the undue advantage was given directly or via a third party. Further, the form of undue advantage offered or given is also not relevant since the law prohibits any form of gratification.

A limited carve out has been provided to protect persons who are compelled to give a bribe in that if a person is forced / coerced to give an undue advantage but reports the same to the concerned authority within 7 (seven) days of doing so, he shall not be liable for the same.

2. Meaning of 'Undue Advantage':

The scope of 'undue advantage' has been clarified and the Amendment Act defines 'undue advantage' to mean any gratification other than legal remuneration that a public servant is permitted to receive. It further explains that 'gratification' is not limited to pecuniary gratifications or to gratifications estimable in money. This entails that even non-monetary considerations such as gifts and favours to family members, entertainment or travel benefits, employment offers or other benefits not estimable in money can also fall within the ambit of undue advantage. It is significant to note that the PCA makes no specific distinction between 'facilitation payments' and other forms of bribery. Thus, any undue advantage including facilitation payments to public servants is prohibited by the PCA.

3. Bribery by Commercial Organizations:

The Amendment Act introduces the concept of corporate liability and provides that a commercial organization would be guilty of committing an offence of bribery under the PCA where any person associated with such commercial organisation gives or promises to give an undue advantage to a public servant with an intention of obtaining/retaining business or an advantage in conduct of business for such commercial organisation. Such an offence would be punishable with a fine, the quantum of which has so far not been prescribed.

A 'commercial organisation' has been defined to mean (i) a body corporate or partnership firm incorporated in India which carries on business in India or outside India; as well as (ii) a body corporate or partnership firm or association of persons incorporated or formed outside India but which carries on business or part of its business in any part of India. A 'person associated with a commercial organisation' includes an employee, agent or subsidiary of such organisation or any person who performs services for and on behalf of the commercial organisation. This provision has far reaching effects and companies conducting business in India must be mindful of the potential liability that could arise not only by actions of their employees but also external agents such as contractors, distributors, consultants and other intermediaries.

Similar to the defence available under the UK Bribery Act, a commercial organisation can defend itself when accused of any offence under the PCA, if it proves that it had 'adequate procedures' in place to prevent persons associated with the commercial organisation from carrying out such conduct. The Amendment Act requires the Government to formulate and prescribe guidelines on what would constitute 'adequate measures'. These guidelines are still to be issued.

Another pertinent provision that must be highlighted is the introduction of managerial liability. A director, manager, secretary or other officer of an organization can be held responsible and criminally liable if an offence under the PCA is proved to have been committed with the consent or connivance of such director, manager, secretary or officer. The official can be subject to imprisonment for a term which can range between three to seven years and a fine or both. Accordingly, companies conducting business in India ought to familiarize their senior officials of the consequences of wrongdoing under the PCA.

4. Attachment of Property:

The Amendment Act gives powers to the enforcement authority to confiscate, attach and administer money or property procured by means of an offence committed under the PCA.

5. Time flame for Trial:

The Amendment Act prescribes that a trial in relation to an offence under the PCA should, to the extent possible, be completed within 2 (two) years. This period can be extended by 6 (six) months at a time and up to a maximum of 4 (four) years in aggregate subject to proper reasons for the same being recorded.

Conclusion

The PCA in its original form saw very limited success in actually combating corruption in India. The Amendment Act is clearly a move in the right direction to bring the anti-corruption law of India at par with global standards.

In light of the changes introduced by the Amendment Act, it is incumbent on companies conducting business in India to ensure that appropriate safeguards are put in place against the potential risk of bribery and corruption related offences. Companies will need to assess risks and actively develop and implement internal anti-corruption and whistle blowing policies, compliance programmes, manuals and guidance notes to train and educate their employees and third party intermediaries about obligations under the PCA as amended by the Amendment Act. Third party risks must be clearly evaluated and appropriate policies must be applied on dealings with third parties. While guidance from the Government is awaited on the 'adequate measures' which must be implemented, in the meantime, companies would be well advised to follow the principles laid out by established laws such as the U.S. Foreign Corrupt Practices Act and the UK Bribery Act.

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Indonesia

THE INTRODUCTION OF NEW LICENSING SYSTEM IN INDONESIA

2018 年 7 月よりインドネシアではオンライン・シングル・サブミッション（OSS）と呼ばれる新たな許認可手続のプラットフォームが導入され、これまでの投資調整庁による事前承認型の許認可手続から事後監査型の手続に大きく舵が切られた。そこで本稿では OSS の導入による主要な変更点の概要と実務上の留意点について概説する。

Background

After a long preparation and discussion, the Indonesian government finally introduces new licensing system called *Online Single Submission* ("**OSS**") pursuant to the Government Regulation No. 24 of 2018 on Electronically Integrated Business Licensing Service which came into effect on 21 June 2018 ("**GR 24/2018**"). The OSS system is a part of President's program of ease of doing business in that the government aims to streamline the licensing procedure to carry out business in Indonesia.

According to GR 24/2018, the OSS will be administered by the OSS Administrator, namely the Indonesian Investment Coordinating Board/*Badan Koordinasi Penanaman* Modal ("**BKPM**"). However, due to certain matters, currently the system is administered by the Coordinating Ministry of Economic Affairs ("**CMEA**"). The handover of OSS administration from the CMEA to BKPM is expected to be done in November 2018.

Key Provisions

1. Establishment of OSS system:

As a mandate of GR 24/2018, the government has created the OSS system to be accessed by the user. In general the OSS system is similar to SPIPISE system which was created by BKPM used by foreign direct investment companies in Indonesia ("**PMA Company**") to store their corporate documents as well as apply for licenses or approval issued by the BKPM. The difference between OSS and SPIPISE system is now OSS can be used to apply not only for the licenses issued by the BKPM but licenses issued by other government institutions, such as ministries or local government. Hence, the company will not need to go to multiple government institutions to apply for relevant licenses as it can be conducted online through the OSS system.

2. Registration to OSS system and Business Registration Number:

In order to be able to access the OSS system, the user has to create account in OSS website and apply for Business Registration Number/*Nomor Induk Berusaha* ("**NIB**"). The NIB is a unique number attached to a company and will be used as the identification for applying the licenses through OSS system.

3. Function of NIB:

Besides serves as the OSS ID, the NIB shall be considered as (i) the company's registration certificate ("**TDP**"); (ii) the company's importer identification number ("**API**"); and (ii) the company's access number for customs matters. Therefore, by obtaining the NIB, a company is deemed to have obtained the TDP, API, and access number for customs matters.

4. Lesser Role of BKPM:

Before the introduction of OSS system, all PMA Companies irrespective of their line of businesses shall obtain business license from BKPM. However, currently BKPM is only in charge as licensing authority for the following licenses and recommendation:

a. Geothermal business license;

b. Geothermal survey and exploration license;

c. License for utilization of oil and gas data;

d. License for oil and gas survey;

e. License for oil and gas storing;
f. License for oil and gas processing;
g. License for oil and gas transportation;
h. License for oil and gas trading;
i. License to open foreign representative office for oil and gas business;
j. Mining exploration license;
k. License for terminating mining activities;
l. Mining exploration license for operational production,
m. Mining exploration license for transportation and trading;
n. Mining exploration license for processing and/or refinery;
o. Temporary mining license for transportation and trading;
p. Mining service license;
q. Property Development and Management License;
r. Housing License;
s. Granting tax facility for importation of machinery;
t. Issuing the proposal of tax holiday and/or tax allowance;
u. Representative office license;
v. License for opening branch office;
w. Recommendation to obtain limited stay visa as shareholder;
x. Recommendation on change of the status of visit permit to limited stay permit; and
y. Recommendations on change of the status of limited stay permit to permanent stay permit.

All licenses other than mentioned above shall be applied through OSS system.

5. Simplification of Establishment of a New PMA Company:

In former regime, the foreign investors who wish to establish a subsidiary in Indonesia in the form of a PMA Company must firstly submit the application to obtain the investment registration or in-principle license. Upon such submission, the BKPM would review whether the proposed investment has been in accordance with the prevailing regulations, specifically the negative list. After the issuance of the investment registration or in-principle license, the foreign investors will appear before the Indonesian notary to execute the deed of establishment and followed by the application to obtain the approval from the Minister of Law and Human Rights ("**MOLHR**"). However, after the introduction of OSS system, such investment registration or in-principle license is no longer required. Hence, the foreign investors may directly execute the deed of establishment and apply for MOLHR approval.

6. No BKPM approval for corporate actions:

Previously, any corporate actions in a PMA Company, including but not limited to increase of capital, change of shareholders, or mergers, must firstly obtain the approval from BKPM. Now, such approvals are no longer required. Thus, a PMA Company may directly process such corporate actions by passing the resolution of General Meeting of Shareholders and obtaining the approval and/or receipt of notification from the MOLHR.

7. Government is Inclined to Undertake Post-Audit Actions:

One major thing that must be taken into consideration upon the introduction of OSS system is the supervision of government is changed from pre-audit to post-audit actions. For instance, as we have explained in point No. 5 and 6, prior to the OSS regimes, the establishment and corporate actions of PMA Companies must firstly obtain the approval from BKPM. The BKPM will review whether all requirements have been fulfilled. However, in the

OSS regime, the government may firstly issue the license and the supervision will be done later. If there is a violation to the prevailing laws and regulations, the BKPM will notify such company to comply with the relevant regulations. Failing to do so may lead to the revocation of license.

8. The Company is Expected to be responsible for its OSS Account:

As the implementation of post-audit, the company is expected to be individually responsible for its OSS account and ensure that all information therein is correct and updated. For example: if there is a change of shareholders in such company, the company shall immediately update the newest information in its OSS account upon the completion of the transaction.

Conclusion

In our opinion, the OSS system has both benefit and downside for the foreign investors. In one hand, the OSS system indeed simplifies the licensing procedure so that the foreign investors may not need to submit licensing applications to various government institutions. On the other hand, the post-audit actions may cause uncertainty to the foreign investors. For example: if the foreign investors have obtained the business license and injected the money into a PMA Company, but later the government argues that such investors are prohibited to carry out such business due to foreign investment restriction, such situation will be irritating as it is very difficult to withdraw the money or find the potential buyer in a short time. In this case, although the BKPM approval is no longer required, we strongly suggest and believe that it is safer for foreign investors to firstly discuss with the BKPM or relevant authorities prior to the commencement of certain transactions to have clarity whether or not such transaction can be completed.

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Myanmar

NEW MYANMAR COMPANIES LAW: KEY PROVISIONS AND RE-REGISTRATION REQUIREMENTS

1914 年に制定されたミャンマーの会社法が実に 100 年超の期間を経て 2017 年に改正され、投資法制の改正と合わせて現代化が行われた。それと合わせて 2018 年 8 月から企業情報の電子登録システムの運用が開始されており、実務面でも大きな変更が生じていることから本稿ではこれらの変更について概観する。

Background

The new Myanmar Companies Law ("**MCL**") was signed by the President of the Union of Myanmar on 6 December 2017 to replace the Myanmar Companies Act 1914 ("**MCA**"). Directorate of Investment and Company Administration ("**DICA**") issued the Companies Regulations on 23 July 2018 and established a Myanmar Companies Online ("**MyCO**") (electronic registry system) which was launched on 1 August 2018.

The Companies Regulations 2018 provide the guidelines to be followed for conducting transactions on the electronic registry, MyCo, including filing or lodging of any document, or the submission, delivery or sending of the documents, making of any application, submission or accessing of any document or information maintained by the Registrar under MCL.

Key Provisions of the MCL

1. Meaning of Foreign Company and Overseas Corporation under the MCL:

'Foreign Company' is defined in the MCL as a company incorporated in the Union 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%. The key thing to note is that, as a corollary to the definition of foreign company, a company with a foreign shareholding under 35% is considered to be a local Myanmar company under the MCL.

Under the MCL, an overseas corporation which is defined as a body corporate outside of Myanmar is required to register with the Registrar when it intends to carry on business in the country. An overseas corporation or other body corporate is not deemed to carry on business in Myanmar merely because it holds meetings of its directors or shareholders or carries on other activities concerning the management of its internal affairs, maintains bank account, loans money, invests its funds and holds property in Myanmar and conducts an isolated transaction that is completed within a period of 30 days, not being one of a number of similar transactions repeated from time to time.

2. Residence Requirements for Directors:

According to Section 4 (a) of the MCL, a private company is required to have only one director and one shareholder (as opposed to two shareholders and directors under the MCA) and a private company requires at least three directors. MCL also requires every private company (including a foreign company) registered under the companies law to have a director (who need not to be a Myanmar citizen) ordinarily resident in Myanmar for at least 183 days in each 12 months period. A public company is required to have a Myanmar citizen director who is ordinarily resident in Myanmar. Companies existing in Myanmar are required to comply with these requirements with effect from 31 July 2019.

3. Other Key Amendments:

Below are some of the other significant changes from MCA to MCL:

Key provisions	MCA (Old Law)	MCL (New Law)
Minimum number of shareholder	2	1
Minimum number of director	2	1 (resident director)
Business Activities Clause	Required	Not Required
Company Constitution	Memorandum & Articles of Association	Company Constitution
Director's duties and liabilities	Not clearly defined	Clearly defined
Nominal or par value of share	Required	Not required
Share certificates issuance	Within 3 months	Within 28 days
Notice to Registrar on issuance of shares	Within 1 month	Within 21 days
Notice to Registrar on appointing directors of company or chief representatives of overseas corporation	Within 14 days	Directors - within 28 days Chief representatives - within 7 days
Filing of audited financial statements for overseas corporation	Annually	Within 28 days of the end of its financial year

Re-registration of existing companies and other body corporates

All the existing companies and other body corporates in Myanmar must re-register with the Registrar through MyCO within the re-registration period (six months) from 1 August 2018 until 31 January 2019. Re-registration can also be done in person by submitting relevant forms at DICA or through the MyCO.

The Registrar may serve written notices by electronic or other means on existing companies and body corporates regarding registration. If an existing company does not re-register on the electronic registry system within the re-registration period, the Registrar may strike its name off the register, and publish notice thereof in the Gazette and, on the publication in the Gazette of this notice, the company will stand dissolved, save for any liability of a director or member of the company which may continue and may be enforced as if the company has not been dissolved.

Application for re-registration: An application for the re-registration of an existing company or body corporate must be made to the Registrar in the prescribed form and must state:

(i) the full name, date of birth, gender, nationality and address of every director and any secretary of the company or body corporate;

(ii) the address of the registered office of the company or body corporate;

(iii) the address of the principal place of business of the company or body corporate (if different from the registered office);

(iv) in the case of an existing company:

A. the full name and address of every member of the company, and the number and class of shares issued to each member;

B. whether the company has an ultimate holding company; and

C. whether the company will, on re-registration, be a foreign company; and

D. any other matters set out in the prescribed form

A new incorporation certificate will be issued with the new registration number after complete application is processed by the Registrar.

It must be noted that the re-registration of an existing company or body corporate under the MCL and Companies Regulations does not create a new legal entity, affect the property rights, or obligations of the company or body corporate, affect any proceedings by or against the company or body corporate (or its members), or affect the liability of the company or body corporate for any amounts payable by way of penalty or default in respect of matters that were required to be done by any applicable law.

Conclusion

MCL is a significantly improved version of the MCA. It is now in line with companies law of jurisdictions such as the UK or Singapore. In particular, the MCL has done away the requirement of having an objects clause giving more flexibility to businesses. Further, the role and duties of directors have now been clearly defined to bring in more accountability. The requirements for disclosure of beneficial ownership address the transparency requirements to ensure that companies are not used as conduits for money laundering or other illicit activities and in general the MCL creates a more comprehensive regulatory framework for businesses in Myanmar.

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