Shareholder Remedies under Myanmar Company Law

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Abstract

ミャンマーの事業体に関する法律であるミャンマー会社法が新会社法として改正された。ミャンマーは新会社法で、コーポレートガバナンスを十分でないまでもある程度規定することに成功し、その原理が会社法に幾分組み込まれた。株主の保護は、会社の取締役等の役員による不適性経営の結果として起こされる株主代表訴訟や不公正な侵害に対する訴え（the unfair prejudice action）の方法によって、コーポレートガバナンスにおいて、法の下に保証されている。株主はこれらの方法によって保護されているにもかかわらず、法はさらに、裁判所に取締役等の善意による不適正経営に対する法的救済の権限を与えた。そのために新会社法の打ち出す方針は、ある意味では、経営判断原則に大きく依存している。本論文は、新会社は株主保護を最優先とする必要があるという見解を示している。

Keywords: shareholder remedies, unfair prejudice, oppression, derivative claim

1 Introduction

In order to achieve the economic development of the country, the responsible government organizations in Myanmar have passed the necessary new laws and reformed some laws relating to business entities. One of the laws relating to the business entities in Myanmar, the Myanmar Companies Act (MCA), has been upgraded as the Myanmar Companies Law (MCL) by the Directorate of Investment and Company Administration (DICA). The Union President has already approved and passed it after the Myanmar Legislative Council (*Hluttaw*) discussed in the Parliament. The accomplishment of issuing the MCL, by this way, meets the need for corporate governance in Myanmar to some extent. The principles aligned with the standard of corporate governance are somewhat incorporated in the law.[1] However, as the saying goes “nothing is perfect” the business community wants more than what are in the MCL.[2] All our Myanmar people and parliament did not get the point and assist to clarify effectively although DICA asked for the advice from anyone through DICA’s website and gazette.

To talk about the corporate governance, a system by which a company is directed and controlled as defined by Francis (2012),[3] it is the mechanism that entails a set of relationships between its board, its shareholders and other stakeholders.[4] The role of actors from these three layers needs to be clearly defined. For example, rights of shareholders, duties of board members, and the participation of other stakeholders should be taken

into consideration. Shareholders' protection is guaranteed by means of setting out minority shareholder rights and granting them to take the direct action against the abuse of power by the director. [5] Besides, the derivative action can be brought by a person on behalf of the company when that person has got the reflexive loss from a company.

Shareholder remedies within MCL are, indeed, of five kinds: removal of directors (MCL, Part IV, Division 19, §167), unfair prejudice action or oppression remedy (MCL, Part IV, Division 19, § 192), derivative claim (MCL, Part IV, Division 19, § 197), share buy-backs (MCL, Part III, Division 15, § 120), and in an extreme case the just and equitable winding up of a company (Part V, Division 26, § 292). The research will trace these remedies and analyze which remedies are the best. In essence, this research finds out how Myanmar needs to solve what will be encountered based on the situations from the UK. The policy implications of business judgment rule from the UK CA 2006 and MCL are included in this research. The research design is a qualitative style, and the statutes, cases, legal documents, archival of law reviews, the published books on corporate governance, and research paper are used.

2 Research Findings

Among the five kinds of remedies (removal of directors, unfair prejudice action, derivative claim, share buy-backs, and the just and equitable winding up of the company), derivative action and unfair prejudice action are the new statutory remedies given under the MCL. There are the reasons why derivative action and unfair prejudice action are considered to be the more effective shareholder remedies than the other kinds of remedy. The first reason is that even if the directors are removable by shareholder resolution, it cannot be done smoothly. The second reason is that the shareholders cannot remain as shareholders after the share buybacks or just and equitable winding up. Therefore, after the ideas of derivative action and unfair prejudice action have been conceived in the law, the concept of business judgment rule which MCA ingrained requires to be revisited. As the MCL renders the unfair prejudice action and derivative action which are the brand new actions a person can claim in Myanmar, the formal procedures of this kind of action also need to be analyzed. To be in specific, in British view, derivative claim was designed for the interaction with duties of directors or officers in a company[6] although it was not sure it had impact on the deterrence effect and in conformity with the rational theory.[7] Notwithstanding, the latter part of MCL provides that the infringement of director duties in good faith is excusable. Thus, the law favors business judgment rule in a high degree and in a unique way. In a nutshell, the rule similar to the business

judgment rule adopted in MCL requires not to hinder the effective corporate governance.

3 Shareholder Remedies in Companies in Myanmar

Remedies of shareholders in companies in Myanmar within MCL are in five categories. Thus, if MCA and MCL are compared in this sphere, more shareholder remedies have been given within the scope of the latter. Nevertheless, some of the reliefs which MCL authorizes the court to grant need to be clarified and made to be in consistence with the first provisions of MCL to promote the effective corporate governance.

3-1 Removal of Directors by Shareholders

As a general principle, the shareholders give power to directors to manage the company either by the law or the constitution of the company.[8] Shareholders are able to appoint some shareholders to be directors, and they can also remove the directors in certain circumstances. There are three ways to vacate the office of the directors: removal by the members of the company before the expiration of the period of office, resignation, and cessation of office under the terms of the company's constitution.[9] The first method can be done in consequence of any mismanagement of directors. The other two ways are carried out under any other circumstance such as a resignation by the directors themselves or the expiration of the period of the office.

Removal of directors by members is provided in § 174 of the MCL. According to this section, directors are removable by resolution at a general meeting. This section will override all other contractual agreements made between the directors and the company[10] if the policy is at the same footing with UK Companies Act 2006 (CA 2006).[11] Despite § 174 of MCL being a straightforward route to remove directors, removal of directors before the expiration of the period of the office was not an easy means.[12] In order to hold a meeting, the approval of shareholders to convene a meeting or written resolution must be achieved.[13] Further, in case a company contracted with the directors to pay compensation or damages for dismissal during the period of the contract, removing the directors under § 174 of MCL might be very expensive as asserted by Davies (2006).[14] Furthermore, according to § 151 (ix) of the MCL, if a meeting is called and arranged by members holding not less than one-tenth of the votes that may be cast at a general meeting of the company, such members need to pay the expenses of calling and holding the meeting.

Therefore, due to the above two reasons, instead of removing the concerning director by the special resolution, seeking remedies under the title of unfair prejudice action or derivative action might be a better solution. Moreover, even if a director has mismanaged the company affairs, there may be a circumstance in

which some shareholders cannot obtain the resolution to remove the director while a majority of shareholders are in control of the company. The claim under unfair prejudice action or derivative action is the threshold to get remedies for such incidents.

3-2 Unfair Prejudice Action or Oppression Remedy (Personal Action)

It is an advancement of the MCL to offer the unfair prejudice action for an oppressive conduct of the company or the directors. The remedy is designed for the protection of either a director or minority shareholder. Not all of the jurisdictions statutorily and specifically provide this kind of redress although the two remedies, remedy for unfair prejudice and derivative action, are not homogeneous.[15] Kawashima et al., (2017) expounded the unfair prejudice action under § 459 of the U.K. Companies Act 1985.[16] Continuingly, to trace the origination of the unfair prejudice action, it started in § 210 of Companies Act of 1948 as a remedy for oppressive conduct.[17] This remedy was indeed first defined in Companies Act 1948 with the remedy being the alternative to the winding up of the company.[18] However, as the U.K. attempted to increasingly open shareholder remedy and widen the scope under that section, the Companies Act 1980 was turned to provide "unfair prejudice" in place of "oppressive conduct," and was also carried on in § 459 of the Companies Act 1985 as well.[19]

Eventually, the legislature in the U.K. continuingly provides the unfair prejudice action in § 994 in Part 30 of CA 2006. In order to apply for the unfair prejudice action, the petitioners were required to show the evidence that shareholders suffered by unfair prejudice.[20] One of the examples of the unfair prejudice is that in the circumstances that the majority shareholder, by diverting business from the company to another company and procuring that company to make a rights issue so as to increasingly reduce minority shareholder's proportional holding, and by paying the director an excessive salary, caused unfair prejudice to a minority shareholder.[21] Breach of trust and exclusion of management of the company affair by diluting share concentration were also the facts for granting the unfair prejudice action.[22] The CA 2006 authorizes the Secretary of the State to take a measure for protection of members against unfair prejudice manner under the supervision of the court. Joffe (2008) described ten examples of cases which were decided by the court as amounting to the unfair prejudicial conducts:

1. Exclusion from management/removal as director;
2. Omission to consult the petitioner or to provide information;
3. Misappropriation of corporate business or assets;

4. Mismanagement of company's business;
5. Mismanagement of the company's internal affairs;
6. Payment of excessive director's remuneration;
7. Failure to pay reasonable dividends;
8. Allotment of shares and rights issues in bad faith;
9. Failure to comply with CA 2006; and
10. Failure to follow according to the terms of shareholders' bargain and lacking of appointed independent external valuers.

Harris v Jones, [2011] All ER (D) 94(Ch. June 14, 2011) (citation omitted). Joffe restated these examples based on the facts that the court considered in Harris v Jones. *Id*.

Among the fore mentioned rights, there are certain exceptions – exclusion of management of the company, failure to the petitioner to provide information, and mismanagement of company's business – not to be filed under the unfair prejudice action. Therefore, Boros (1995) mentioned that the case of exclusion from management of the company was required to settle under breach of contract.[23] However, Joffe (1995), argued that cases claiming remedy for unfair removal of directors and such exclusion from management were frequent among complaints under § 994 of CA 2006.[24] Due to the extreme difficulty as explained by Joffe (1995) in seeking a remedy for exclusion from management under § 994,[25] Boros (1995) asserted that the action for breach of contract was a proper way for this context.[26]

The infrastructure of the remedy was on that when directors mismanaged a company business and risks to the interest of shareholders would increase, there still were other reasons which prevented the unfair prejudice action. The two reasons – a disagreement of the petitioner with management decision taken by the board in good faith and the shareholder acquiring shares in the company that she took the risk by her improper management – supported not to be amounted to such unfair prejudice despite the decisions taken by those in control of the company's affair were commercially disadvantageous.[27]

In a nutshell, unfair prejudice action was limited in cases of enforcement of contractual rights, of statutory rights, and of the articles.[28] If a petitioner could obtain relief under unfair prejudice remedy with respect to breach of contract, the case would amount to winding up on the just and equitable ground as decided in the case of Re A. & B.C. Chewing Gum Ltd [1975] 1 All ER 1017.[29] The petition that could be solved under the unfair prejudice action were the cases such as the members complaining between each other or a member complaining

of the affairs of the company or proposed conduct by or on behalf of the company.[30] However, Boros (1995) pointed out that where a contractual dispute was tied in with other intra-corporate disputes, the petitioner had to be allowed the enforcement of contract by means of the unfair prejudice remedy.[31] Nevertheless, the most reflexive situation was mentioned by Kawashima et al. (2017) that most of the court orders made under § 994 of CA 2006 were the share purchase orders.[32] The court ordered so because they wanted to resolve the problem flexibly.[33] However, the articles of some companies may not allow share purchase by the company. In such a case the court needs to order the alteration of the articles first. Francis (2012) also pointed out that the alteration of articles was one of the remedies for unfair prejudicial conduct.[34] The subsequent procedure in case the court ordered the articles of the company to be altered in order to allow the company or shareholders to purchase shares is also provided in § 999.[35]

Fig. 1 Popular Shareholder Remedies in the U.K.

Kinds of Remedies	By Shareholder's Name	Against Director (Officer)/Shareholder	Reliance on Court	Prima Facie Reliance on Shareholder Meeting	Objective Test
Unfair Prejudice Action	yes	both	yes	no	yes
Derivative Claim	no	Director (officer)	no	yes	yes

Derivation from the fore-mentioned ideology, § 192 of the MCL came to provide that "the Court may make an order…if the conduct of a company's affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company is either: (a) contrary to the interests of the members as a whole; or (b) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity."

The following section i.e. § 193 of the MCL provides what the court is authorized to do relating to the § 192 of the MCL. According to § 193, the court can make any order that it considers appropriate in relation to the company, including an order:

(i) that the company be wound up;

(ii) that the company's existing constitution be modified or repealed;

(iii) regulating the conduct of the company's affairs in the future;

(iv) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(v) for the purchase of shares with an appropriate reduction of the company's share capital;

(vi) for the company to institute, prosecute, defend or discontinue specified proceedings;

(vii) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(viii) appointing a receiver of any or all of the company's property;

(ix) restraining a person from engaging in specified conduct or from doing a specified act;

(x) requiring a person to do a specified act; or

(xi) for damages.

MCL § 193 (2017). This section was retrieved from https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/final_mcl_english_version_6_dec_president_signed_version_cl.pdf from the website created under the authority of the Directorate of Investment and Company Administration in Myanmar.

From all of these orders which the court can make, the orders that the court can pass under (i), (iv), and (v) are not to be considered as the best remedies because the shareholders will no longer remain as shareholders. Nevertheless, as Boyle (2002) had stated that the unfair prejudice action was much more complicated than derivative action because depending on the concept,[36] there was imperfection on having only the unfair prejudice remedy.

Fig. 2 Process of Unfair Prejudice Action under MCL

<table>
<tr><td>Claimant (who)</td><td>1. Member</td><td>2. a person who has been removed from the register of members because of a selective reduction</td><td>3. a person who has ceased to be a member of the company</td><td>4. a person to whom a share in the company has been transmitted by will or by operation of law</td><td>5. a person whom the Registrar thinks appropriate having regard to investigations it is conducting or has conducted into the company’s affairs or matters connected with the company’s affairs</td></tr>
<tr><td rowspan="2">Defender (whom)</td><td rowspan="2">1. Company</td><td>2. a person on behalf of the company</td><td rowspan="2">3. members who have proposed or omitted the act</td><td rowspan="2">4. class of members who have proposed or omitted the act</td><td rowspan="2"></td></tr>
<tr><td>Officers (directors, auditors, etc)</td></tr>
<tr><td rowspan="2">Reasons (why)</td><td colspan="3">1. an actual or proposed act or omission by or on behalf of a company</td><td colspan="2">2. a resolution, or a proposed resolution, of members or a class of members of a company</td></tr>
<tr><td colspan="5">1. or 2. is either contrary to the interests of the members as a whole; or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members</td></tr>
<tr><td>Ex-ante or ex-post (when)</td><td colspan="3">1. ex-ante</td><td colspan="2">2. ex-post</td></tr>
<tr><td>Forum (where)</td><td colspan="5">Court</td></tr>
</table>

3-3 Derivative Action (Corporate Action)

While the unfair prejudice action (or) oppression remedy is a personal action, the derivative action is an action brought by a member of a company on behalf of the company.[37] The derivative action originated in the U.K. through a leading case.[38] The action is the main remedy for a shareholder whenever a director breaches the duties or other obligations owed to the company in the U.K. and commercially disadvantages the interest of the company as a whole.[39] In the U.K., before the revision of Companies Act in 2006, derivative actions were viewed as the common law derivative actions. The common law derivative action was established from the rules in Foss v Harbottle [1843] 2 Hare 461.[40] Because of the proper plaintiff rule set up by this case, only a handful of derivative claims were successful. However, Edwards v Halliwel [1950] 2 All ER 1064 laid down the rules to open the derivative action.

If a majority of the shareholders controlled the company, and minorities of the shareholders were not able

to claim the loss under derivative action, the rules adopted by Edwards v Halliwel supported the minorities to bring the suit in the name of the company. Thus, whether the shareholders could seek redress under the derivative claim depended on the principles adopted through the legal decisions. This phenomenon was a common law derivative claim. However, the Company Act in the U.K. statutorily provided the derivative action in the revision in 2006. The provisions of statutory derivative claims under this Act overruled the common law derivative action.[41]

Nevertheless, the new statutory derivative proceeding still maintains the proper plaintiff rule adopted by Foss v Harbottle. It is said so because CA 2006, § 260 (1) (b) provides that member can seek relief under the derivative claim only on behalf of the company, and so it maintains the proper plaintiff rule adopted in Foss v Harbottle. Moreover, § 260 (2) (b) provides that a derivative claim can be conducted in pursuance of the court in a proceeding for protection of members against the unfair prejudicial conduct. Thus, if the company can stand as a plaintiff for the member(s), then a proceeding under unfair prejudice action can be brought under the derivative claim in pursuance of the court's order.

In a derivative claim, the important factors to bring a claim are that the claimant is required to be the represented member(s) and that the claim is required to bring against the concerning director(s). "Another person" provided in § 260 (3) means a director, or legal or real persons who have assisted the director in breach of the duty and this word doesn't cover "the third parties unconnected to a director."[42] In a company having a sole shareholder, such a shareholder may bring the claim against a company as well as a director.[43]

In order to start a derivative claim, the claimants require an application for permission from the court in accordance with the CA 2006, § 261(1). The CA 2006 provides for a two-step-procedure in proceeding for a derivative claim.[44] The first step is to consider whether a derivative claim should or should not be granted depending on the prima facie case supported by the applicants. The second is that the court has to consider whether the claim meets the conditions provided in § 263 (3). The court should consider to grant the action based on the three conditions – the member acting in good faith in seeking to continue the claim, promoting the success of the company, and that the member could or could not pursue in his own right rather than on behalf of the company – in order to permit the claim. Moreover, there are also certain conditions which bar the court to give permission under the CA 2006, § 263(2). Therefore, § 263 is said to provide all of the provisions for the court to consider whether to approve to continue on the derivative claim or dismiss the claim and thus the core statutory procedure for derivative action.[45]

Any of the three conditions provided in § 263 (2) – that a person acting in accordance with § 172 (duty to promote the success of the company) would not seek to continue the claim, that the act or omission has been authorised by the company, or that the act or omission, was authorised by the company before it occurred or has been ratified by the company since it occurred – prevents shareholders from claiming derivative action despite the claimant or company still intending to continue the claim.[46] How shareholders can rectify acts of directors is provided in § 239 of the CA 2006. According to this section, directors and members connected with such interested directors are not entitled to take part in resolution. At the first stage of the derivative claim, if the court is satisfied that a prima facie case is disclosed by the application and supporting evidence, the court may give directions for to the evidence to be provided by the company and may adjourn the proceeding to obtain the evidence.[47] During the adjournment period, the company can convene a shareholders' meeting in order to obtain shareholder resolution whether a breach by the director is rectifiable.[48] The valid rectification is required to be free from breach of the directors' duty under § 172 of the CA 2006.49 Then, if the court does not dismiss a claim at the first stage, the hearing process which is the second stage follows the first stage. On hearing, the court may still decide whether to give or refuse permission, dismiss the claim, or adjourn the proceedings on the application and give the directions as it thinks appropriate.[50] However, when a company has brought the claim and the cause of action can be pursued as a derivative claim, but if there are imperfections as described in § 262 (2), then a member can apply to continue the claim as the derivative claim.

After the member has applied to continue a derivative claim, if other members find any defect of the claimant which causes the court dismiss the claim, that other member can apply to continue the claim relying on section 264 (2) of the CA 2006; however, if the court is unsatisfied with the application and evidence filed by the applicant, the court may dismiss under § 264 (3) (a) or make any consequential order according to § 264 (b). If the court has dismissed the application by that member, then it may give directions to the company to provide the evidence and proceed with the claim.

Ultimately, according to the mentioned explanation, the CA 2006 provides a comprehensive explanation for a derivative claim. Nevertheless, one problem of the setting out principle on rectification has remained completely unsolved in the U.K. With regard to this problem, as the U.K. practices common law system, if the court is to consider to what extent of the ratification can prevent from the derivative claim as stated by Reisberg (2009),[51] then the court has to rely on the legal cases. In addition, if there are no provisions in the statute or principles in deciding cases, the judges will still have a discretionary power to settle the problem in accordance

with justice, equity, and good conscience. Even before the duties of directors and oppression remedy or unfair prejudice action had not been statutorily provided, two cases (*Alexander v Automatic Telephone Co* [1900] 2 CH 56, and *Cook v Deeks* [1916] 1 AC 554) served as the examples of the invalid rectification of breach of the directors' duties.[52] In either of these two cases, there was a majority control on minority shareholder and if the court granted derivative claim, it would amount to fraud on the minority and this would be sorted under the unfair prejudice actions. Thus, all of the rectifications gained by shareholder meeting were not a sufficient evidence to permit the derivative claim to be proceeded.[53]

Similar to the CA 2006, the MCL precludes the general law to be referred and cited. Derivative claim requires to be pursuant only under the MCL. The derivative claim is to be obliged by the MCL from § 196 to § 201. What are the good points are that a person claiming to file the derivation action does not need to receive the permission of the concerning company if it is claimed for the benefit of the company,[54] that the court can intervene in such case even if the company rectified the conduct of the officers,[55] and the court is to set the costs order.[56] Therefore, the MCL still maintains the power of the courts to intervene the company affairs based on the problems which popped up in the U.K. cases. Further, the MCL requires to clarify is the fact that, according to Fig. 4, "against whom a derivative action can be filed".

Fig. 3 Some Legal Texts of Derivative Action within MCL

196. Bringing, or intervening in, proceedings on behalf of a company

(a) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if the person is acting with leave granted under section 197 and is:

i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(ii) a director, former director, officer or former officer of the company.

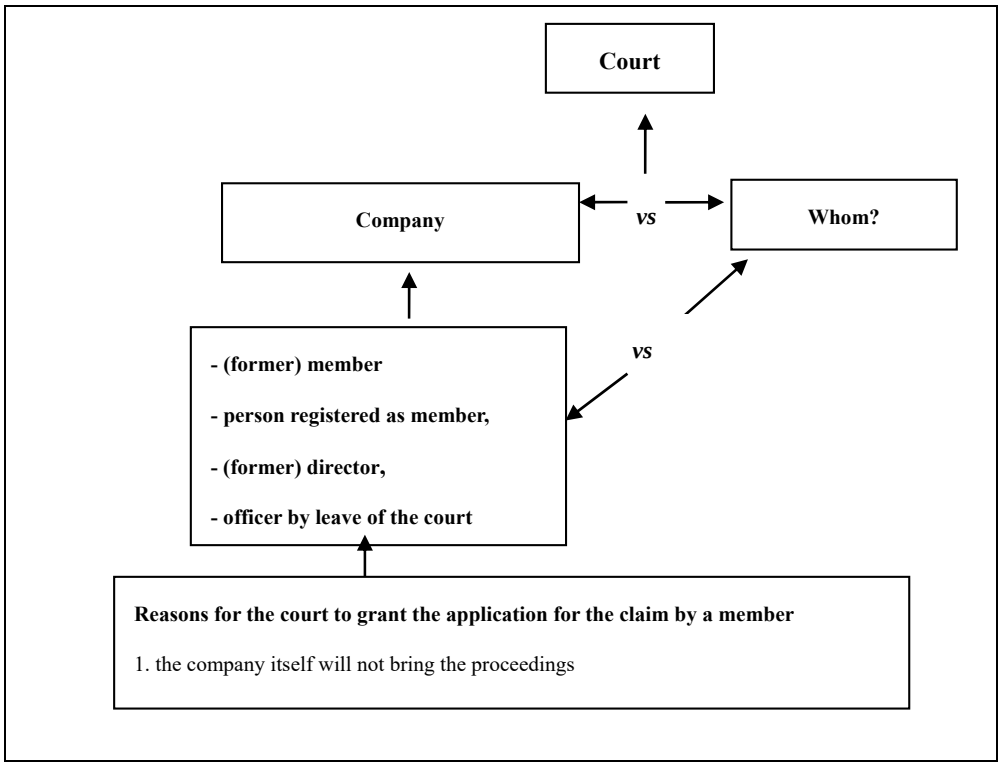
(b) Proceedings brought on behalf of a company must be brought in the company's name.

(c) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

197. Applying for and granting leave

(a) A person referred to in section 196(a) (i) may apply to the Court for leave to bring, or to intervene in, proceedings.

Fig. 4 Process of Derivative action under MCL



3-4 Share Buybacks

Share buybacks were known in Myanmar as one of the reasons for the capital reduction in a private company. It was because the buyback was permitted only in the situation of capital reduction according to the MCA in § 54(A). Actually, the purposes for deregulation for share buybacks might be in variation. The deregulation would open to prevent the low share price followed by hostile takeover and to maximize shareholder return like in Japan.[57] For the U.K, the share buybacks might also be designed to reduce the wasteful investment and surplus cash and to maintain the balance sheet.[58]

As for Myanmar, the MCL allows share buybacks under the four conditions[59] if the shareholders' approval is accompanied with the buybacks.[60] The first condition is that when the value of company assets is greater than its liability after the buybacks.[61] The second is that it must be fair and reasonable for all shareholders in the company.[62] The third is that it must not cause harm to the company's ability to pay its creditors.[63] The fourth condition is that for an equal buyback, an ordinary resolution of shareholders from a general meeting must support for that buyback. For a selective buy-back, the special resolution of shareholders and no votes by

any person who will receive the consideration for the buy-back is required.[64] Therefore, it is not so tough to do the equal buy-backs; but the selective buy-back will not be smoothly done due to taking account of votes of a person receiving the consideration. Nevertheless, the MCL permits share buybacks which do not inflict the creditor protection.

Share buybacks rules are, according to Kawashima (2018) and Chokuda (2017), the remedies either for shareholders who did not want to exit from the company, [65] or in this article, who wanted to exit from the company when they were not satisfied with the management style of the directors; but they don't want to fight back against the concerning directors. Based on these views, shareholders should have a chance to claim through shareholder meetings for their shares to be purchased by the company in the situation of an illiquid market. With regard to the purchasing shares by the owned company within the MCL irrespective of a merger, it can be done through the resolution of the shareholders.[66] However, that shareholder who wants to exit from a company due to the imperfection of the management of directors but does not want to sue in court can claim the company the exit right by the shareholders' approval is not explicitly provided. The rationale for not expressly opening that kind of right might be consistent with that the former Myanmar Chief Justice Dr. Maung Maung opined, "A company is like a family of people who have pooled their resources to work together and share the profits, sticking together in good time and in bad. When problems arise about the management of their affairs the natural and reasonable thing for the company to do is to get together and discuss the problems and arrive at their solution."[67]

Therefore, in order to claim for the share purchase order, the shareholders not holding the redeemable shares have to inevitably sue the directors under § 192 of MCL as previously described in 3-2 of this research paper. The single reason of mismanagement by the directors is not a sufficient proof to make the claim under that section. It goes further beyond the mismanagement. Any of the facts mentioned in any 3-2 in this paper have to be accompanied with the claim. Nevertheless, even if the MCL opens the share buybacks, it can authorize the court to make any other order other than the buyback order.

3-5 Just and Equitable Winding Up

"Winding Up" of a company may not generally be the fantastic term; but "Just and Equitable" might appease the so-called termination. Therefore, a remedy created through this kind of judicial treatment is considered to be the last resort. The roots of the reason are that the unfair prejudice action and the derivative actions are the two kinds of shareholder remedies which could bring sufficient remedy.[68] Nevertheless, there

were cases in which a remedy cannot be sought under these two kinds of actions. For such cases, the court would allow for the just and equitable winding up of the company. However, despite winding up order by the court was one of shareholder remedies, a shareholder could not gain all of the remedies by applying this process.[69] The winding up process is assimilated with the unfair prejudice action and has very little operation.[70] The court granted a winding up order unless no other remedy was sought.[71] The unfair prejudice action and derivative action are reliable as two kinds of remedies for shareholders.[72] Therefore, a winding up order is the last resort to settle the dispute in director's mismanagement of the company. The leading case in Myanmar, U Ohn Maung and two v. Chan Thar Zay Co. [1964] B.L.R. p.499, also adopted that mismanagement by directors was not a good reason for the court to grant the winding up processes.

The leading case in Myanmar which the court granted winding up order was Mg Mg Kyi & Co.Ltd with Myanmar Companies Act, 1960, Petty Case No. 243 reported in [1967] B.L.R, p.406. In that case, three shareholders out of twenty-six applied for winding up of the company by the court under § 162 of the MCA, but nineteen shareholders objected. Nevertheless, as the company became unable to carry on its business, nineteen shareholders then wanted to wind up the company voluntarily. Moreover, the director who had forged the signatures on the share certificates transferred the (94) pieces of the certificate to a minor person was charged under § 465 and § 467 (forgery) of the Penal Code. Therefore, the shareholders had applied to take action by the criminal offence under the title of forgery. The court considered that if the process would not be allowed as the voluntarily winding up, the criminal trial which had been delayed must continue to be stayed, and then the case would never end. After allowing the company to voluntarily wind up, only then could the criminal trial be conducted. Further, the court in considering the long term economic benefit of the existence of the company, it could not be pursued because that company would be forfeited by the then government.[73] This case offers an example of the facts which the court considered as the grounds for winding up the company.

With regard to the current law, the provisions which open the winding up process are found in § 192 (i) which is the unfair prejudice action and § 292 specifically for the winding up processes. However, if the suit is filed under § 192, it is the consideration of the court to order other than the winding up. It is because § 193 authorizes the court, depending on the circumstances of the case, to grant various remedies as previously described in 3-2 of this paper. For example, if the court is of the opinion that the claim should be changed to another remedy such as the derivative claim, purchasing shares, restraint the act, etc., the court will refrain from granting the winding up order. The winding up processes of the companies registered under the MCL are

provided in Part V, Division 26.

Within the scope of Division 26 of the MCL, the remedies of shareholders and company are reflective in § 397 (a). It provides that if a director or other officer has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any malfeasance, that officer(s) are liable for damages or repayment or restoration of the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of or breach of trust in relation to the company. The remedy given under this section has to be claimed by the liquidator. Thus, the remedies of shareholders given under this section are not explicitly for the same, but as of the damages for the whole company at large. Notwithstanding, the company's money or other assets gained by this process is considered to be of shareholders collectively.

Looking into the overall structure of the winding up process within the MCL, Nishimura Asahi Law Firm opened in the former capital city in Myanmar apprehended that there would be any inconsistency with the bankruptcy law which would be enforced in Myanmar later and the unpredictability of the time frame of the liquidation process.[74] With regard to the bankruptcy law, as § 390 and § 393 of the MCL mandate the company law to be applied with the enforcing insolvency law, the respective Myanmar law drafting council would note this point. For a company which has overcome the insolvency test, only the winding up processes provided under the MCL are to be used. The only concern is left on the time frame of the liquidation process.

4　Obstacle to Shareholder Remedies adopted in MCL

Shareholder remedies in 3-1, 3-2, 3-3, 3-4, and 3-5 of this article are to be well equipped in order to control the corporate governance. These are still not exhausted. The concept of business judgment rule also plays a critical role in deciding to grant or not to grant the shareholder remedy. Business judgment rule is "the presumption that in making business decisions not involving direct self-interest or self-dealing corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest."[75] According to the Black Law, the rule shields directors and officers from liability with due care and within their authority.

Not all of the jurisdictions provided the rule in the statute. The U.K., as pointed out by Puchniak and Nakahigashi, was one of the countries which did not have a formal business judgment rule.[76] Gerner (2013) was also of the view that CA 2006 of the U.K. did not explicitly provide the rule despite the court grant a margin

of discretion.[77] On the other hand, Francis (2012) described "the court has a discretion to relieve directors, wholly or in part, from breach of duty committed in their official capacity if they ought in the circumstances to be excused" by § 1157 of CA 2006.[78] Based on these premises, this research views that the provision supposed to be a business judgment rule had been reflective in § 1157 of CA 2006. However, this problem did not frequently pop up as the reported cases in U.K.[79] The reason why there was no report on such case might be that the lower courts in the U.K. might favour this § 1157 to be overruled by the provisions on duties of directors.

As for Japan, the business judgment rule has not been codified; however, the Supreme Court adopted the rule with certain exception.[80] The decision of the Supreme Court binds the lower courts in Japan.[81] In *Apamanshop Holdings Co. Ltd case*[82] the Supreme Court of Japan held in favour of the directors based on the following excerpt:

> [T]he formulation of such business restructuring plans can be seen as something to be appropriately entrusted to the 'specialized managerial judgment' of the directors which involves considering future business prospects, including evaluating the merits of forming a wholly-owned subsidiary. Therefore, in regard to the methods and pricing for acquiring shares in such cases, directors can consider the overall situation and make decisions about not only share price, but also the necessity of obtaining shares, *Apamanshop*'s financial burden, the necessity of smoothly acquiring shares, and so on. So long as there are no significantly unreasonable aspects involved in the process and content of such decisions, it should be understood that the directors will not violate their duty of care as directors.

Saikō Saibansho [Sup. Ct.] July 15, 2010, Case No. 2009 (Ju) 183, HANREI JIHŌ [HANJI] 2091- 90 (Japan) (citation omitted). The excerpt is based on the translation by Puchniak & Nakahigashi *supra note* 80 at 6.

The lower courts in Japan also follow the rules adopted by the Supreme Court.[83] However, in Myanmar, § 435 of the MCL, the similar provision of § 1157 of the CA 2006, can be said to set up the rule indirectly:[84]

> [I]n any proceeding for negligence, default, contravention (including in respect of an obligation under this Law), breach of duty or breach of trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

MCL, § 435 was retrieved from https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/ final_ mcl_english_version_6_dec_president_signed_version_cl.pdf from the website created under the authority of the Directorate of Investment and Company Administration in Myanmar.

Besides, according to § 436 of MCL, the Registrar, any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, contravention (including in respect of an obligation under this Law), breach of duty or breach of trust, or another person authorised in writing by the Union Minister, may apply to the Court for relief. The Court on any such application shall also have the power to relieve him under this section.

Therefore, the MCL stresses on the business judgment rule in a unique way. There might be some reasons why it provides so: that the idea of the tort claim for negligence is not active in Myanmar yet, that the remedy for non-fulfillment of duties is not to be sorted as negligence liability or strict liability, that such commitment has to be based on whether the concerning person had done with the intention to do wrong (*mens rea* used in criminal trial), and that it is merely designed to commit only in subjective (criminal) way (not by both subjective and objective tests). CA 2006 from the U.K. and the MCL have the similar provision supposed to be involved with the business judgment rule. As the suits claimed under this provision were not often filed in the U.K.,[85] there seemed to be no big problem. Even if there was any case involved, the court used the standard of care by directors first (*Re,* O'Neill v Phillips [1999] 2 BCLC 1). However, as the U.K. is very advanced in tort claim, it uses both the subjective and objective tests in order to commit the delinquent officer.

5 Conclusion

Among the changes in the MCL, the sections relating to corporate governance are provided more than the former Companies Act. The MCL develops by being input statutory director duties and the remedies against the officers breaching duties and mismanagement of the company affair. As Myanmar does not have any precedent cases related to duties of a director, only the statutory duties will be cited. In order to check and monitor the duties of the directors which are statutorily provided in the MCL, the litigious rights of the shareholders against the mismanagement of directors (shareholders remedies) also need to be interactive with those duties. If shareholders will hardly have a chance to claim the remedies as an *ex-post* right against the infringement by the directors for any loss, then the board of directors will freely determine even if any conduct is against the benefit of a company and the shareholders as well. Then, the efficiency of corporate governance

cannot be ensured.

One of the tools which controls the effective corporate governance is the unfair prejudice action or the remedy for an oppressive conduct. This kind of remedy is tested objectively and there will be no problem except being tough in interpreting the term “unfair prejudice.” Therefore, the court, in order to commit the concerning person under the unfair prejudice action, requires the consideration of the negligence of that person which was not based on the ill-minded. In other words, that whether the courts require to commit a person based on her intention to do with the ill-minded or whether she has done without malpractice but for gross negligence need to be reconsidered. Moreover, the fact that the interest of the company is diminished is required to be taken into account.

Notwithstanding that the corporate governance has been upgraded, it is hard to say that the enforcement for a good corporate governance is framed out in the law. This concern relates to the provision that the court requires to grant a concerning officer the relief for infringement of her duties in good faith. For this kind of case, the MCL still maintains the power of the court to make the concerning officer free from the action being taken for her non-fulfillment of the duties imposed by the Act. According to the literal meaning of the MCL provisions, the court has to use the subjective test in order to commit the concerning person. Therefore, although the MCL has developed from the MCA passed in 1914 to a large extent, if the provision on the court power to grant the relief for negligence which seemed to be the business judgment rule would be kept silent, then a device for checking the corporate governance within the law would be more developed.

Notes

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11 *See generally* Manabe Kana（眞鍋　佳奈）「Myanmā Shinkaisha-Hō no Zentai-Zō to Kongo no Kadai（ミャンマー新会社法の全体像と今後の課題）」27-35 *Junkan Shōji Hōmu*（旬刊商事法務）, No.2162 (2018.3.25) (MCL being commented as a transplant of Australia Corporations Act, and since the Act is derived from the U.K. Concept, there might not be a distinct different from the Companies Act, 1985 of the U.K).
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