Client Update: Myanmar
2022 FEBRUARY

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State of Emergency in Myanmar – One Year On

Overview

On 1 February 2021, a state of emergency was declared for a period of one year ("**Declaration**") pursuant to Article 417 of the Constitution of the Republic of the Union of Myanmar 2008 ("**2008 Constitution**"). More than one year after the Declaration, Myanmar still remains under a state of emergency with a new caretaker government (i.e. the State Administration Council ("**SAC**")) headed by Senior General Min Aung Hlaing. He has also assumed the role of the Prime Minister and has pledged to hold elections by August 2023.

In the commercial cities of Yangon and Mandalay, daily lives of the residents appear to have resumed subject to the COVID-19 restrictions, although armed conflicts in the rural regions have continued. At the same time, the number of reported COVID–19 infection cases appear to have lessened and more medical assistance (including access to healthcare facilities and COVID-19 vaccinations) is being made available as compared to the first six months after the Declaration. The electricity supply and internet connections continue to remain unstable which has posed significant operational challenges for a number of businesses.

Daw Aung San Suu Kyi continues to be detained as she faces trial for more charges, having previously been convicted under the Export and Import Law, Telecommunications Law and National Disaster Management Law. She is still awaiting trial for the more serious corruption charges. In spite of a blend of diplomatic efforts and punitive sanctions from the international community, Myanmar is still mired in severe unrest and political uncertainty, with millions living below the poverty line. As threats of civil war loom, there have been efforts behind the scenes to ramp up humanitarian efforts across the country as the situation on the ground is widely expected to worsen in the coming months. Amidst the currently volatile political and socio-economic backdrop of Myanmar, we discuss below the legal and regulatory developments that have taken place in the country since our previous update titled "State of Emergency in Myanmar - Six Months On", which is available here.

General Update on the Situation in Myanmar

Transport

Public transport service has resumed within commercial cities such as Yangon and Mandalay. Inter-state travel restrictions have also been eased, even though the presence of police and military personnel on the streets can still be observed in most cities. The curfew from 10 p.m. to 4 a.m. has remained in effect due to security concerns and the general public tends to avoid heading out after 8 p.m. to avoid any unnecessary inspections by the military personnel.

On the other hand, international travel remains highly restricted, as the suspension of all international flights (save for relief flights, special flights and diplomatic fights) and e-visa applications have been further extended until 28 February 2022. In addition, incoming travellers are required to be quarantined for up to either seven days or ten days (depending on COVID-19 vaccination status of the traveller) upon their arrival in Myanmar.

Finance

The daily and weekly limits on the withdrawal of cash at the banks and ATMs have remained the same. These are currently set at MMK 500,000 per day, MMK 2 million per week for individuals and MMK 20 million per week for companies. Owing to the limited supplies, the price of imported goods has more than doubled in some cases and there is a shortage of certain imported goods in the supermarkets.

Employment

With the setbacks caused by the COVID–19 pandemic and the ongoing political uncertainty throughout 2021, the unemployment rate in Myanmar is unfortunately on an upward trajectory. The International Labour Organisation reported that at least 1.2 million workers had already lost their jobs by the middle of 2021 particularly in the construction, garment manufacturing and tourism sectors. Some labour union leaders in Myanmar had estimated that more than 200,000 workers in the garment manufacturing sector could become unemployed by the end of 2021 due to the ongoing political situation.

For companies and workplaces that have continued operating, many of them have ceased their work from home arrangements and have resumed working from office either fully or on the basis of a 50/50 split attendance. While vaccination against the COVID-19 virus has not been made compulsory by the Ministry of Health ("**MOH**"), this is highly encouraged by employers in general, especially for those employees who are returning to the office. Vaccination rates however are still low compared to other Southeast Asian countries, with the take-up of vaccines being generally higher in the major cities such as Yangon compared to the rural areas.

Education

Public schools and universities have officially been reopened after the stay-at-home orders were lifted in 108 townships on 24 November 2021. However, many parents remain reluctant to send their children to the public schools and some have enrolled their children for online learning instead.

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New Legislation and Legislative Amendments Enacted by the SAC

Legislative power has been vested with the Commander-in-Chief of the Defence Services since the Declaration, which means that the enactment of legislation can be expedited without having to go through the usual legislative processes. In the paragraphs below, we discuss some of the key legislative changes that have been initiated by the SAC in the second half of last year since the Declaration.

Law Amending the Foreign Exchange Management Law ("FEML Amendment Law")

The FEML Amendment Law amends Section 41 of the Foreign Exchange Management Law 2012 ("**FEML**") which previously restricted "foreign exchange licensees" from violating any rules, regulations, orders and notifications issued under the FEML. The FEML Amendment Law has removed the term "foreign exchange licensees" and replaced it with the term "anyone", considerably broadening its regulatory ambit. Furthermore, the FEML Amendment Law also introduces a new penalty provision which stipulates that anyone who violates Section 41 of the FEML will be subject to imprisonment for a period of less than one year, or a fine, or both.

The FEML Amendment Law appears to be aimed at attempting to stabilise the exchange rate fluctuations by expanding the regulatory reach beyond only those which were registered as foreign exchange licensees with the Central Bank of Myanmar ("**CBM**"). In other words, a non-licensee which undertakes foreign exchange business will be subject not only to the penalty for failure to obtain a licence, but could also be subject to penalties for non-compliance with the relevant provisions in any of the subsidiary legislation issued under the FEML. In spite of this legislative change, underground money changers and the black market for foreign currency continue to thrive amidst the unstable exchange rate.

Law Amending the Civil Procedure Code ("CPC Amendment Law")

The CPC Amendment Law introduces mediation as an avenue for dispute resolution in civil disputes, namely: (a) cases which are prescribed for mediation by any law or notification issued by the Union Supreme Court; and (b) cases which are voluntarily referred to mediation by the parties. The CPC Amendment Law further prescribes that mediation proceedings will be confidential and that any communications, statements and admissions made during mediation process will not be admissible in any subsequent hearing in the same suit or in any other proceedings. The agreement reached at mediation can then be submitted by application to the Court, which will then pass an order or a decree as it thinks fit (e.g. monetary order, specific performance order, etc.) which reflects the agreement reached at mediation.

The CPC Amendment Law was a welcomed codification of a process which tends to have been overlooked in written law but has commonly (and informally) been adopted in practice. By way of background, notwithstanding the increasing interest in arbitration, many commercial disputes in Myanmar are and have typically been resolved through informal mediation, involving an influential body or individual.

Law Amending Bar Council Act ("BCA Amendment Law")

The BCA Amendment Law removes the right of the advocates to elect the members of the Bar Council. Instead, the Bar Council will be chaired by the Union Minister of the Ministry of Legal Affairs (who is also the Union Attorney-General since the reorganisation of the Office of the Union Attorney General into the Ministry of Legal Affairs announced by the SAC on 30 August 2021). In this regard, the members of the Bar Council will be nominated by the Union Chief Justice, the Union Supreme Court and the Union Minister of the Ministry of Legal Affairs respectively.

Some consider these amendments as effectively putting the Bar Council back under the control of the military. It is also worth noting that the Union Attorney General and the Chief Justice of the Union Supreme Court have been sanctioned by the US Government late last month alongside the Chairman of the Anti-Corruption Commission, possibly for their roles in the prosecution and conviction of Daw Aung San Suu Kyi.

Law Amending Television and Radio Broadcasting Law ("TRBL Amendment Law")

The Television and Radio Broadcasting Law 2015 ("**TRBL**") originally applied only to radio and television, and expressly excluded Internet-based broadcasting. However, the TRBL Amendment Law expands the definition of "television and radio broadcasting" to include access to radio and TV broadcasts through "*any other technology*" which is potentially broad enough to include Internet-based broadcasting (including YouTube, Facebook, TikTok, and other social media platforms), with the implication that these over-the-top broadcasting platforms may need to apply for and obtain a broadcasting licence issued by the Broadcasting Council, the independence of which has been questioned.

Further, the TRBL Amendment Law introduces an imprisonment term as the penalty for conducting any broadcasting service without a licence, in addition to raising the fines previously prescribed in the TRBL prior to the recent amendment. The TRBL Amendment Law also prescribes imprisonment for a term ranging from one year to four years, or a fine ranging from MMK 10 million to MMK 50 million, or both for violating any rules, regulations, by-laws, notifications, orders, directives or practice directions issued under the TRBL.

Some consider these amendments, which could potentially be utilised to further limit the media and press freedom, as an indication of the regression in the rule of law in the country.

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Law Amending Yangon City Development Law ("YCDL Amendment Law")

The YCDL Amendment Law offers rewards to employees and organisations that convince the public to comply with the rules and regulations issued under the Yangon City Development Law 2018 ("**YCDL**"). Further, the YCDL Amendment Law expressly provides that the Yangon City Development Committee ("**YCDC**") may request the assistance of the police in discharging its duties and responsibilities under the YCDL, and that the police must render its assistance to the YCDC in such cases.

These amendments on their plain reading do not appear to have any direct relation to the Declaration and/or its aftermath, but they appear sufficiently broad to be relied on in managing any unrests within Yangon city. For instance, the YCDC has powers under the YCDL to take actions against any person who undermines the safety or security of the buildings, offices and assets under the management of the YCDC, which could potentially be relied on to prosecute protestors targeting the establishment within Yangon city.

Law Amending the Union Taxation Law ("UTL Amendment Law")

The UTL Amendment Law, which will be effective between 8 January 2022 to 31 March 2022, introduces a one-time commercial tax of MMK 20,000 for selling and activating a new SIM card and a 15% commercial tax on the income earned from the internet connection services. Many believe that such ramping up of tax collection efforts particularly against the telecommunications sector is aimed at discouraging the use of social media by the public to disseminate anti-military messages by raising the costs of doing so.

Separately, the UTL Amendment Law has revised the personal income tax rates to reduce the tax burden on those falling within the lower income tax brackets as shown in the table below. However, given that the country's tax revenue to GDP ratio remains one of the lowest in the world, some may view the provisions as not being particularly meaningful other than to demonstrate the regime's desire to boost its credibility given the widespread hardships faced by the general population, especially the lower income groups.

Before UTL Amendment Law			**Under UTL Amendment Law**		
Income (MMK)		Income Tax Rate	Income (MMK)		Income Tax Rate
From	To		From	To	
1	100,000,000	3%	1	300,000,000	3%
100,000,001	300,000,000	5%	300,000,001	600,000,000	5%
300,000,001	1,000,000,000	10%	600,000,001	1,000,000,000	10%
1,000,000,001	3,000,000,000	15%	1,000,000,001	3,000,000,000	15%
3,000,000,001 and above		30%	3,000,000,001 and above		30%

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Draft Cyber Security Law 2022 ("Draft CS Law")

The Draft CS Law was circulated by the Ministerial Office of the Ministry of Transport and Communications ("**MOTC**") on 13 January 2022 to a number of Ministries (including the Ministry of Defence, Ministry of Home Affairs, Ministry of Planning and Finance, Ministry of Legal Affairs and Ministry of Investment and Foreign Economic Relations) for the addressee Ministries to provide their feedback by 28 January 2022 to the Director General of the National Cyber Security Centre (a government agency within the MOTC) ("**NCSC**").

The Draft CS Law has some similarities to the draft Cyber Security Law 2021 ("**2021 Draft**") that was previously circulated to the mobile network operators and licensed telecoms service providers for feedback on 9 February 2021. However, there are some salient differences, namely the additional clarity over the concept of "digital service providers" (with the key implication being that providers of digital platform services, such as Facebook, TikTok, etc. would need to register with the authorities in Myanmar), and the requirement to obtain the MOTC's prior approval for the use of VPN. Some view these provisions as being aimed at quashing dissent and curbing the free flow of information, including the freedom of speech.

Sectoral Legal and Regulatory Developments

In addition to the abovementioned key legislative changes, the SAC has also introduced several sector-specific processes and changes, the key developments of which are further discussed below.

Reorganisation of the Union Ministries

Under the SAC caretaker government, several existing ministries have been reorganised, including the following:

(a) the Ministry of Planning, Finance and Industry has been reorganised into (i) the Ministry of Planning and Finance and (ii) the Ministry of Industry;
(b) the Ministry of Education has been reorganised into (i) the Ministry of Education and (ii) the Ministry of Science and Technology;
(c) the Ministry of Health and Sports has been reorganised into (i) the Ministry of Health and (ii) the Ministry of Sports and Youth Affairs;
(d) the Ministry of Labour, Immigration and Population has been reorganised into (i) the Ministry of Labour and (ii) the Ministry of Immigration and Population;
(e) the Ministry of Union Government Office has been reorganised into (i) the Ministry of Union Government Office No. (1) and (ii) the Ministry of Union Government Office No. (2); and
(f) the General Administration Department has been transferred from the Ministry of the Union Government Office to the Ministry of Home Affairs.

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In addition, under SAC Order No. 140/2021 dated 17 June 2021, the Ministry of Cooperatives and Rural Development has been newly constituted.

Taxation

The Internal Revenue Department ("**IRD**"), which is the statutory body responsible for tax collection in Myanmar, has introduced the E-filing Management System ("**EMS**") for filing quarterly and annual returns for commercial tax, special goods tax, capital gains tax and corporate income tax in order to minimise the need for in-person filings in light of the COVID–19 pandemic. The EMS was implemented with effect from 1 December 2021.

Financial Sector

The key developments in the financial sector, all of which have been led by the CBM, are discussed below in turn.

In order to address the challenges faced by the limited banking operations and the limits on the cash withdrawals in the aftermath of the Declaration, the CBM introduced several measures as follows:

(a) following on from the directive of CBM in March 2021 to banks to reopen and resume operations in light of the widespread Civil Disobedience Movement, the CBM issued further measures in the second half of 2021 to reinforce compliance with its earlier directions; and

(b) issuing Order No 43/2021 dated 3 November 2021, limiting the cash payment for the purchase of any goods or services to MMK 20 million in each transaction.

Further, the CBM introduced several measures to address the volatility in the Myanmar Kyat:

(a) announcing by way of Directive No. 16/2021 that in addition to the five foreign currencies which had already been permitted for trading by the foreign exchange licence holder banks and non-bank financial institutions, the respective official currencies of Mainland China (i.e. Yuan or Renminbi) and Japan (i.e. Yen) have been permitted for trading with effect from 12 October 2021;

(b) issuing Directive No. 18/2021 which came into effect on 10 November 2021, directing that all licensed authorised dealers and money changers must not buy, sell or exchange foreign currencies at a rate beyond the +/- 0.5% difference from the reference rate published by the CBM; and

(c) pursuant to Section 35 of FEML, importers are required to deposit their income derived from exports in foreign currency within six months after the receipt of the remittance. This period was later reduced to four months under Notification No. 33/2021 and further reduced to three months under Notification No. 46/2021 dated 10 November 2021 published by CBM.

The CBM has also introduced several measures relating to the compliance obligations of the banks as follows:

(a) on 7 September 2021, the CBM issued a letter to all banks, financial services companies and mobile financial service providers, instructing them that the financial year will be amended to 1 April to 31 March (as opposed to the existing financial year from 1 October to 30 September) with effect from the 2022-2023 financial year. In the meantime, the period from 1 October 2021 to 31 March 2022 has been designated as an interim budget period. It is also our understanding that the aforementioned change in financial year is not limited only to the businesses in the financial sector, and that it would apply to all companies operating in Myanmar; and

(b) previously, the CBM had reduced the minimum reserve requirement for all private banks to 3% of the total deposit made by customers in Myanmar Kyat up till 12 October 2021. On 1 October 2021, the CBM issued Directive No. 13/2021, stipulating that the aforementioned reduced minimum reserve requirement has been further extended for two additional periods, namely (i) from 13 October 2021 to 9 November 2021, and (ii) from 2 March 2022 to 29 March 2022 respectively. The CBM has also stated that it may consider the mitigating factors (including the bank's digital payment service operations, cheque clearing operations and participation in the Union's policies) in determining the appropriate penalties against a bank which fails to comply with the aforementioned minimum reserve requirement.

Import/Export Sector

As the manufacturing and services sectors face considerable headwinds with the pandemic and political situation in the country, trading has become increasingly important to sustain the faltering economy. The key developments in the trading sector are discussed below in turn.

The Ministry of Commerce ("**MOC**") announced in the Newsletter No. 16/2021 dated 25 August 2021 that the application, extension, revocation, suspension of import / export licences or permits will be made through the Tradenet 2.0 online system with effect from 1 September 2021. After the online application has been submitted, if payment is not made within 10 days, the application will be automatically cancelled from the Tradenet 2.0 system. At the time of writing, the requirement for import licences has generally been suspended for most items save for certain prescribed items (including electronics, beauty products and construction materials).

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Furthermore, it has been reported that on 30 September 2021, the Department of Trade issued an announcement that the issuance of import permits / licences in respect of motor vehicles imported by individuals, show rooms and sale centres, or by permitted civil servants will be temporarily suspended with effect from 1 October 2021. Further, the opening of new motor vehicle sale centres has also been temporarily suspended with effect from the same date.

Another key change that was introduced to the trading sector was the amendment of the "preferential goods" list. By way of background, foreign participation in the importation and distribution of goods in Myanmar was restricted until the issuance of the Notification No. 25/2018 by the MOC which permitted 100% foreign owned companies and Myanmar-foreign joint ventures to carry out importation and distribution of the products registered with the MOC. The MOC also issued Newsletter No. 3/2018 dated 26 July 2018 which sets out a list of preferential goods which were permitted to be distributed by the 100% foreign owned companies and Myanmar-foreign joint ventures ("**Previous Preferential Goods List**"). However, the aforementioned list has since been repealed and replaced by the list set out in Newsletter No. 19/2021 that was issued by the MOC on 12 November 2021 ("**Revised Preferential Goods List**"), which has widened the categories of goods that are permitted to be distributed by 100% foreign owned companies and Myanmar-foreign joint ventures to include ingredients used for making food for human consumption and animal consumption respectively.

Court Processes

The Courts in Myanmar are no longer conducting hearings through video conferencing, as the stay-at-home order has already been lifted in most of the townships across Myanmar.

Separately, the Union Supreme Court has not issued any announcement to date that revokes the earlier announcement on 15 February 2021 suspending the writ application under Article 296(b) of the 2008 Constitution, Section 3(b) of the Law on the Application for Writ and Section 19(b) of the Union Judiciary Law. As a result, many litigants are still facing difficulties in bringing administrative challenges before the Union Supreme Court.

Companies Administration

To facilitate the recovery or operation of businesses in the light of COVID–19 pandemic, the then Ministry of Planning, Finance and Industry (which has since been reorganised into two separate ministries) extended loans with a tenure of one year to companies that fulfilled the prescribed criteria in 2020. The aforementioned financial assistance has continued to be available in 2021 and the interest rate has remained fixed at 1% per annum.

As acknowledgement of the struggles encountered by many companies, the Directorate of Investment and Company Administration ("**DICA**") also introduced certain measures that were aimed at easing the compliance burden of companies in Myanmar, including the following measures which have remained in place as at the time of writing:

(a) Notification No. 92/2020 dated 20 October 2020, which has suspended the requirement for a resident director under the Myanmar Companies Law 2017 ("**MCL**") from 29 March 2020 until such time as the borders of Myanmar reopen (which is until 28 February 2022 as at the time of writing); and

(b) relief against the late submission of the annual returns by suspending the penalties for late filing. Nevertheless, many companies have still failed to file their annual returns, resulting in more than 800 companies being struck off the register of companies maintained by the DICA in May 2021 and an additional approximately 1,700 companies being struck off again by the end of November 2021 for failing to submit their annual returns.

In light of the less than favourable economic conditions in the country, it is not surprising to see a number of companies being wound up. To this end, DICA made an announcement on 19 November 2021 that all winding up proceedings of companies must be undertaken under Myanmar Insolvency Law 2020 ("**IL**") as opposed to under the MCL. The IL came into effect on 14 February 2020 and contemplates a unified insolvency regime for both personal bankruptcy and corporate insolvency. In addition, the IL addresses cross-border insolvency as well as corporate rescue and rehabilitation to broaden the options for companies under financial distress.

For Existing Investors: Chartering the Way Forward

In addition to the economic sanctions and travel bans discussed in our previous update, a number of jurisdictions and organisations have imposed additional targeted sanctions against certain entities associated with the military.

Specifically, the Biden administration has imposed sanctions against the Directorate of Defence Industries, the Ministry of Defence Quartermaster General Office, and the Myanmar War Veterans Organisation. Canada and the UK have imposed sanctions against the aforementioned entities as well as the Myanmar Directorate of Procurement. The UK has also included the Htoo Group of Companies and its chairman U Tay Za in the list of sanctioned entities. Recently, the US Government sanctioned U Tay Za and his two sons alongside further sanctions against the Myanmar Directorate of Procurement, a handful of businessmen and business organisations as well as the individuals holding the positions of Union Attorney General, Union Supreme Court Chief Justice and Chairman of the Anti-Corruption Commission, as previously indicated. On the eve of the anniversary of the Declaration, the UK imposed new sanctions against three individuals who hold the positions of Union Attorney General, Chairman of the Union Election Commission and Chairman of the Anti-Corruption Commission, as part of a joint action with the US and Canada. Meanwhile, the European Union has stated that it stands ready to impose further sanctions against the military regime.

In light of the imposition of such targeted measures, foreign investors would inevitably need to re-assess their plans and business relationships in the country, and take the appropriate actions depending on a number of factors, including the nature of any interactions with the military or military-affiliated entities (whether or not such relationship is apparent), and their own internal company policies on business integrity or ESG.

Certain foreign investors which have been involved in projects with a sanctioned entity or individual have sought to manage the associated risks, with some opting to terminate the relevant relationships. For example, Japanese brewer Kirin Holdings has announced that it will seek to end its partnership with the military-controlled stated-owned enterprise Myanma Economic Holdings Limited ("**MEHL**") over Myanmar Brewery and Mandalay Brewery. In the meantime, MEHL has applied to the Myanmar court for a winding up order against Myanmar Brewery to dissolve the joint venture.

Where the relationship with the military or military-controlled entity is more apparent than real, it is crucial for the foreign investor to consider their stakeholders' perception of this relationship. It is also important for such businesses with operations on the ground to manage security risks arising from unprovoked attacks by pro-democracy forces against the businesses' premises, assets and employees.

On the other end of the spectrum, foreign investors, such as Telenor[1] and Australian-listed Myanmar Metals Limited, have taken the proactive step of exiting the country as part of their corporate responsibility principles, even though they have not been directly or indirectly linked to the military or any military-affiliated entities. In addition, Telenor Group is reported to have entered into an agreement to sell its 51% stake in Wave Money, a leading digital payment solution in Myanmar, to Yoma MFS Holdings Pte. Limited, a subsidiary of the Yoma Group. Other foreign business entities such as Metro, a German wholesale distribution company, announced its exit from the country in September 2021 and India's Adani Group will reportedly withdraw its investment in Myanmar by the end of March 2022. In late January 2022, French energy company TotalEnergies and US energy company Chevron also announced that they were planning to cease all operations in Myanmar.

That being said, a number of foreign investors have indicated interest in remaining in the country and navigating their way through the existing situation. For instance, Japan External Trade Organisation announced that 70% of the Japanese companies plan to remain and expand their businesses amidst the withdrawal of international business entities and the limited business opportunities in Myanmar.

[1] However, the sale by Telenor to Lebanon's M1 Group is currently being stalled, reportedly owing to the regulator's insistence that the sale be made to a Myanmar-controlled company.

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Concluding Remarks

Myanmar businesses and foreign investors have largely adopted a "wait and see" approach in the aftermath of the Declaration. Even after one year from the Declaration, the situation has remained highly fluid and uncertain. It would also be interesting to see how the ASEAN's approach towards the situation in Myanmar could shift with Cambodia as the new chair of the bloc this year. Rajah & Tann Myanmar has been advising clients since the country was under the Tatmadaw's rule back in the 1990s, and we have a depth of experience that we are able to tap on to help clients navigate the challenges brought about under this current military regime. With general elections still more than a year away, companies are well advised to consider how best to responsibly conduct their businesses in the country to deal with the new normal.

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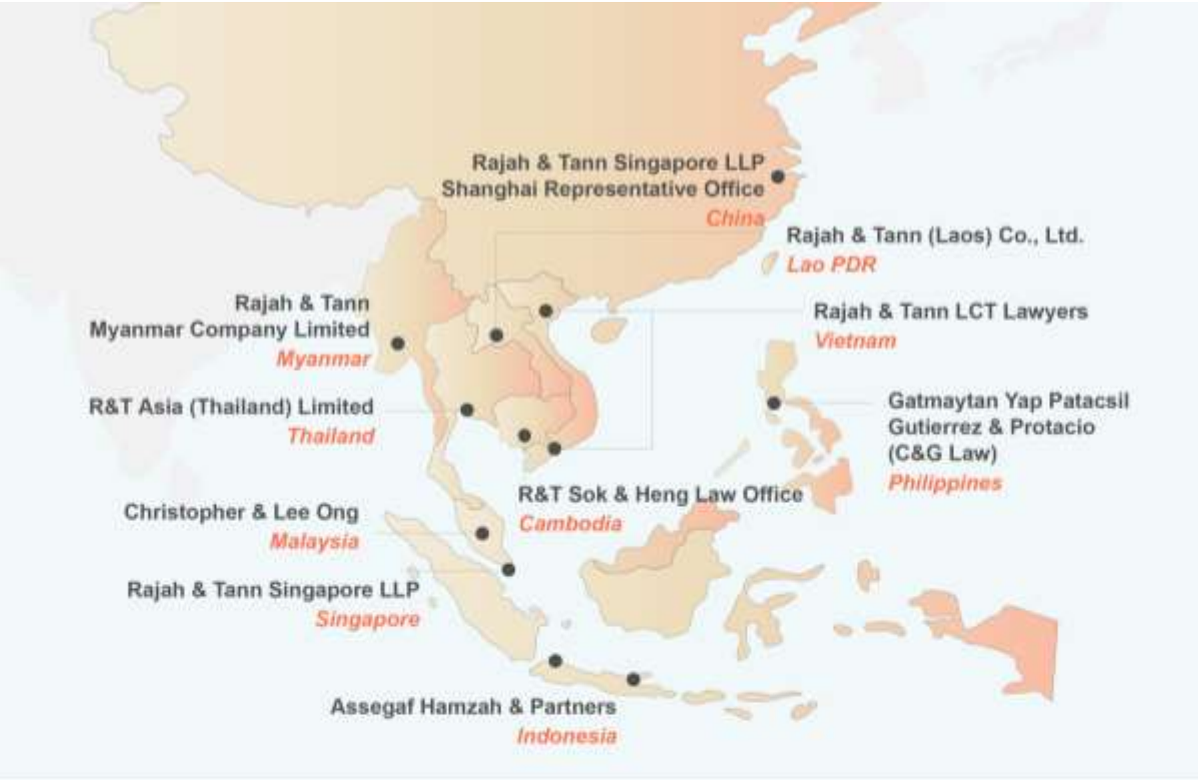

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