

State of Emergency in Myanmar

State of Emergency in Myanmar – Two Weeks On

Overview

A year-long state of emergency commencing from 1 February 2021 ("**Emergency**"), pursuant to Article 417 of the Myanmar Constitution 2008, was declared after the military detained government leaders including the State Counsellor Daw Aung San Suu Kyi, President U Win Myint and other senior government officials from the National League for Democracy ("**NLD**") in the early morning of 1 February 2021.

During the Emergency, the legislative, executive and judicial powers of the country have been transferred to the Commander-in-Chief of Defence Services, Senior General Min Aung Hlaing. The military has since replaced the NLD government, removing NLD appointed ministers and deputies while naming replacements under the military's new administration.

We had previously issued an Update on 3 February 2021 on "State of Emergency in Myanmar – Answering Your Pressing Questions", available [here](#), discussing the Emergency. In this Update, we answer some of the frequently asked questions regarding the situation on the ground in Myanmar at the time of writing, which has seen significant developments since our Update of 3 February.

Frequently Asked Questions

1. Are there presently any border controls and/or movement controls within Myanmar?

The Yangon International Airport's ("**YIA**") website indicates that the operation of international flights has been suspended until 28 February 2021 in light of the COVID-19 pandemic. In addition, the military has reportedly announced after the declaration of the Emergency that the suspension of flights would continue until 30 April 2021, although the said extension has not been published on the YIA's website at the time of writing. However, domestic flights and international relief flights are expected to still continue, although the schedules of such relief flights remain uncertain at the time of writing.

In light of the growing Civil Disobedience Movement ("**CDM**") (as elaborated below) throughout the country, the military has imposed a curfew from 8 p.m. to 4 a.m. (local time) in a number of cities, including the commercial cities of Yangon and Mandalay. In addition, a gathering of five or more

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people in public places is also prohibited. Interstate travel has also been restricted, although this has already been in place due to COVID-19 measures.

At the time of writing, we understand that armoured vehicles have been deployed by the military in a number of cities, including Yangon, due to escalating tension between the military and the protestors.

2. Are essential utilities and services still available to the public during the Emergency?

Internet disruptions and telecommunications cuts were reported in the early morning on the first day of the Emergency. Further Internet disruptions were reported on the following weekend from 6 to 7 February 2021, and again from 1 a.m. to 9 a.m. (local time) on 15 and 16 February 2021 respectively.

Access to Facebook, the most popular social media platform in the country, was blocked from 4 to 7 February 2021. Other social media platforms, such as Twitter and Instagram, have been banned until further notice.

Public transport, healthcare and banking operations have also been significantly affected due to the growing CDM in the cities throughout the country, with a number of local banks unable to operate due to their staff participating in the CDM. A number of government offices remain closed, due to civil servants participating in the CDM.

3. Are there protests?

As at the time of writing, there are widespread demonstrations and protests, both by civilians as well as civil servants, owing to the CDM. In response, military and police presence are seen on the streets in various cities across the country, including the commercial cities of Yangon and Mandalay. Key protest hotspots in Yangon include major landmarks / junctions such as Sule Pagoda and Hledan junction, as well as in front of Chinese and U.S. Embassies.

4. What should companies take note of if their employees are arrested in protests?

Companies should note that participation in a riot or behaviour in a disorderly manner to cause a breach of peace or public nuisance can be an arrestable offence. Access to counsel in practice will typically be granted only after the accused has been charged.

There have also been reports that the State Administration Council (i.e. the governing body which has been formed by the military following the declaration of the Emergency) has suspended the application of Sections 5, 7 and 8 of the Law Protecting Privacy and Security of Citizens 2017

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("Privacy Law") for the duration of the Emergency. The implications of such suspensions include the following: (a) arrests, searches and seizures by the police in a residential place no longer need to be accompanied by an officer from the relevant township administration office and/or a warrant; (b) arrested persons may be detained beyond 24 hours without the need for any application to extend the remand period; (c) communications over telecommunications equipment can be intercepted by the military, without a need for a warrant; and (d) the government authorities may request telecommunications operators to disclose personal communications over telephones and other electronic information, without a need for a warrant.

5. Are there any current sanctions against conducting business in Myanmar?

There are no widespread sanctions against Myanmar as a whole, although a number of countries have imposed targeted sanctions against certain military generals.

Specifically, the Biden administration has frozen U.S.-based assets belonging to 10 current and former Myanmar military officials, including Senior General Min Aung Hlaing, his deputy, Soe Win and the current acting President U Myint Swe, as well as three entities connected to the military namely, Myanmar Ruby Enterprise, Myanmar Imperial Jade Co., Ltd. and Cancri (Gems and Jewellery) Co., Ltd. All property (including any interests in such property) of the sanctioned individuals and entities, and of any entities that are more than 50% owned, directly or indirectly, by the above individuals and entities, individually, or with other blocked persons, that are in the United States or in the possession or control of U.S. persons, are blocked and must be reported to Office of Foreign Assets Control of the U.S. Notably, there have not been sanctions imposed as yet on more prominent military-linked companies, such as Myanmar Economic Holdings Limited and Myanmar Economic Corporation.

New Zealand has also suspended all high-level contact with Myanmar and has imposed a travel ban on Myanmar military leaders.

6. Can my business contracts be terminated because of the Emergency?

Along with internet and telecommunication disruption, and the temporary closure of banks as a result of the Emergency, contracts involving performance in Myanmar may be delayed, disrupted or hindered.

The doctrine of frustration is recognised in Myanmar pursuant to Section 56 of the Contract Act 1872. A contract is frustrated when unforeseen events occur which, outside the fault of either party, render the performance of the contract radically different from what the parties intended such that the contract is incapable of being performed, in which case the parties may be discharged from further obligations under the contract.

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On the other hand, a force majeure clause is a common contractual clause providing for what should happen upon the occurrence of certain events beyond the reasonable control of either party. The party affected by the force majeure event could rely on the force majeure clause in order to suspend or discharge its obligations arising from the contract or terminate the contract.

Whether either of the above doctrines would apply depends on the terms of your contract. First, if "act of government" or "coup" is one of the listed force majeure events, an affected party may be able to claim force majeure. However, force majeure clauses are generally drafted to apply only if the event causes disruption or prevention of the fulfilment of contractual obligations, or if the force majeure event is protracted. This could depend on the severity of the Emergency, and increased expense, mere delay or additional difficulty in the performance of the contract resulting from the Emergency may not amount to force majeure. For instance, a temporary closure of banks resulting in a delay in payment is unlikely to constitute a force majeure event allowing for termination, as payment could still be made after the banks have re-opened (albeit on a later date) – however, this could be a justification for delaying payment if you are the debtor or payor.

Even if there is no force majeure clause in your contract, one might claim that the Emergency has resulted in the contract being frustrated. Nonetheless, the key consideration is whether the Emergency and the associated disruptions (e.g. the CDM) have a materially adverse impact on the performance of the contract, rendering it incapable of being performed. That said, the threshold for determining frustration under Myanmar law is relatively high. For instance, if the Myanmar Government were to impose an embargo on shipments outside of Myanmar as part of the "lock-down" measures following the military coup, which makes the performance of a delivery contract impossible for a few months, it arguably may not amount to frustration, but it could amount a "force majeure event".

Conclusion

Myanmar businesses and foreign investors alike have started to consider the impact of the Emergency. While many have adopted a "wait and see" approach, parties should be mindful of the fluid situation and its impact on their business operations and contracts. Please feel free to contact us below if you require any assistance.

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