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Memo: Duties and Liabilities of Directors of Myanmar Companies

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Content

A. Introduction

The rights, powers, duties and obligations of directors of a company in Myanmar, whether a private company limited by shares or a company limited by guarantee (together referred to as "**company**") are manifold. They originate from common law principles, from statutory law as well as from the constitutional documents of a company.

The present guidelines focus on important key areas and intend to provide directors with a general understanding of their office. To allow for a more detailed study of the subject matter, the footnotes reference Myanmar law, particularly the Companies Law (2017). It is important to understand that the constitutional documents of each company may deviate from the standard position under the Companies Law (2017). Hence, these guidelines shall always be read together with the relevant company's constitution.

B. Board and resident director

A director is an officer of a company[1]. Directors may be Myanmar citizens or foreigners. A director must be a natural person of at least 18 years[2], sound of mind[3], not be disqualified from acting as director under any applicable law[4], and not be an undischarged bankrupt[5]. A share requirement is no longer required under the law, but only necessary if required by the company's constitution[6].

It is important to note that at least one of a company's directors must be ordinarily resident in Myanmar, i.e. be a "resident director". The position of resident director of a private company can generally be assumed by a Myanmar citizen or a foreigner, as long as this person is a permanent resident of the Republic of the Union of Myanmar under an applicable law or is resident in the Republic of the Union of Myanmar for at least 183 days in each twelve month period commencing from:

- In the case of a company registered before 1 August 2018, the date of commencement of the Companies Law (2017); and
- In the case of a company incorporated under the Companies Law (2017), the date of registration of the company[7].

It is important to note that the members of the company are responsible for having a director ordinarily resident in the Republic of the Union of Myanmar 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 members are duty-bound to appoint a new resident director as soon as possible, but no later than within six months. If no such replacement is made within six months, and the business continues to operate, any member who knows that the company carries on business in contravention of this requirement may be personally held liable for the company's debts incurred during such period.

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C. Appointment of directors

Unless provided otherwise in the company's constitution, directors may be appointed by ordinary resolution passed by the members, either in a meeting (also called "**general meeting**")[8] or by resolution in writing.

Any casual vacancy occurring among the directors may be filled up by the directors, even if those directors would not at the time constitute a quorum, but the person so appointed shall be subject to approval of the members at the next general meeting of the company held after the appointment, which must be called within six months of the appointment.[9] The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in the appointment or a failure to meet any applicable qualification for appointment whether under the Companies Law (2017) or the company's constitution.[10]

1 S. 1 (c) (x) Companies Law (2017)
2 S. 175 (b) Companies Law (2017)
3 S. 175 (c) Companies Law (2017)
4 S. 175 (d) Companies Law (2017)
5 S. 175 (e) Companies Law (2017)
6 S. 175 (a) Companies Law (2017)
7 S. 1 (c) (xix) Companies Law (2017)
8 S. 173 (a) (ii) Companies Law (2017)
9 S. 173 (a) (iii) Companies Law (2017)
10 S. 176 Companies Law (2017)

D. Proceedings of the directors

The business of a company is 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 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 the Companies Law (2017) or the company's constitution.[11]

I. Proceedings

In the absence of any provisions in the law or the company's constitution, pursuant to which a decision/approval of the members is necessary, the general meeting cannot assume the powers of the board of directors or override a management decision made by the board of directors. The general meeting and the board of directors are separate organs which are sovereign with respect to their respective decision-making power.

In general, the directors are only able to act collectively, i.e. only the board of directors can represent the company and, in theory, every transaction of the company enters into has to be approved by the board of directors.

The decisions of the board of directors are embodied in board resolutions. These resolutions may be passed at a physical board meeting where directors meet in person for the despatch of business. As an alternative to a physical board meeting, a board meeting can be held as well by telephone conferencing or by other means of simultaneous communication (e.g. a videoconference via Zoom, MS Teams, Skype). The constitution may set out how board meetings are to be summoned and what the necessary quorum for the transaction of business is.

Board resolutions may also be passed in writing without a board meeting. Resolutions in writing have to be signed by all directors. Any such written resolution may be contained in a single document or may consist of several documents in like form, each signed by one or more directors.

II. Delegation of power

In practice, the board of directors may delegate its powers to act for the company and sign agreements on the company's behalf to a single director, or even to a third person. Such may be done by issuing a specific power of attorney, or by implementing management regulations stipulating the delegation and limits of authority conveyed upon management and other employees of the company.

If the directors delegate powers, they are responsible for the exercise of the powers by the delegate as if the powers had been exercised by the directors themselves, unless the directors can show that they believed at all times and on reasonable grounds that the delegate would exercise the powers in conformity with the duties imposed on directors of the company by the 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 powers delegated.

If the reasonableness of a director's reliance on information or professional or expert advice arises in proceedings brought to determine whether a director has breached one of the duties under division 18 of the Companies Law (2017) ("Directors and their powers and duties") or an equivalent duty, the director's reliance on the information or advice is taken to be reasonable if the information or advice was given or prepared by:

- An employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- A professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;
- Another director in relation to matters within the director's authority; or
- A committee of directors on which the director did not serve in relation to matters within the committee's authority; and

the reliance was made in good faith and after making an independent assessment of the information or advice, having regard to the director's knowledge of the company and the complexity of the structure and operations of the company.[12] This presumption is however rebuttable and may be disproved by the person bringing the proceedings.[13]

11 S. 160 Companies Law (2017)

12 S. 191 (a) Companies Law (2017)

13 S. 191 (b) Companies Law (2017)

E. Duties of a director

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

- Fiduciary duties,
- Duties of care, skill and diligence; and
- Statutory duties.

While the duties of directors historically originate in common law principles, the most important duties and responsibilities have been codified in the Companies Law (2017), which contains detailed provisions on duties and responsibilities of directors.

I. Fiduciary duties

A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of her office.

The word "honestly" covers a multitude of obligations which are classed as directors' fiduciary duties. This duty encompasses two basic propositions:

1. The duty to act in the interest of the company; and
2. The duty to avoid conflicts of interest.

1. Acting in the interest of the company

In the performance of her functions, a director must at all times act in what she honestly considers to be *in the company's interests* – and not in the interests of herself or some other person. Nobody else's interests may be elevated above that of the company. This is the director's leading duty. The director shall only make decisions or transactions which will be beneficial to and further the company's overall interests.

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

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

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

All transactions authorized by the board of directors must be *commercially justifiable*. This does not mean that profits have to be maximized in all cases. Even a transaction that may, at first, only lead to a financial loss for the company might be commercially justifiable, if it can, with reasonable expectation, lead to intangible benefits for the company.

> ***Example:***
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> *A donation for a charitable purpose or the making of arrangements for the benefits of a company's employees may, on the face of it, not serve the company's interests, but only the interests of the donation's beneficiary or of the company's employees. However, such an act might become commercially justifiable, if it is made bona fide to promote the company's prosperity, be it, e.g., due to an expected advertising impact coming with the donation or an expected increase in productivity of the company's employees.*

If in doubt, it can be considered best practice for directors to obtain the approval of the members, whenever they see the risk that an act might not be commercially justifiable, respectively not in the interest of their company. In principle, the members have the power to approve transactions which would otherwise amount to a breach of the directors' fiduciary duty.

Directors have to consider various interests when determining whether or not a decision or transaction benefits the interest of the company.

a. The company as a corporate entity

A transaction that is entered into honestly in the interest of the company as a corporate entity cannot be in breach of the directors' fiduciary duty, even if it might impinge the personal interests of members, creditors and employees.

> ***Example:***
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> *The directors decide to use the company's profits for new investments of the company instead of distributing them as dividends.*

b. Members

The collective interests of all members of the company may also be equated with the interests of the company. However, situations might arise in which the interests of different members conflict. If, in such a situation, it is not clear what serves the company as a corporate entity best, it may be prudent for the directors to obtain the approval of the members at the general meeting.

c. Creditors

In some cases, the interests of the creditors of the company must be taken into account.

> ***Example:***
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> *Directors may only pay dividends to members out of profits.*[14] *A director who wilfully pays or permits to be paid any dividend in contravention of this rule shall be liable to a fine of MMK 500,000. Furthermore, the director shall be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits.*[15]

d. Companies in the group

Where a company is part of a group of related companies, the question arises whether the interests of that group as a whole can be considered. Only if expressly permitted by the constitution of the company, directors of subsidiaries or joint ventures may take into account the interests of the holding company or the individual shareholders above the interest of the company (see further below).

2. Acting honestly in conflict of interest situations

As directors occupy a fiduciary office, they do have a duty to act honestly in situation where a possible conflict between their fiduciary duties and their own interests arises.

Where a reasonable person looking at the relevant facts and circumstances of the particular case would think that there was at least a sensible possibility of a conflict between the interests of the director and her fiduciary duty, the director has to provide full disclosure of this conflict to the other director or to the members of the company and obtain their approval for the intended action.[16] Otherwise, the director may be in breach of her fiduciary duty. In general, conflict of interest should be considered broadly and include, but not be limited to the directors' immediate family members, affiliates, potential outside roles and commitments, shareholding in other companies (whether competitors of not), etc.

It should be stressed that the mere fact that a director is in or gets into a position of conflict does not constitute a breach of her fiduciary duty. Rather, the breach lies in her failure to disclose the material facts. The mere sensible possibility of a conflict of interests is enough to require the director to make such disclosure. Thus, the best practice rule is: if in doubt, disclose!

Conflicts of interest are possible in cases in which a director's acting on behalf of the company involves a possible profit for the director. However, her fiduciary duty applies as well in cases where the interests of the company to whom the director is bound conflict with her personal non-financial interests or the interests of any other third party whom the director acts for or is interested in. A conflict of interest may especially arise:

- Where a director uses company property to further her own interests and/or for making profit.
- Where a director intends to use information acquired by her as the director to gain an advantage or profit for herself. In some cases, the Companies Law (2017) might consider the usage of such information "improper"[17] and prohibit it even regardless of a disclosure to and approval of the members. For example, a director who is aware of the fact that her company is facing the risk of insolvent liquidation is not allowed to use that information to protect herself or other companies of which she is the director from the consequences of the liquidation to the detriment of the creditors.
- Where a director is competing with the company. A director shall not be in a position where her fiduciary duties to one company are compromised by her acting in the interest of another.

3. Codified fiduciary duties

a. Acting in good faith and in the interest of the company

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

14 S. 107 Companies Law (2017)

15 S. 108 (b) Companies Law (2017)

16 S. 172 (iii) Companies Law (2017)

17 S. 167 and 168 Companies Law (2017)

- A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which 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.[18]
- A director of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director, 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 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.[19]
- A director of a company that is a joint venture between multiple shareholders may, when exercising powers or performing duties as a director in connection with the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which 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.[20]

Finally, in connection with the above obligations, when exercising their powers and discharging their duties, the directors may have regard to the likely long-term consequences of the decision, including its impact on the company's employees, the company's business relationships with customers and suppliers, the environment, the company's reputation, and the need to act fairly as between members of the company.[21]

b. Use of position

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

c. Use of information

Pursuant to sec. 168 Companies Law (2017), directors must not improperly use information obtained by them as directors to gain an advantage for themselves or someone else or cause detriment to the company.

18 Sec. 166 (b) Companies Law (2017)

19 Sec. 166 (c) Companies Law (2017)

20 S. 166 (d) Companies Law (2017)

21 S. 166 (e) Companies Law (2017)

d. Conflict of Interest and restrictions on voting

Pursuant to sec. 163 Companies Law (2017) and subject to the company's constitution, if a director of a company has a material personal interest in a matter that relates to the affairs of the company that is being considered at a board meeting, the director must not be present while the matter is being considered at the meeting or vote on the matter.

The said director may be present at a board meeting at which a matter that the director has a material personal interest in is being considered and voted on, 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.

Subject to the company's constitution and if the above requirements are satisfied, 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.[22]

e. Disclosure of interests

Pursuant to sec. 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;

22 S. 166 (c) Companies Law (2017)

- 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 that 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 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 members of the company. If the sole director company has additional members, then a notice is required to be given under the above sub-section to those members.

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.

It should be noted that contravention of the above by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

4. Consequences of a breach of the director's fiduciary duties

A breach of the director's fiduciary duty may have broad consequences:

- The company may seek disgorgement of any profits the director receives from a transaction, i.e. it can ask the director to surrender these profits to it.[23]
- A director may be liable to compensate the company for possible losses arising from the breach the duty of loyalty.[24]
- Finally, a director may be guilty of an offence and liable on conviction to a fine not exceeding MMK 10,000,000,[25] as well as such additional penalty as the court may determine, and be disqualified from acting as a director of a company for such period as may be determined by the court.[26]

II. Duties of care, skill and diligence

Directors shall at all times use reasonable diligence in the discharge of the duties of their office. Hence, directors have the duty to be skilful and diligent. They further owe a duty of care to their company.

1. The duty to be skilful

There is a distinction to be made regarding the level of skill and care that is required from an executive director compared to the level required from a non-executive director. Typically, an executive director will have (explicitly or impliedly) agreed to act with reasonable care, skill and diligence. Hence, the method for establishing whether an executive director has breached the duty to act with reasonable skill, care and diligence is an objective one. Her actions have to be judged not by looking at the knowledge and expertise that she or a person of her knowledge and experience might have. They rather have to be judged by looking at the objective body of knowledge and expertise that those who have the same calling as the director in question typically have.

In relation to non-executive directors, a lower standard is accorded and can be described as follows:

- In the performance of her duties, a non-executive director does not need to exhibit a greater degree of skill than may reasonably be expected from a person of her knowledge and experience.

23 S. 443 Companies Law (2017)
24 S. 442 Companies Law (2017)
25 S. 190 (a) Companies Law (2017)
26 S. 190 (b) Companies Law (2017)

- However, it is expected that a non-executive director is capable of understanding her company's affairs. She must take reasonable steps to acquire the knowledge necessary to guide and monitor the management of her company.

2. The duty of care

A director owes a duty of care to her company. She has to adhere to the standard of care that can reasonably be expected of a person who carries out the particular functions which she has in relation to her company. The necessary standard of care is an objective one. It is determined by looking at a fictive reasonable director in the same position. Nevertheless, if a director in fact possesses special knowledge (or if she held herself out to possess this knowledge), the standard will be raised.

Generally speaking, the following principles apply:

- A director has to make herself familiar with her rights and obligations under her company's constitution and under the law. In doubt, taking legal advice is recommended to make sure that the necessary expertise is available to the board.
- Directors are allowed to delegate their powers and to trust their delegates as well as other directors to carry out 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 her reliance is unwarranted.
- Directors are not obliged to supervise their co-directors and cannot be held responsible for their acts or omissions.

3. The duty to be diligent

Directors have to exercise reasonable diligence in the discharge of the duties of their office. What is reasonable may, again, depend on the type of director.

> ***Example:***
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> *If the managing director of a company does regularly not take part in board meetings, this might constitute an infringement of her duty to be diligent.*

4. Codified duties of care, skill and diligence

a. Act with care and diligence

Pursuant to sec. 165 Companies Law (2017), directors 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 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.

Directors 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 Companies Law (2017) to avoid reckless trading, 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.

b. Compliance with the law and constitution

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

c. Avoid reckless trading

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

d. Duty in relation to obligations

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

5. Consequences of a breach of the director's duties of care, skill and diligence

A director may be guilty of an offence and liable on conviction to a fine not exceeding MMK 10,000,000.[27] A director may further be subject to such additional penalty as the court may determine and be disqualified from acting as a director of a company for such period as may be determined by the court.[28]

III. Statutory duties

Statutory provisions relating to the duties and liabilities of directors can be found in various Myanmar laws, rules and regulations. In addition to the Companies Law (2017), numerous other laws, such as employment and tax laws, may specify statutory obligations to be observed by the directors. In general, it can be said that it is the directors' responsibility to ensure that their company complies with Myanmar law. If a company does not comply with Myanmar law, this may – depending on the circumstances of the case – lead to a personal liability of the directors.

Please refer to our comprehensive compliance memoranda for further information.[29]

27 S. 190 (a) Companies Law (2017)

28 S. 190 (b) Companies Law (2017)

29 Luther, "Legal Obligations of Companies under Myanmar law"

F. Excursus: related party transactions

The Companies Law (2017) contains a number of restrictions on related party transactions, which include transactions between the company and its directors.

I. Related Party Transactions

Sections 187 and 188 Companies Law (2017) contain provisions concerning transactions with directors. Related Party Transactions are enumerated in Sec. 187(a) Companies Law (2017) as:

"(i) the payment of remuneration or the provision of other benefits by the company to a director or a director's related party for services as a director or in any other capacity;
(ii) the payment by the company to a director or former director of compensation for loss of office;
(iii) the making of loans by the company to a director or a related party;
(iv) the giving of guarantees by the company for debts incurred by a director or a related party;
(v) the entering into of a contract to do any of the things set out in paragraphs (i), (ii), (iii), and (iv) or to the provision of any other kind of financial benefit to a director or a related party not otherwise regulated under this Law."

II. Definition of a Related Party

Pursuant to sec. 1 (c) (xxxiii) Companies Law (2017), a related party of a company means:

"(A) in relation to a body corporate, a person which controls the body corporate; and

(B) in relation to a person (including a body corporate):

(I) an associate of the person (other than a related body corporate of the person);
(II) a spouse, parent or child of an associate of the person; and
(III) a body corporate controlled by any of the persons referred to in sub-sections (A) or (B)(I) and (II) above."

According to the above definitions, the following persons/ entities may be considered as a related party under the Companies Law (2017):

1. "Person which controls the body corporate" (sec. 1 (c)

(xxxiii) (A) Companies Law (2017))

Pursuant to sec. 1 (c) (xxxiii) (A) Companies Law (2017), a related party includes a person who is in a position to "control" a company. The Companies Law (2017) does not provide an explicit definition of the term control. The term control typically refers to the ability to exercise decisive power over the management of the affairs of the company, the composition of the board of directors, and the decisions taken by the board of directors, whether through the ownership of voting shares or securities, by contract or otherwise.

According to the above definitions, directors shall be considered as a related parties.

2. "Associate" (sec. 1 (c) (xxxiii) (B) Companies Law (2017))

The definition of a related party includes any associates of the company. The term associate is defined in sec. 1 (c) (ii) as:

"(A) specifically, in relation to a company, means:

(I) a director or secretary of the company;
(II) a related body corporate;
(III) a director or secretary of a related body corporate;
(IV) a person who controls the company, or who is controlled by the company; and

(B) generally, in relation to a person (including a company), means:

(I) a person in concert with whom the person is acting, or proposes to act in relation to the relevant matter;
(II) a person with whom the person is, or proposes to become, associated, whether formally or informally, in any other way in relation to the relevant matter; and
(III) a prescribed person in relation to the relevant matter,

(C) does not in any case include someone who may otherwise be considered an associate under paragraphs (A) or (B) merely because they:

(I) give advice to the person, or act on the person's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; or
(II) have been appointed to as a proxy or representative of a person at a meeting of members, or of a class of members, of a company."

Related body corporate is defined as follows:

"related body corporate" of a body corporate (which includes a company) means:

(A) a holding company of the body corporate

(B) a subsidiary of the body corporate; or

(C) a subsidiary of a holding company of the body corporate;

In this respect, holding company is defined as: *"in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary;"*

And subsidiary is defined as:

(A) a company in which another company:

(I) controls the composition of the board of the first-mentioned company;
(II) is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the first-mentioned company;
(III) holds more than one-half of the issued shares of the first-mentioned company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or
(IV) is entitled to receive more than one-half of every dividend paid on shares issued by the first-mentioned company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; and

(B) a subsidiary of the first-mentioned company will also be a subsidiary of the second-mentioned company;

According to sec. 1 (c) (ii) (A) Companies Law (2017), an associate includes:

- A director or secretary of a company;
- A related body corporate (i.e. a holding company, a subsidiary, or a subsidiary of a holding company);
- A director or secretary of a related body corporate; and
- A person who controls (see above) or is controlled by the company.

Pursuant to sec. 1 (c) (ii) (B) Companies Law (2017), the term associate further includes:

- A person or company with whom the company is acting in concert or when there is in place a formal agreement to act. This could for example refer to transactions where two companies are acting in concert to acquire shares in a third company; and
- When there is in place a formal or an informal association between two companies or between a company and a person with respect to a transaction or any associated matter in relation to a transaction, these companies may be considered to be associates under sec. 1 (c) (ii) (B) Companies Law (2017).

Please note that due to the broad language used in this section, two companies forming a contractual joint venture or other kind of cooperation, may be considered as related parties.

3. "A spouse, parent or child of an associate of the person" (sec. 1 (c) (xxxiii) (C) Companies Law (2017))

Pursuant to sec. 1 (c) (xxxiii) (C) Companies Law (2017), related party includes the spouse, parent or child of an associate of a company.

4. "A body corporate controlled by any of the persons" (sec. 1 (c) (xxxiii) (D) Companies Law (2017))

A body corporate which is controlled by any of the aforementioned persons is considered a related party as per sec. 1 (c) (xxxiii) (D) Companies Law (2017).

III. Approval process for related party transactions

Approval of related party transactions may be given by the Board of Directors under sec. 187 Companies Law (2017), if the Board of Directors is satisfied that the transaction is (i) in the best interest of the company, (ii) is reasonable in the circumstances, and (iii) the terms are no worse than arm's length from the perspective of the company.

Where a transaction does not meet these requirements, the Board of Directors may only authorize a related party transaction upon members' approval pursuant to sec. 188 Companies Law (2017), prior to which the Registrar shall be notified.

1. Approval by Board of Directors

The related party transactions as defined in sec. 187 (a) (i) – (v) Companies Law (2017) can be approved by the Board of Directors as set out in sec. 187, provided that:

- The board must be satisfied, that the payment is in the best interest of the company, is reasonable in the circumstances, and the terms are no worse than arm's length from the perspective of the company; and
- The directors who vote in favor of authorizing the payment must sign a certificate confirming the above; and
- The board must ensure that any authorization is entered in the register of interests (cf. sec. 189); and
- The particulars of the payment must be disclosed to the members at the next annual general meeting.

Should any related party transactions be approved without complying with the provisions set out above the (former) director or the benefitting related party may be personally liable to the company for the amount of the payment or benefit, unless they can prove that the benefit was fair to the company at the time it was provided. If the benefit is a loan, it becomes immediately repayable to the company by the director or the related party.

2. Approval by the members and directors

If a related party transaction cannot be approved by the Board of Directors (e.g. because it is not entered into at arm's length terms, or it is not in the interest of the company), then it shall first be approved by the members of the company in accordance with sec. 188 Companies Law (2017).

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

- A proposed notice of 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. In making a determination under sub-section (c) the registrar may direct the company to clarify or vary any document submitted under sub-section (b) where this is considered reasonably necessary for the protection of 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 director or related party must however not vote on the resolution at the general meeting.

Finally, the company must lodge with the registrar a copy of any resolution under sub-section (a) within 14 days after it is passed.

G. Luther in Myanmar

Active in Myanmar since 2013, Luther is one of the largest law firms and corporate services providers in Yangon. Our international team of more than 50 professionals consist of lawyers, tax consultants, corporate secretaries and accountants from Germany, France, Italy and Myanmar.

With our "one-stop" service solution, Luther Law Firm Limited and Luther Corporate Services Limited provide a comprehensive range of services to assist and advise clients in all stages of the business lifecycle, namely, from the establishment of a Myanmar business, through on-going legal and tax advice, bookkeeping, accounting, payroll and payment administration up to the dissolution of enterprises.

We devise and help our clients to implement legal, tax and corporate compliance structures that work and let them focus on being successful in Asia's last frontier market. Myanmar's legal framework is governed by both old and new laws and regulations, as well as internal policies and practices of the Myanmar authorities. Many laws dating back to the colonial and post-independence periods are, with more or less changes, still in force. Since its political and economic opening in 2011, Myanmar has embarked on a comprehensive reform process and is currently overhauling its legal framework.

Our local and international colleagues have the necessary knowledge, experience and commercial expertise to serve our more than 600 clients in this rapidly developing country, including multinational investors, MNCs and SMEs, development organisations, embassies, NGOs and local conglomerates.

To advise each client in the best possible way, our lawyers and tax advisors – in addition to their specialised legal and tax expertise – have expert knowledge of specific industries.

Further, our team members are well connected and actively participating and holding positions in various chambers to stay abreast of the latest developments, such as the European Chamber of Commerce in Myanmar, the German Myanmar Business Chamber, the British Chamber of Commerce and French Myanmar Chamber of Commerce and Industry.

We offer pragmatic solutions and recommendations based on best practice guidelines. We never compromise on quality and we always put our clients first. Our lawyers are trained to deliver work products that comply with the highest standards and we will not settle for less.

Awards

"The Legal 500 Asia-Pacific 2022" ranked Luther Myanmar in Band 3 and shortlisted the firm as Law Firm of the Year - Myanmar

The LEGAL 500

SOUTHEAST ASIA AWARDS 2020 / 21

In 2022, both Luther Myanmar and Alexander Bohusch individually were ranked in Band 3 by Chambers Asia Pacific.

Chambers AND PARTNERS

CHAMBERS 2022

Legal advisory services

Our international and Myanmar lawyers provide comprehensive legal and tax advice in all areas of corporate and commercial law, including:

Foreign direct investment and market entry
- Support and advice on the choice of location
- Advice with regard to the appropriate market entry and restrictions under the Myanmar Investment Law
- Representation vis-à-vis regulatory authorities
- Application for permits and endorsements under the Myanmar Investment Law 2016 and the Special Economic Zone Law 2014

Establishment of a Myanmar business
- Advising on the type of entity to be established and the optimal corporate & tax structure
- Incorporation of limited companies and registration of foreign corporations (“Branch or Representative Offices“)

Corporate law, investment structuring and joint ventures
- National and international joint ventures, PPP projects
- Capital measures (increase and reduction in capital, cash and in kind)
- Advice to members of executive and supervisory boards
- Shareholders agreements, constitutions and rules of procedure
- Disputes among shareholders

M&A advisory
- Support in M&A, domestic and cross-border acquisitions by asset or share deal
- Due diligence
- Corporate restructuring measures
- Post-merger / closing integration

Finance advisory
- Banking, finance and insurance law
- Corporate finance
- Loan and security agreements
- Registrations with the Central Bank and FRD
- Legal opinions

Real estate law
- Sale and purchase agreements and leases
- Financing structures

Non-profit sector
- Advice on the appropriate legal structures for NGOs, development organisations, foundations, social enterprises and charities
- Registration of companies limited by guarantee, associations and NGOs
- Application of tax exemptions

Compliance
- Anti-corruption compliance
- Corporate governance and corporate compliance
- Labour law compliance
- Regulatory compliance
- Tax compliance

Employment and labour law
- Employment and secondment contracts, employment policies
- Registration of employment contracts with Myanmar labour authorities
- Corporate restructuring, redundancy and compensation plans

Immigration law
- Visa, long-term stay permits and foreigner registration cards
- Labour Cards
- Form C (Occupation of Residential Premises)

Contract law
- Negotiation and drafting of commercial agreements
- Registration of deeds and contracts with the authorities
- Advice and assistance on stamp duty payments

International trade and distribution law
- Registration of foreign trading companies
- Review of general terms and conditions
- Supply and procurement agreements
- Distributorship and sales agency agreements

Intellectual property law
- Development and implementation of IP protection strategies
- Registration of trademarks, designs and patents
- License agreements, research and development agreements

Tax advisory and business process outsourcing services

Our tax advisors, company secretaries and accountants support clients with a complete range of BPO services, including:

Corporate secretarial services

- Provision of personnel to assume statutory positions
  - Company secretary
  - Nominee director/officer
- General statutory compliance services
  - Advice on best practice, corporate governance and compliance with Myanmar law
  - Setting up, custody and maintenance of statutory books and registers
  - Filings with the Directorate of Investment and Company Administration (DICA) and the Myanmar Investment Commission (MIC)
  - Preparation of notices, minutes, and other documents pertaining to directors' and shareholders' meetings
  - Provision of registered office address
- Managing changes:
  - Change of name
  - Change in constitutional documents
  - Change in capital structure (transfer of shares, issuance of shares)
  - Change of shareholders, directors, representatives, auditors and company secretaries
  - Change of registered office address
- Cessation of a business
  - Liquidation of companies
  - De-registration of Overseas Corporations (Branch/Representative office)

Tax advice and tax structuring

- International tax (inbound and outbound)
- Direct and indirect taxes
- Tax structuring of M&A transactions
- Transfer pricing

Tax compliance

- Commercial tax and special goods tax
- Corporate income tax and withholding tax
- Personal income tax
- Applications for relief under Double Tax Agreements
- Liaison with the Internal Revenue Department
- Payment of stamp duty

Accounting and financial reporting

- Bookkeeping
  - Setting up the chart of accounts
  - Recording of all payments and funds received
  - Preparation of monthly bank reconciliation statements
  - Recording of all sales, purchase and trade debtors
  - Recording of prepayments and accruals
  - Recording of assets and related depreciation
  - Recording of all commercial tax (CT) on taxable purchases/supplies
  - Extraction of monthly trial balances and general ledger
- Management reports
  - Compiling of profit and loss account and balance sheet
  - Generating aged financial analysis of debtors and creditors
  - Business advisory services such as accounting reports
  - Budget preparation, comparison and analysis of key components of financial performance
  - Statutory accounting
  - Preparation of financial statements and notes to the financial statements

Human resources and payroll administration

- Processing and payment of employee expense claims
- Computation of salaries, social security contributions and personal income taxes
- Provision of payroll reports and financial journals
- Payment of salaries net of personal income tax and social security contributions
- Filing and payment of personal income tax and social security contributions
- Ensuring compliance with tax and social security reporting requirements

Payment administration

- Administration of cash funds deposited with us or in client's own bank accounts
- Account signatory services to enable settlement of company payment obligations and observance of "four eyes principle"
- Cash flow forecasting and processing of accounts receivables
- Issuance of payment vouchers and arrangement of payments

H. Luther in Asia

Expertise

Our Myanmar office works closely together with the other Luther offices in Asia and Europe. We take a holistic approach, dealing with Asia-wide compliance issues, assisting with the creation of international holding structures and ensuring tax-efficient repatriation of profits.

We provide the complete range of legal and tax advice to clients doing business in and from Asia. To offer a seamless service, we have teams in Europe as well as in Asia, led by partners with many years of experience on both continents. That way, we can immediately answer questions concerning investment decisions and provide our clients with an accurate assessment of the particularities of their projects, no matter where they are located.

Our lawyers unite substantial practical knowledge in important legal areas and cover the entire spectrum of law in Asia and beyond. We support foreign investors in the assessment of location and investment criteria, the structuring of investment projects, acquisitions and joint ventures. Finding and implementing solutions for sensitive areas like technology transfer and know-how protection also form part of our work. Alongside our clients we negotiate with future partners and local authorities and ensure the enforcement of their rights, in and out of court as well as in arbitration proceedings.

The services of our lawyers are complemented by our accountants, HR professionals and tax consultants offering all the services one would necessarily associate with a “one-stop shop” concept, from outsourced administration to accounting, payroll and tax compliance. Additionally, we provide corporate secretarial services, especially in Asian “common law” countries.

Collectively, our lawyers, tax consultants and professionals combine the competence and experience necessary to comprehensively assist comprehensively on all business matters in Asia. Our tax experts advise on individual and corporate tax compliance as well as on withholding tax issues, on Double Taxation Agreements and on complex international tax structures. Our accountants and professionals carry out the time-consuming administrative tasks of accounting and payroll functions a business must undertake, allowing our clients to concentrate on growing their business.

Singapore

Singapore is a leading international trade and financial hub. As such, it serves as Asian headquarters for many international companies operating within the Asia-Pacific region.

With a staff strength of more than 90, Luther is by far the largest continental European law firm in Singapore. More than 26 lawyers from Singapore, Germany, France and other jurisdictions cover the full range of corporate and commercial legal work as well as the structuring of investments within South and South East Asia.

Our team is supported by excellent local Singaporean lawyers, notary publics, tax advisors, accountants, corporate secretaries and other professionals.

Shanghai

Shanghai is the main hub for doing business in China, and with a team of more than 20 international lawyers, Luther is the largest German-speaking law firm in the city. Our China team consists of German and Chinese legal experts most of whom have over a decade of experience in developing and entering the Chinese market.

Luther Shanghai is fully authorised to offer legal services including litigation and provides advice on all questions of Chinese law. Our legal team is supported by Chinese tax advisors, accountants, corporate secretaries and other professionals.

Region

Our two principal Asian offices in Singapore and Shanghai are complemented by offices and teams in Yangon (Myanmar), Bangkok (Thailand), Delhi-Gurugram (India), Ho Chi Minh City (Vietnam), Kuala Lumpur (Malaysia) and Jakarta (Indonesia).

This network of Luther offices is further strengthened by the long-established business relationships that we have successfully developed both locally and with our regional partners in Australia, Hong Kong, Japan, New Zealand, the Philippines and South Korea.

Hits the mark. Luther.

Luther Rechtsanwaltsgesellschaft mbH is one of the leading corporate law firms in Germany. With some 420 lawyers and tax advisors, we can advise you in all fields of German and international corporate law. In addition to having offices in every economic centre throughout Germany, we are also present in 11 locations abroad: in Brussels, London and Luxembourg in Europe, and in Bangkok, Delhi-Gurugram, Ho Chi Minh City, Jakarta, Kuala Lumpur, Shanghai, Singapore and Yangon in Asia.

Our advisory services are tailored to our clients' corporate goals. We take a creative, dedicated approach to achieving the best possible economic outcome for each of our clients. The name "Luther" stands for expertise and commitment. With a passion for our profession, we dedicate all our efforts to solving your issues, always providing the best possible solution for our clients. Not too much and not too little – we always hit the mark.

We know how crucial it is to use resources efficiently and to plan ahead. We always have an eye on the economic impact of our advice. This is true in the case of strategic consulting as well as in legal disputes. We have complex projects on our agenda every day. At Luther, experienced and highly specialised advisors cooperate closely in order to offer our clients the best possible service. Thanks to our fast and efficient communication, permanent availability and flexibility, we are there for you whenever you need us.

Luther has been named "Law Firm of the Year: Germany 2021" and also "European Law Firm of the Year 2021" by The Lawyer, one of the most well-known legal magazines worldwide.

Luther Myanmar is ranked in the Asia Pacific Guides 2022 of Chambers and Legal 500.

About unyer.

unyer, founded by Luther and Fidal in 2021, is a global organisation of leading international professional services firms. Besides law firms, unyer is also open to other related professional services, especially from the legal tech sector. unyer is based in Zurich as a Swiss Verein. unyer is globally connected but has strong local roots in their respective markets.

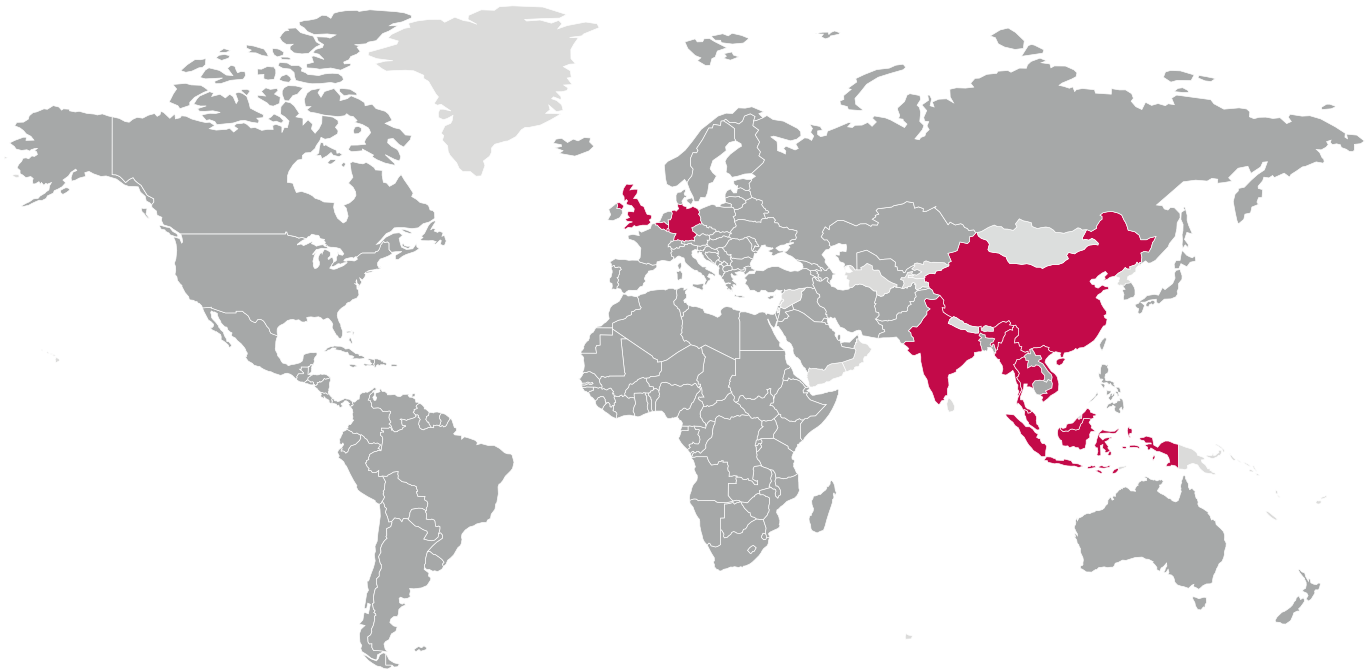
unyer has an exclusive approach and only accepts one member firm from each market. unyer members offer its clients full services across all jurisdictions with a compelling industry focus. The organisation has an annual turnover of more than EUR 650 million and includes over 2,550 lawyers and advisors in more than 10 countries in Europe and Asia. In September 2021, Pirola Pennuto Zei & Associati joined the international organisation. In the spring of 2023, the Austrian law firm KWR joined the group. www.unyer.com

MEMBER OF unyer

Our locations

We have a global outlook, with international offices in 11 key economic and financial centres in Europe and Asia. We also maintain close relationships with other commercial law firms in all relevant jurisdictions. Luther is a founding member of unyer (www.unyer.com), a global organisation of leading professional services firms that cooperate exclusively with each other. This way, we ensure a seamless service for our clients throughout their demanding international projects.

Our partner firms are based in Africa, Australia and New Zealand, Europe, Israel, Japan and Korea, the Middle East, Russia and the CIS, South and Central America, the US and Canada.



Luther locations
Best friends

Our locations

Bangkok
Berlin
Brussels
Cologne
Delhi-Gurugram
Dusseldorf
Essen
Frankfurt a.M.
Hamburg
Hanover
Ho Chi Minh City
Jakarta
Kuala Lumpur
Leipzig
London
Luxembourg
Munich
Shanghai
Singapore
Stuttgart
Yangon

Our awards

JUVE

In the 2022/2023 JUVE Guide to Commercial Law Firms, 52 lawyers from Luther were recommended, and 10 of these were also listed as “leading advisors”. The legal publisher JUVE ranked Luther in 31 areas of law. In 2022, Luther was nominated for the JUVE award “Employment Law” as well as “Real Estate” and was named “Law Firm of the Year” by JUVE in 2019. In the past, Luther already won the JUVE award “Law Firm of the Year 2017 for Environmental and Regulatory Law”.

The Legal 500

The Legal 500 Germany 2023 recommends Luther in 30 areas of law, with “Top Tier” rankings in two of these areas. 72 lawyers are being recommended, 12 of whom have been specially recognised as “Leading Individual” or “Next Generation Partner”. Luther has also been included for Germany in the first edition of **The Legal 500 Green Guide EMEA 2022**. This guide provides an overview of law firms’ engagement with sustainability, including both work for clients as well as firms’ own best practices and initiatives.

Chambers

In 2023, Luther was recognised by Chambers Europe for 13 practice areas in Germany as well as in two practice areas in Luxembourg. Moreover, 15 partners were included in the Individual Ranking. Additionally, in 2023, Luther was recognised by Chambers Global in three advisory areas in Germany and Myanmar, while five partners were also included in the Individual Ranking.

The Lawyer European Awards

Luther has been named “Law Firm of the Year: Germany 2021” and also “European Law Firm of the Year 2021” by The Lawyer, one of the most well-known legal magazines worldwide.

Kanzleimonitor

Kanzleimonitor 2022/2023 recommends Luther in 25 areas of law and has also included 16 Luther lawyers among the recommended lawyers mentioned by name.

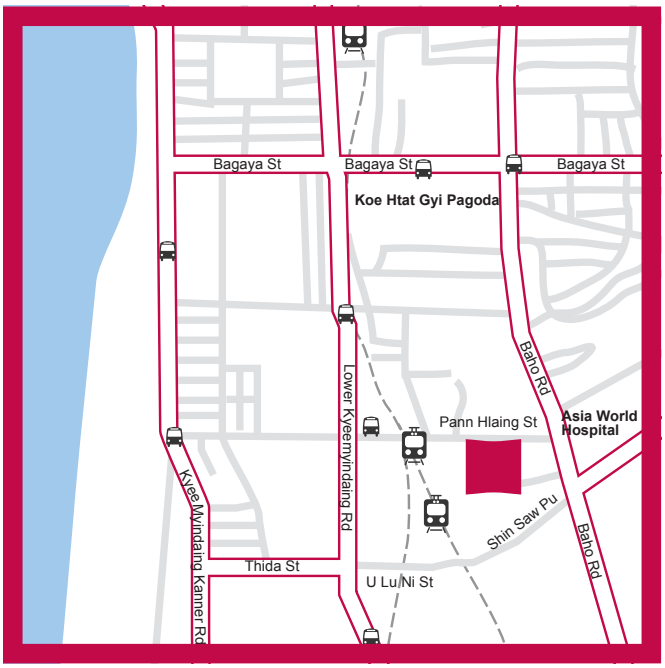
„Best Lawyers in Germany 2024“

For the year 2024, 99 lawyers have been recommended by Luther as “Best Lawyers in Germany 2024”, an award presented by the US publisher “Best Lawyers” in cooperation with the German Handelsblatt, including one partner as “Lawyer of the Year” for his area of law, and 19 colleagues who have received the recommendation “Best Lawyers - Ones to Watch”.

WHO’S WHO LEGAL

WHO’S WHO LEGAL listed 21 lawyers in December 2022, four of whom were recognised as Thought Leaders, which is the highest award, and three of whom were named Future Leaders.

Contact



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Disclaimer

Although every effort has been made to offer current and correct information, this publication has been prepared to provide only introductory information on regulatory and legal developments in Myanmar. It is not exhaustive and will not be updated; neither does it constitute legal and/or tax advice. This publication is distributed with the understanding that Luther, the editors and authors cannot be held responsible for the results of any actions and/or omission taken on the basis of information contained herein.

Luther.

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www.luther-services.com

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Corporate Services | www.luther-services.com

unyer GLOBAL ADVISORS