



Myanmar's New Companies Law and Investment Framework: Corporate Structures and Corporate Finance

Training Series with the Australian and British Chambers

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Corporate Structures and Corporate Finance

- Holding companies, subsidiaries and corporate groups;
- Share capital and issuing different classes of shares and securities;
- Dividends; share buy-backs and capital reductions; corporate reorganisations;
- Mergers and acquisitions; and
- Joint ventures.

Corporate Structures and Corporate Finance

- The Companies Law 2017, a company's constitution and the common law;
- Shift in the policy and regulatory approach;
 - DICA to have less of a gatekeeper role but an enhanced advocacy and supervisory role;
- Modernisation;
- Not fully tested.

HOLDING COMPANIES, SUBSIDIARIES AND CORPORATE GROUPS

Group Structures

- Formation of groups
 - Recognition of groups; and
 - Wholly-owned subsidiaries
- Structures; and
- Further developments in the tax regime?

CL 2017

Subsidiary:

(A) a company in which another company:

- **controls the composition of the board** of the first-mentioned company;
- 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;
- 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
- 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;

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

CA 1914

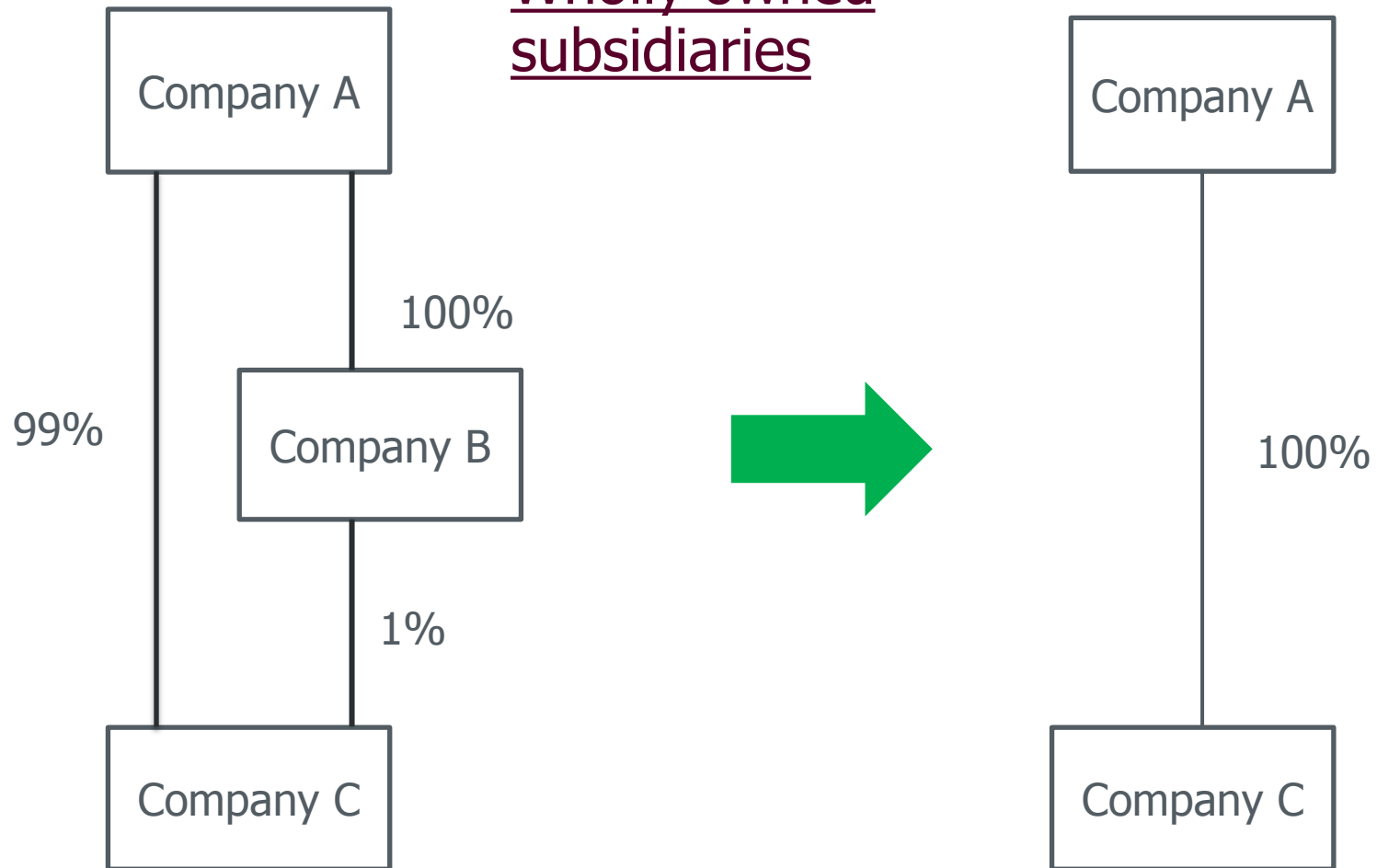
Subsidiary:

Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not; and

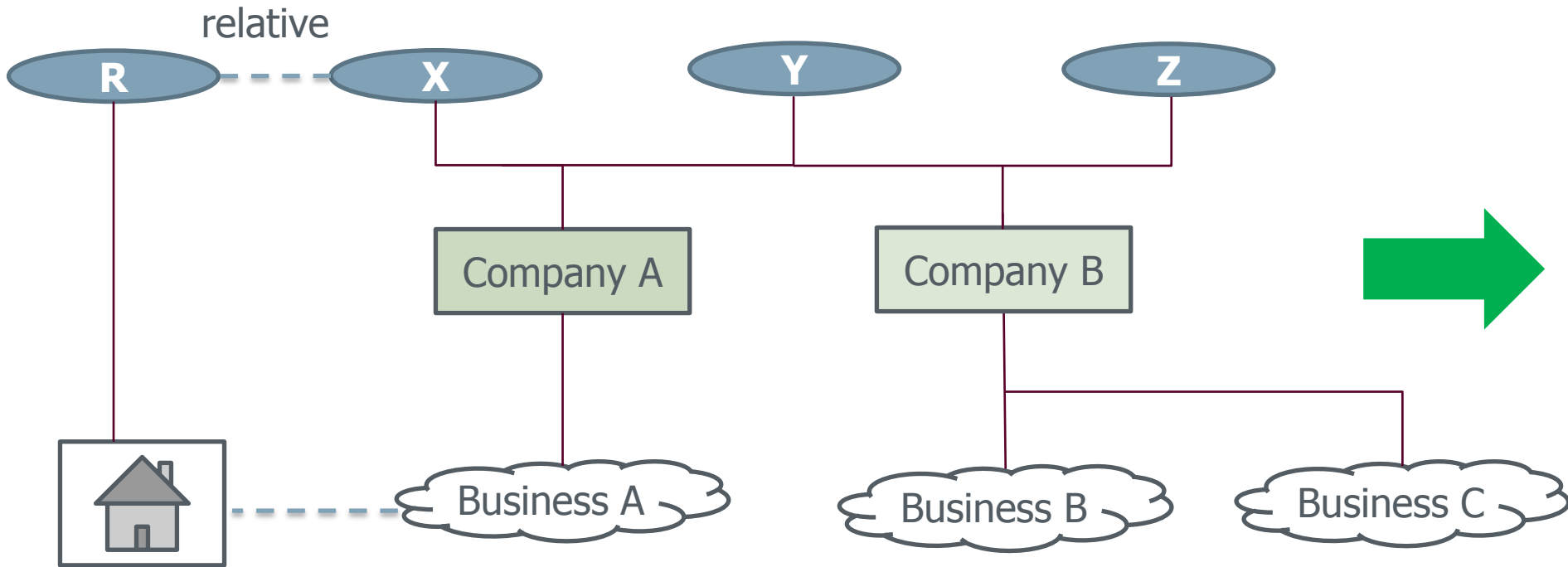
- (a) the amount of the shares so held is at the time when the accounts of the holding company are made up **more than fifty per cent of the issued share capital** of that other company or such as to entitle the company to **more than fifty per cent of the voting power** in that other company, or
- (b) the company has the power (not being power vested in it by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to **appoint the majority of the directors of that other company**.

Group Structures

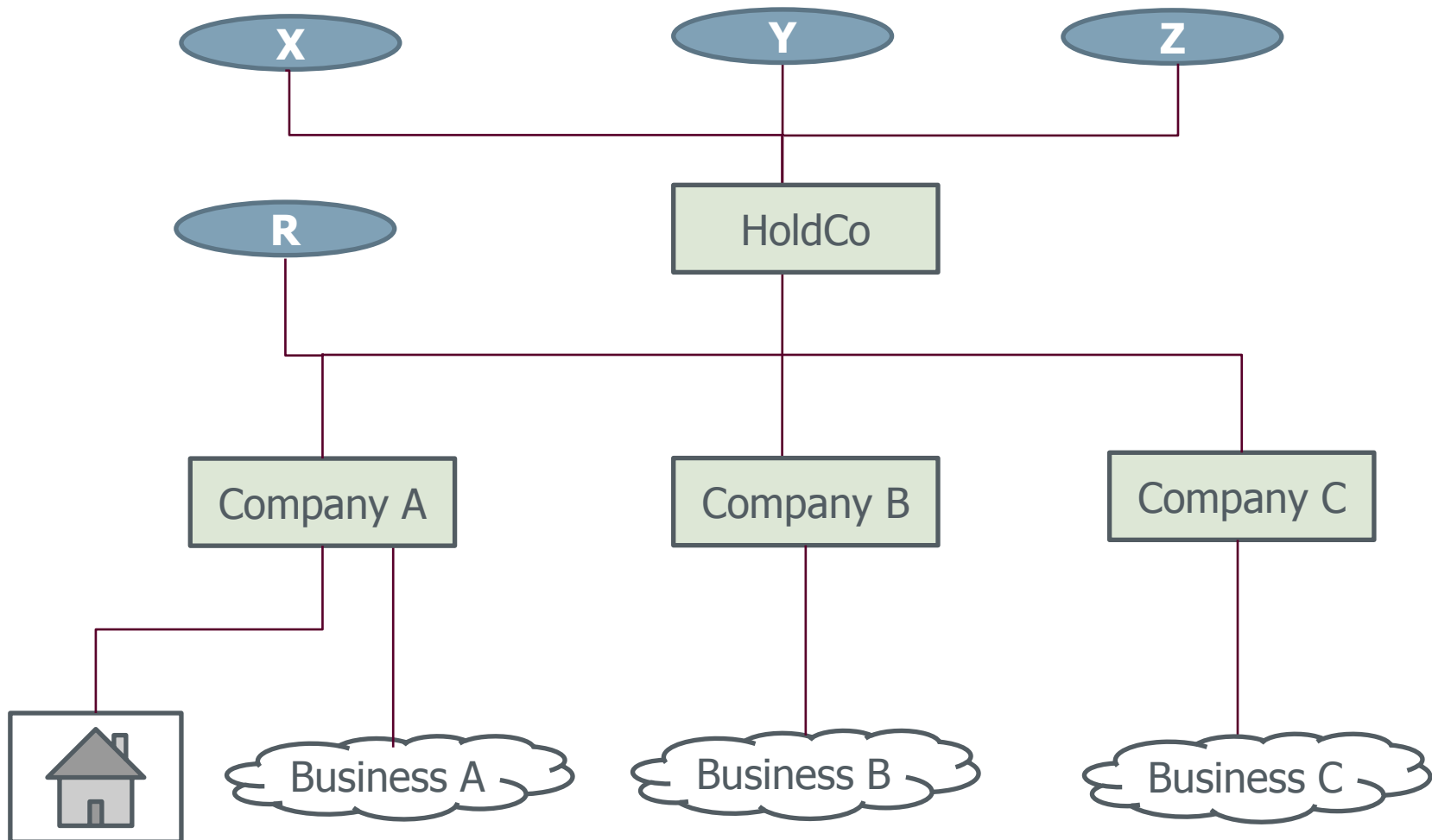
Wholly owned subsidiaries



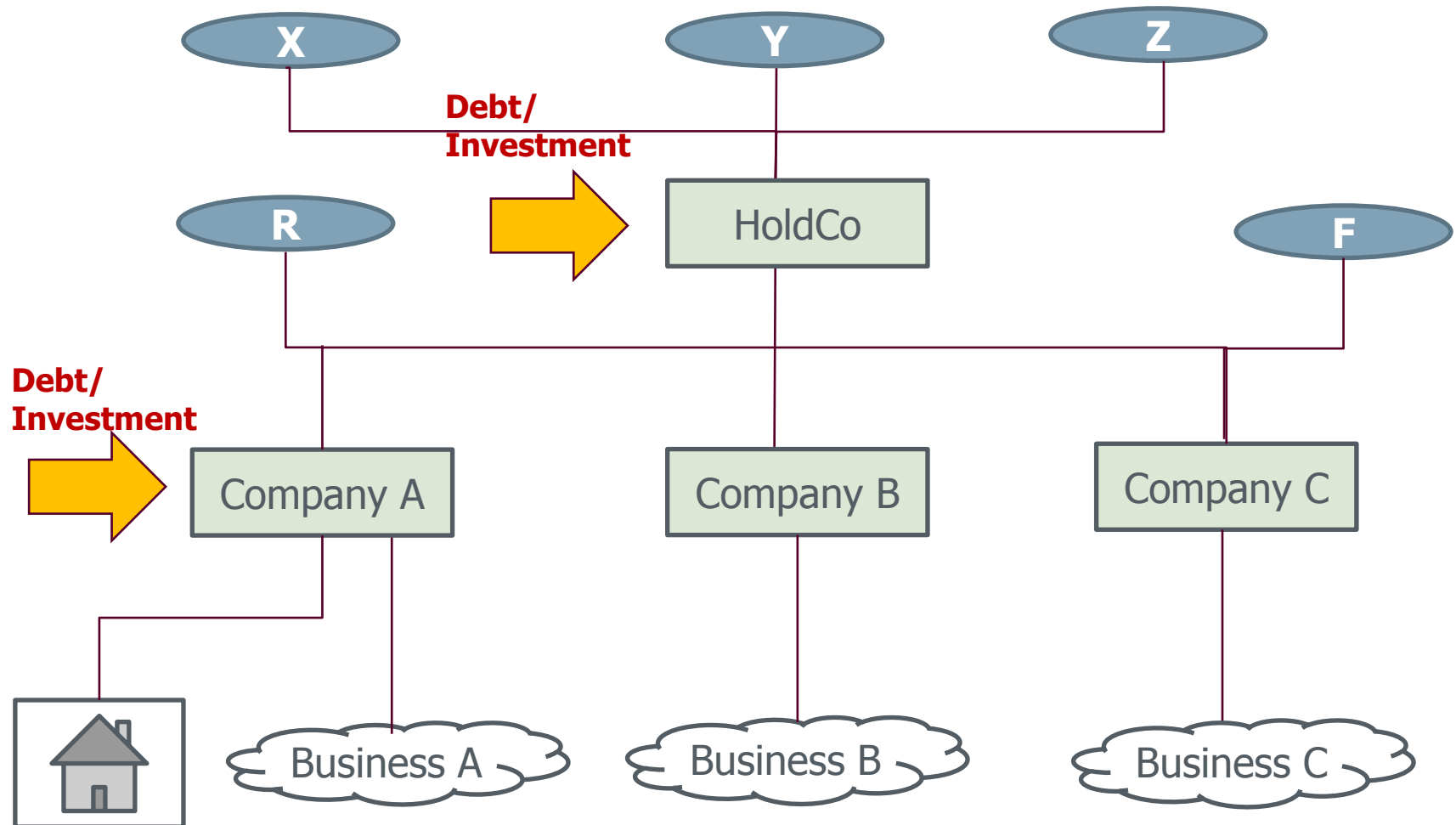
Group Structures



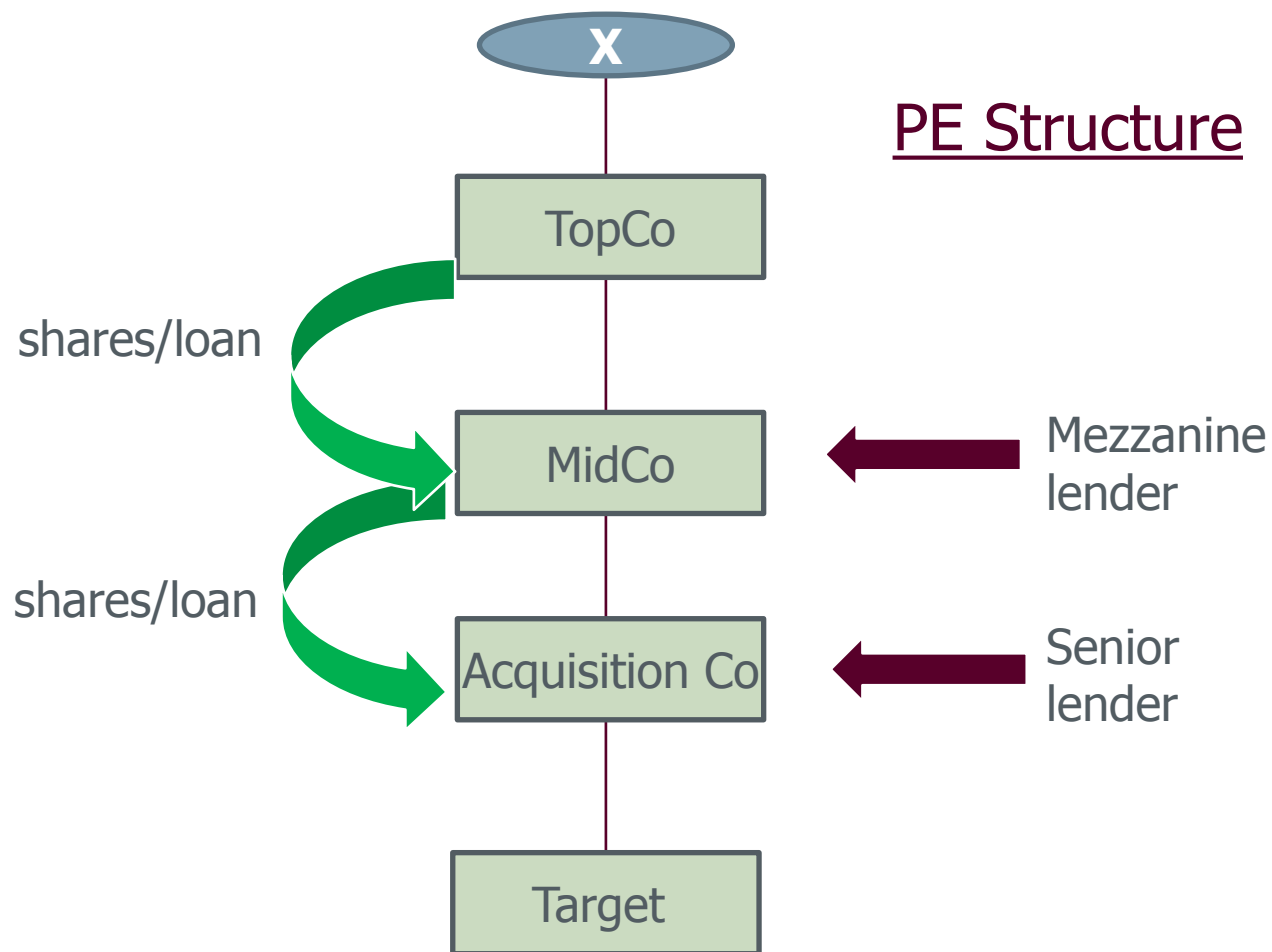
Group Structures



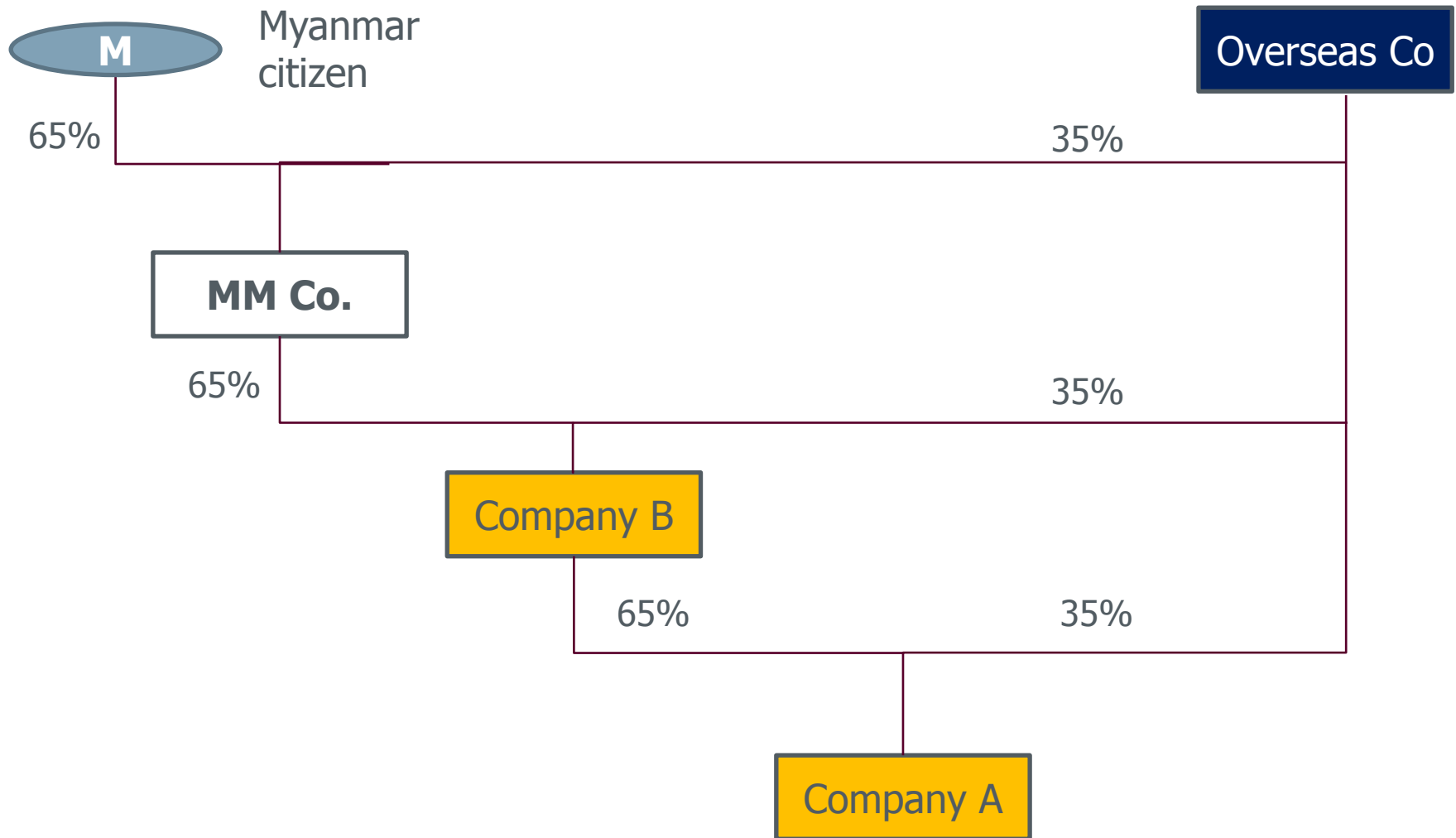
Group Structures



Group Structures



Group Structures



Group Structures

- **"foreign company"** means a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than 35%.
- **"ownership interest"** means a legal, equitable or prescribed interest in a company which may arise through means including:
 - a direct shareholding in the company;
 - a direct or indirect shareholding in another company which itself holds a direct shareholding, or an indirect shareholding, in the first company; or
 - through an agreement which provides the holder with a direct or indirect right to exercise control over the voting rights which may be cast on any resolution of the company.
- **Control/Board?**

SHARE CAPITAL

Shares

- Familiar concepts and new concepts

CL 2017	CA 1914
60. (a) The shares or other securities of any member in a company shall be moveable property, transferable in the manner provided or permitted by this Law and any other applicable law and subject to the constitution of the company.	28. (1) The shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.
(b) A share will not have a nominal or par value.	(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

Shares

CL 2017	CA 1914
89. (a) Share certificates - prima facie evidence of the title of the member to the shares or security therein specified.	29. Share certificates - prima facie evidence of the title of the member to the shares or stock therein specified.
103. (a) Without prejudice to any other provision of this Law or other applicable law, the register of members shall be prima facie evidence of any matters by this Law directed or authorised to be inserted therein, including the title to the shares of the registered member.	40. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein.

Shares

Abolition of par value

- Concepts related to par value such as share premium and discounted issue are no longer necessary and are abolished. The proceeds raised from a share issue will be credited to share capital.
- The concept of paid up capital and partly paid shares will continue to be relevant under the new law. They will relate to the total consideration paid or agreed to be paid for the shares issued, and not to par value.

Shares

Abolition of par value

- Issue price? – *“on terms and in any number the board thinks fit”*.
- *The issue price of a share is a commercial bargain between the company (which issues the share) and an investor (who subscribes for the share and becomes a shareholder). The abolition of par has removed the minimum price at which shares may be issued, but this does not give directors a completely free hand in setting the issue price. They would still have an overriding fiduciary duty to set the price in good faith.*

Shares Classes

- 61. (a) Subject to sub-section (b), a share in a company confers on the holder of such share:
 - (i) the right to one vote on a poll at a meeting of the company on any resolution;
 - (ii) the right to an equal share in dividends; and
 - (iii) the right to an equal share in the distribution of assets of the company.
- (b) The rights specified in sub-section (a) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued.

Shares Classes

Income

5.1 Until the "A" Shareholders and the "C" Shareholders have received the Return Target, the "B" Shareholders shall not be entitled to any dividend on the "B" Shares and the profits which the Company may determine to distribute shall be distributed amongst the "A" Shareholders and the "C" Shareholders in the proportion which the amount paid up or credited as paid up (including any premium paid) on those "A" Shares bears to the amount paid up or credited as paid up (including any premium paid) on those "C" Shares.

(Return Target – IRR of [x])

5.2 Once the "A" Shareholders and the "C" Shareholders have received the Return Target, any profits which the Company may determine to distribute shall be distributed as follows:

- 90% to the "A" Shareholders and the "C" Shareholders in the proportion which the amount paid up or credited as paid up (including any premium paid) on those "A" Shares bears to the amount paid up or credited as paid up (including any premium paid) on those "C" Shares, and
- 10% to the "B" Shareholders.

Shares Classes

Capital

5.3 In the event of a reduction or return of capital of the Company, or a buy-back of Shares by the Company, after payment of the costs, charges and expenses of such reduction, return or buy-back all sums shall be distributed in the proportion which the amount paid up or credited as paid up (including any premium paid) on those "A" Shares bears to the amount paid up or credited as paid up (including any premium paid) on those "C" Shares but once the "A" Shareholders and the "C" Shareholders have received the Return Target, any further sums which the Company may determine to pay to Members in respect of such event shall be distributed as follows:

- 90% to the "A" Shareholders and the "C" Shareholders in the proportion which the amount paid up or credited as paid up (including any premium paid) on those "A" Shares bears to the amount paid up or credited as paid up (including any premium paid) on those "C" Shares; and
- 10% to the "B" Shareholders .

DIVIDENDS

Dividends (CA 1914)

- Lawfulness -

Reg 97. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.

- Authority

*Reg 95. the company in **general meeting** may declare a dividend to be paid to the members, but no dividend shall exceed the amount recommended by the Directors. No dividends shall be paid otherwise than out of the profits of the year or any other undistributed profits.*

*Reg 96. **The directors** may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.*

Dividends (CL 2017)

- Lawfulness

S.107 The company may not pay a dividend unless:

- (a) the company will, immediately after the payment of the dividend, satisfy the solvency test;*
- (b) the making of the dividend is fair and reasonable to the company's shareholders as a whole; and*
- (c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors.*

- Authority

*S.106 Subject to s107 and s109 and the constitution, **the board** of a company may determine that a dividend is payable to its shareholders and fix the amount, the time for payment and the method of payment (s).*

Dividends (CL 2017)

- (a) Solvency Test

"solvency test" means that:

- (A) the company is able to pay its debts as they become due in the normal course of business; and*
- (B) the company's assets exceed its liabilities,*

in each case as determined in accordance with the accounting standards applicable to such companies or prescribed from time to time.

- Creditor Protection

the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

CAPITAL REDUCTION AND SHARE BUY-BACK

Capital Reduction / Buy-back (CA 1914)

Capital Reduction

- *Create distributable reserves. This may be to pay a dividend or to buy back or redeem its own shares.*
- *Reduce or eliminate accumulated realised losses in order to be able to make distributions in the future.*
- *Return surplus capital to shareholders.*
- *Distribute non-cash assets to shareholders.*

Buy-back

- *Return surplus cash to shareholders.*
- *Increase earnings per share.*
- *Increase net assets per share.*
- *Enhance share liquidity.*
- *Increase gearing.*
- *Provide an exit route for shareholders.*

Capital Reduction / Buy-back (CA 1914)

Capital Reduction

54A. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66.

Capital Reduction (CL 2017)

Capital Reduction

115. (b) The reduction must not be undertaken unless:

- (i) the company will, immediately after the reduction, satisfy the solvency test;*
- (ii) the reduction is fair and reasonable to the company's shareholders as a whole;*
- (iii) the reduction does not materially prejudice the company's ability to pay its creditors; and*
- (iv) it is approved by shareholders under section 116.*

Capital Reduction (CL 2017)

Capital Reduction

- Notice of the meeting must include a statement setting out all information known to the company that is material to the decision on how to vote on the resolution.
- Before circulating the notice, the company must:
 - (i) file the notice of the meeting and any document relating to the reduction that will accompany the notice of the meeting sent to shareholders; and
 - (ii) publish in a daily newspaper circulating generally in the Union a notice of its intention to call a meeting to approve a reduction and advising that the notice of meeting and associated documents have been filed with the Registrar.
- Registrar must respond within 28 days.
- The company must lodge with the Registrar the relevant resolution within 21 days after being passed and publish the notice of the passing of such resolution and the details of the reduction in a daily newspaper circulating generally in the Union. The company must not make the reduction until 28 days after publication of such notice in the newspaper.

Capital Reduction (CL 2017)

- Default

The Company shall be liable to a fine of 5,000,000 kyats, and every director or other officer of the company who knowingly and wilfully permits the default shall be liable to the same penalty.

In addition if the company becomes insolvent following and in connection with such reduction, every director of the company who knowingly and wilfully permitted a reduction in default shall also be liable to the creditors of the company to the extent of the reduction where the debts due by the company to the respective creditors exceeded the recoverable assets of the company and such amount may be recovered from them by the creditors or the liquidator suing on behalf of the creditors.

Share Buy-back (CL 2017)

120. Share buy-backs

(a) A company may buy-back its own shares if:

(i) the company will, immediately after the buy-back, satisfy the solvency test;

(ii) the buy-back is fair and reasonable to the company's shareholders as a whole;

(iii) the buy-back does not materially prejudice the company's ability to pay its creditors; and

(iv) it is approved by shareholders under section 121 and the procedures in section 122 are followed.

Share Buy-back (CL 2017)

Share Buy-back

- Notice of the meeting must include a statement setting out all information known to the company that is material to the decision on how to vote on the resolution.
- Before circulating the notice and executing any buy-back offer, the company must:
 - (i) file the notice of the meeting, a document setting out the terms of the buy-back and any document relating to the reduction that will accompany the notice of the meeting sent to shareholders; and
 - (ii) publish in a daily newspaper circulating generally in the Union a notice of its intention to call a meeting to approve a buy-back offer and advising that the notice of meeting and associated documents have been filed with the Registrar.
- Register must respond within 28 days.
- The company must lodge with the Registrar the relevant resolution within 21 days after being passed and publish the notice of the passing of such resolution and the summary details of the buy-back in a daily newspaper circulating generally in the Union. The company must not complete the buy-back until 28 days after publication of such notice in the newspaper.

Share Buy-back (CL 2017)

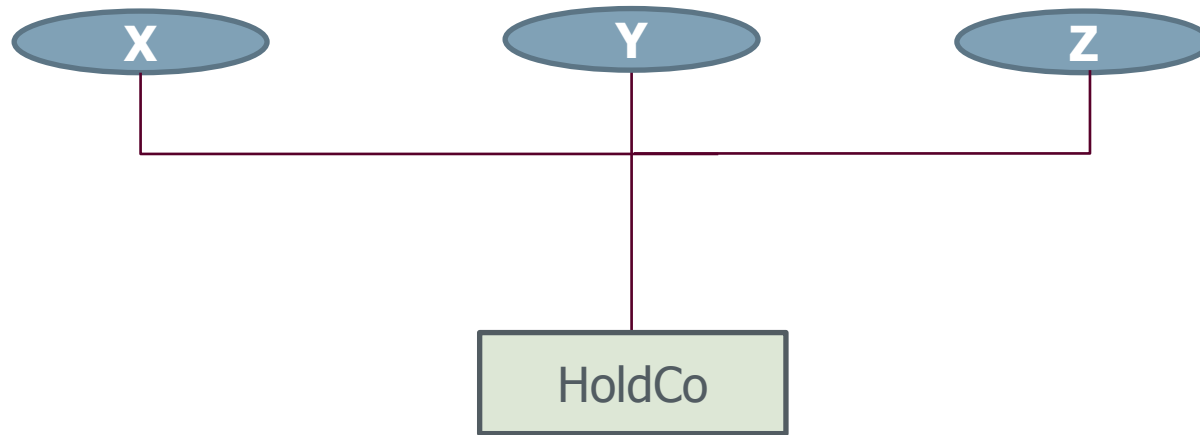
- Default

The Company shall be liable to a fine of 5,000,000 kyats, and every director or other officer of the company who knowingly and wilfully permits the default shall be liable to the same penalty.

In addition if the company becomes insolvent following and in connection with such buy-back, every director of the company who knowingly and wilfully permitted the buy-back in default shall also be liable to the creditors of the company to the extent of the consideration paid for the buy-back where the debts due by the company exceeded the recoverable assets of the company and such amount may be recovered from them by the creditors or the liquidator suing on behalf of the creditors.

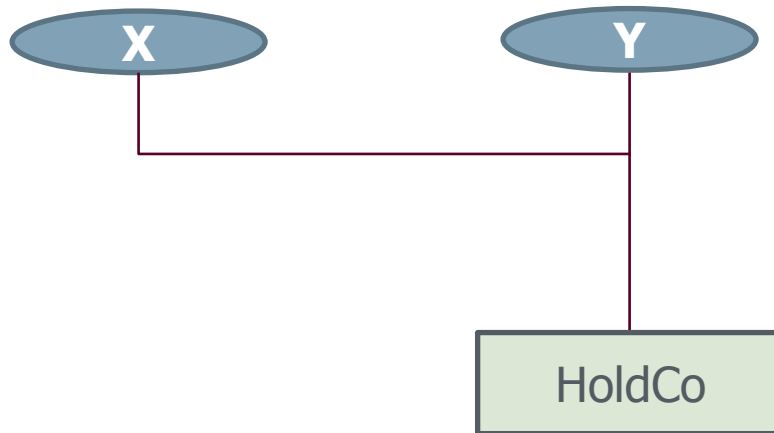
Capital Reduction/Share Buy-back

Equal or Selective



Capital Reduction/Share Buy-back

Selective



Capital Reduction/Share Buy-back

- Property – book value USD10 million.
- Revaluation USD15 million – revaluation reserves of USD5 million.
- 5 million of cash (e.g. Refinancing loan or further investment).
- Bonus issue of shares.
- Followed by capital reduction and buy-back.

Differences ?

Repatriation

Transfer of Funds

56. Foreign investors may transfer the following funds abroad relating to the investments made under this Law:
- (a) capital designated under the provisions relating to capital account rules stipulated by the Central Bank of Myanmar;
 - (b) proceeds, profits from the asset, dividends, royalties, patent fees, license fees, technical assistance and management fees, shares and other current income resulting from any investment under this Law;
 - (c) proceeds from the total or partial sale or liquidation of an investment;

Repatriation

- (l) **Ordinary transaction** means payments for other purposes than the transfer of capital such as:
- Payments to be made in connection with foreign trade, other ongoing business including services, ordinary short-term banking and credit facilities;
 - Payments to be made as interest on loans and as net income from other investments;
 - Payments in a reasonable amount to amortize loans and depreciate direct investment;
 - Reasonable remittance for family expenses.

(m) **Capital transaction** means payments other than payments defined in sub-clause (l) for the purpose of transferring capital.

30. The Central Bank may issue regulations aimed at limiting capital transactions. However, no limits shall apply to the following:

- (a) payback of the principal of loans which the Union Government has allowed;
- (b) aid given to foreign which the Union Government has allowed;
- (c) investment in foreign country which the Union Government has allowed.

31. Nothing in this law shall repeal, or make exception, of the Foreign Investment Law. The Foreign Investment Law takes precedence in case of inconsistencies.

M&A

M&A

- Share Transfer
 - By registration
 - Prescribed form
- M&A Opportunities
 - Myanmar Company to Foreign Company - changed from pre-approval system to notification system (86(b));
 - 35% not a cap;
 - approvals may be required under other legislation.

- Property

CL 2017 s464. The provisions of this Law relating to foreign companies shall not affect the operation of any provision of the Transfer of Immovable Property Restrictions Law 1987 (TIPRL) .

Contrasts with the position on mortgage and charges (s228)

s3. TIPRL 1987 - No person shall sell, buy, give away, pawn, exchange or transfer by any means immovable property with a foreigner or foreigner owned company.

- Property

(c) "Foreigner owned company" means a company or partnership organisation whose administration and control is not vested in the hands of the citizens of the Union or whose major interest or shares are not held by citizens of the Union.

(ဂ) နိုင်ငံခြားသားပိုင် ကုမ္ပဏီ ဆိုသည်မှာ စီမံခန့်ခွဲမှုနှင့် ထိန်းချုပ်မှုသည် နိုင်ငံသားများ၏ လက်ဝယ်တွင်မရှိသော ကုမ္ပဏီ သို့မဟုတ် အစုစပ်အဖွဲ့အစည်း၊ နိုင်ငံသားများ၏ အစုရှယ်ယာ အများစုမပါသော ကုမ္ပဏီ သို့မဟုတ် အစုစပ်အဖွဲ့အစည်းကို ဆိုသည်။

M&A

- Myanmar Investment Law – restrictions
- Change of control

Rule 191. It is a condition of every Permit that the Commission's prior Approval is required if a transfer (or series of transfers) of shares or business referred to in section 72 would result in a person who is not a Related Body Corporate of the Investor acquiring:

- (a) majority ownership or control of the Investor; and*
- (b) more than 50% of the assets of the Investor.*

Financial Institutions Law - acquisition of substantial interest

Section 45. No person shall, alone or in concert with one or more persons, enter into any agreement or arrangement to acquire substantial interest in a bank without the prior approval of the Central Bank.

Substantial interest means owning, directly or indirectly, ten percent or more of the capital or of the voting rights of a financial institution or, directly or indirectly, exercising control over the management of the financial institution, as the Central Bank may determine.

JOINT VENTURES

Joint Ventures

- Joint venture opportunities
 - Companies (with up to minority foreign ownership) will qualify as a Myanmar Investor as defined under the Myanmar Investment Law 2016
 - A number of investment activities (set out in paragraph 1(b) of Myanmar Investment Commission Notification 15/2017) will become open for minority investment by foreign investors.

Joint Ventures

- Share issue for consideration other than in cash
 - Board must determine the reasonable present cash value (which must not be less than the amount to be credited) and the basis for assessing it (s66); and
 - Determine that consideration and the terms of the issue are fair and reasonable to the company and the existing members.
- Bespoke Constitution
 - Note - the constitution has no effect to the extent it is inconsistent with the law (s12).
 - Typical provisions in JV context – drag along and tag along rights, ROFR, reserved matters, default transfer provisions.

Joint Ventures

- Directors' duties
 - A constitution may provide that a director appointed by a shareholder in a joint venture may act in the best interest of such shareholder (s166(d)).
- Resident Director
 - From whose allocation does it come out.

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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

