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Chapter 1

Introduction

Myanmar continues to generate intense investor interest in what remains one of the world's largest underdeveloped markets.

Myanmar is making valiant strides in leveraging its geopolitically strategic position, rich natural resources, young labor force, over 50 million strong population, and proximity to some of the most dynamic economies in the world, to propel its nation and people to greater prosperity and step out of the shadow of its authoritarian past. To these ends, Myanmar is actively encouraging foreign investment, with many international companies having already established a presence in the country, and many more eager to follow suit. Nonetheless, many risks remain.

The legal environment is undergoing a dizzying process of rapid change and modernization. The Myanmar government has made significant progress so far and continues its feverish pace of drafting new laws and instituting regulatory reform. These new laws co-exist with both the old British colonial laws and regulations, which provide much of the foundational legal framework still in place today, and with the laws and regulations issued by the various military governments over the last fifty years. This mixture of a common law heritage with laws more akin to an abridged civil law approach has been further complicated by the liberal application over the last few decades of "policies and practices," which are not detailed in any laws or regulations, and are often unpublished. The result is a legal landscape that requires patience and, most importantly, a deep understanding of the colonial laws, former military government laws and practices, and finally, the recent pro-foreign investment laws. With careful legal and tax structuring and an appetite for risk, foreign investment can be pursued in Myanmar on the principle of "high risk/high reward" for early movers. It is certainly not too late for early mover advantage in numerous sectors.

The country is strategically positioned, sharing borders with China and India, along with Thailand, the Lao PDR, and Bangladesh. Various positive economic conditions suggest that, provided that the political environment remains stable, this economic growth is expected to continue and strengthen in the coming years.

Continuing Pro-Foreign Investment Laws

One of the main pillars of investment is providing investors with a transparent and rules-based approach to the legal and regulatory framework; a clear and well-understood playing field. As mentioned above, this is not yet the case in Myanmar, despite the fact that the old colonial laws and the recent pro-foreign investment oriented laws provide some basic guidelines with regard to:

- The industries that international companies may invest in, and the form they must take;
- The rules applicable to how they should operate once they have entered the market; and
- Trying to make sure that enforcement of the rules is fair.

The effectiveness of the last factor will, of course, become clearer in time. The government appears to be working hard; drafting and issuing new laws to create just such a clear and level playing field. However, this is no easy task and will likely take many twists and turns. Still, some solid progress has been made, the most notable being the enactment of the Myanmar Investment Law on 18 October 2016 (MIL) and the related Myanmar Investment Rules published under Notification № 35 of March 2017 (MIR) issued by the Myanmar Investment Commission (MIC, the body overseeing foreign investment into Myanmar). The MIL and MIR continue the efforts of Myanmar in liberalizing more sectors to foreign investment.

2017 witnessed the passing of the long-awaited version of the Myanmar Companies Law. While the implementation of this important Law remains uncertain, it nonetheless represents a marked policy change in the amount and extent of foreign investment that may be held in Myanmar companies. This law modernizes the regulatory framework applicable to every company in Myanmar, lifting Myanmar to a more internationally recognizable standard.

Chapter 2

Investing in Myanmar

2.1 Regulatory Overview

In October 2016, Myanmar enacted the new Myanmar Investment Law. The new MIL repeals the previous Foreign Investment Law of 2012, and provides for greater incentives in an attempt to attract heightened levels of foreign direct investment into Myanmar. In 2017, the Myanmar Investment Rules were implemented. Together, the MIL and MIR replaced the Foreign Investment Law of 2012, and the Myanmar Citizen Law of 2013. The MIL and MIR have continued the trend of incentivizing foreign investment in Myanmar.

In accordance with the MIL, the MIR and Notifications issued by the Myanmar Investment Commission (MIC) and the Directorate of Investment and Company Administration (DICA) respectively provide further details and guidance on investment projects.

Regardless of whether a foreign investor is seeking an investment permit from the MIC, no foreign company can carry on business in Myanmar unless it has first obtained a Certificate of Incorporation¹ (COI).²

Foreign direct investment in a project to be carried out in Myanmar can either be made:

- Under the Myanmar Investment Law and Myanmar Companies Act;
- For projects falling under the sectors identified by the Myanmar Investment Law, the Myanmar Investment Rules and the MIC Notifications, foreign investors must apply to the MIC for an investment permit (MIC Permit). Companies having obtained such an MIC Permit will be eligible for the key benefits granted to a company formed under the Myanmar Investment Law (MIL Companies). Importantly, these MIC Companies must still obtain a Permit To Trade and Certificate of Incorporation from the DICA, in addition to the MIC Permit;
- Under the Myanmar Companies Act alone; or
- For a project for which an MIC permit is not required, or for which such project is not eligible for an MIC Permit (e.g. for the provision of services), foreign investors can apply for a Permit to Trade and a COL from the DICA, only without the need to go to the MIC.

¹ Or a Certificate of Registration in the case of a branch of a foreign company.

² Section 27A of Myanmar Companies Act of 1914 ("Companies Act").

2.2 Investment Vehicles

A foreign investor may establish a 100% foreign-owned company, a branch office, or enter into a joint venture arrangement with a Myanmar citizen, company, or state-owned entity. The aforementioned types of entities are permissible under the Foreign Investment Law and the Companies Act although, as will be discussed later, the Foreign Investment Law places limitations on the use of certain investment vehicles in various sectors.³

A 100% foreign-owned company will usually be either a subsidiary, or a branch office of the foreign company. In practice, the foreign investor seeking an MIC permit will need to form a subsidiary. Furthermore, the distinctions in potential liability between a subsidiary company and a branch office are not clearly specified in Myanmar law. The only advantage of opting to open a branch office over a subsidiary company is the less onerous filing and corporate secretarial compliance obligations, and a certain amount of flexibility as to how much “onshore” activity the branch can perform. There are two types of limited liability companies in Myanmar, namely a private limited liability company, and a public limited liability company. Currently, there is no a public foreign company in Myanmar.

A joint venture is permissible for any project in Myanmar, though as discussed below there are certain business sectors specified in the MIC Notification which require a partnership with a Myanmar citizen or company. In general, the shareholding ratios are to be decided “by mutual agreement” of the parties; however, the MIC has the discretion to set shareholding ratios between foreign and local investors in specific sectors. Sometimes, in certain sectors, the MIC requires ministry approval, which has been previously contingent upon a public-private joint venture or other analogous system, including a Build-Operate-Transfer contract (BOT), or other partnership with the government.

Foreign investors may also appoint a business representative or enter into an agency arrangement with a Myanmar citizen or 100% Myanmar-owned company for certain activities, such as import/export, trading and retail distribution activities that are generally prohibited to foreigners unless an MIC approval for the activity has been attained.

2.3 The Role of the MIC

The MIC is the government agency that administers the Myanmar Investment Law and coordinates with various ministries and organizations to facilitate foreign investment in Myanmar. The MIC evaluates foreign investment proposals and either approves or denies applications based on the quality and completeness of the proposal, and the specific goals identified in the Myanmar Investment Law.

In accordance with the MIR, the MIC must evaluate proposals and accept or reject them within 15 days of submission of the application, and thereafter issue (or deny) an MIC permit within 90 days. The MIC has broad discretion in approving or denying foreign investment proposals,

³ See more on Chapter 3.

and these timelines may not be adhered to in actual practice.

2.4 Prohibited, Restricted and Conditional Business Activities under MIL, Rules and Notifications

The MIC issued a new Notification 15/2017 containing four categories of business activities which may only be undertaken by:

- the Union;
- a Myanmar citizen or entity;
- by a foreign company only in a joint-venture with a Myanmar citizen or entity; or
- by a foreign company only upon approval by the relevant ministry.

The schedule of specific activities which are reserved exclusively for Myanmar citizens and entities includes certain production and services activities, agricultural cultivation, livestock breeding, and fishing activities.

This Notification repealed Notification 1/2013. The MIC Notifications provide the list of business activities which are prohibited and restricted, requiring environmental impact assessments, and not subject to tax exemptions or relief for foreign investors. The business activities of MIC Notifications must be conducted under the Foreign Investment Law, i.e. requiring an MIC Permit. The major categories of business activities are below:

Businesses which are prohibited and restricted for foreign investors:

- Manufacturing and related services of arms and ammunition for national defense;
- Managing and conserving natural forests;
- Prospecting, exploration, and production of jade and gem stones;
- Small and medium scale production of minerals;
- Administration of the electrical power system;
- Inspection of electrical work;
- Air traffic control services;
- Pilotage services;
- Pet care services; and
- Publishing and distributing periodicals in ethnic languages including Burmese.

Businesses and sectors which require a joint venture with a local partner (shareholding ratios are determined by mutual agreement between the parties and subject to MIC approval) including:

- Manufacturing and domestic marketing, distribution, and sale of cereal products such as biscuits, wafers, and all kinds of noodles;

- Manufacturing and domestic distribution of all kinds of confectionery including those of sweets, cocoa, and chocolate;
- Processing, manufacturing, canning of food products except milk and dairy products;
- Manufacturing and marketing of malt and malt liquors and non-aerated products ;
- Manufacturing, distilling, blending, rectifying, bottling and marketing of all kinds of spirits, alcohol, alcoholic beverages and non-alcoholic beverages;
- Manufacturing and distribution of purified drinking water and purified ice;
- Manufacturing and distribution of all kinds of soap;
- Manufacturing and marketing of chemicals based on natural resources available domestically (excluding gas and petroleum products);
- Manufacturing and marketing of solid, liquid, gaseous fuels and aerosol (acetylene, gasoline, propane, hair spray, perfume, deodorant, insect spray) (excluding gas and petroleum products);
- Manufacturing and marketing of oxidants (oxygen, hydrogen peroxide), compressed gases (acetone, argon, hydrogen, nitrogen, acetylene) (excluding gas and petroleum products);
- Manufacturing and marketing of corrosive chemicals (sulfuric acid, nitric acid);
- Manufacturing and marketing of industrial chemicals gasses including compresses, liquefied, and solid forms;
- Manufacturing of pharmaceutical raw materials;
- Development, sales, and lease of residential apartments and condominiums; and
- Transportation agencies for patients to overseas hospitals.

Businesses activities permitted with the approval of the relevant Ministry:

No.	Type of Economic Activity	Permitting Authority
1	Manufacturing and distribution of medicines which are produced by using narcotic drugs and psychotropic substances	Ministry of Home Affairs (MOHA)
2	Publishing of foreign language periodical newspapers, FM radio broadcasting and television broadcasting using direct-to-home, DVB-T2 or cable systems, movie production and showing.	Ministry of Information (MOI)
3	Investment in fisheries, fishing, manufacturing of veterinary biological products and veterinary medicines, commercial livestock farming, genetic research, importation of animal breeds, importation, production and	Ministry of Agriculture, Livestock, and Irrigation (MALI)

No.	Type of Economic Activity	Permitting Authority
	marketing of seeds, and production of fertilizers and insecticides.	
4	Passengers and cargo transport services by vessels and barges, establishment of nautical and training schools, dockyard services and water transport related services on land plots owned by inland water transport.	Ministry of Transport and Communication (MOTC)
5	National parks, ecotourism, business relating to the reduction of carbon emissions, establishment of forest plantations for production purpose in forest lands with long terms leases, importing, exporting, breeding and fauna species for commercial purposes etc.	Ministry of Natural Resources and Environmental Conservation (MONREC)
6	Construction, implementation, and importing of oil and gas equipment and power projects for over 30 MW.	Ministry of Electricity and Energy (MOEE)
7	Private hospitals, clinics, diagnostic services, private production of pharmaceuticals and medical devices, private medical/health related education institutions, manufacturing of traditional drugs etc.	Ministry of Health (MOH)
8	Wholesale and retail services.	Ministry of Commerce (MOC)

Businesses requiring other conditions or authorizations (e.g. the need for an Environmental Impact Assessment (EIA) and/or a Social Impact Assessment (SIA)) in certain environmentally, or socially sensitive sectors).⁴

Businesses which will not be granted exemptions and relief from commercial tax and custom duty include:

- Manufacturing of alcohol, beer, cigarettes, similar products and related services;
- Sale and distribution of petroleum, diesel, engine oil and natural gas;
- Repair and maintenance of vehicles and similar services;
- Industrial, with not high technology and minimum capital investment, that can be carried out by a Myanmar citizen (excluding labor intensive business);
- Production, extraction (logging) on the basis of the long-term lease of forested areas (reserved, protected forest areas);

⁴ Although not written into the rules, it is becoming clear that the MIC expects an EIA and SIA to be included in almost all proposals submitted to it, across all sectors. The MIC will accept an EIA plan on initial submission, with a more detailed report to come later. A Corporate Social Responsibility ("CSR") policy is also viewed favorably.

- Extracting natural resources (excluding exploration and the production of oil and gas);
- Construction and sale of buildings;
- Rental services of vehicle, machinery, and equipment; and
- Restaurant, food and beverage activities.

Investors in natural resources, infrastructure, and manufacturing (in particular) will need to obtain an MIC Permit due to the general restriction on foreign nationals in Myanmar not being permitted to hold land leases of more than one year at a time,⁵ unless they obtain an exemption under the MIL allowing for longer lease rights for their projects. As further explained below, an MIL company may lease land for an initial term of up to 50 years, renewable twice for terms of ten years each.

In the services sector, the MIC generally does not grant investment permits unless the project satisfies the investment criteria set out in the Myanmar Investment Law under which the MIC must scrutinize every application made for an MIC permit.

A foreign investor proposing to invest in a sector or area of business that is not specified in the Notification may still apply to the MIC for an investment permit although it is not required. If not specified by the MIC Notifications, the foreign investor can select the vehicle for its investment in accordance with the MIL.

2.5 Investment Licensing Process

The process of establishing an entity in Myanmar and obtaining an investment permit from the MIC can be seen as having four individual stages, collectively taking approximately four months to complete. Both the DICA application process for obtaining a Permit To Trade and a Certificate of Incorporation, as well as the application for an investment permit are performed in parallel, although the requirements to obtain a Permit To Trade/Certificate of Incorporation from the DICA and an investment permit from the MIC are separate and distinct.

The first stage involves the preparation of applications, the collection of documents and finally, the submission of the required information. Unlike many countries, the process of collecting and submitting the required documents can be very time-consuming, generally taking at least a month.

The key application form used to obtain an investment permit from the MIC is the Form 1. The information required to complete Form 1 will vary based on the nature of the project. Generally, the required data will include detailed information regarding the equipment and machinery to be imported, a break-down of the staffing needs of the project, financial project, anticipated exports, and copies of key contracts used to effect the project. No single factor will be decisive.

The second stage begins following the submission of the proposal to the MIC, in which an MIC

⁵ Under the Transfer of Immovable Property Restrictions Act of 1987 (TIPRA).

proposal assessment team will scrutinize the application to ensure its compliance with the requirements of the Investment Law. The MIC has broad discretion in weighing whether to grant an application for an investment permit, and in its evaluation, the committee will often make requests for clarification and additional information on the project. There are no set factors under the law that will cause an application to be approved or declined. It should also be anticipated that meetings will be necessary to answer any questions and concerns of the commission and concerned government agencies.

If the MIC comes to the conclusion that the proposal would be beneficial to Myanmar by meeting most or all of the criteria set out in Article 8 of the MIL, is compliant with the MIL and “no objection” letters from all concerned government parties are received, the process can move to the third stage, where a conditional investment permit will be issued.

The fourth and final stage involves obtaining a Permit to Trade and Certificate of Incorporation from the DICA. Under the MIL, the MIC, and the DICA, applications must be submitted “simultaneously” and completed in parallel. However, in practice when an investor applies for an investment permit, the DICA will wait for the conditional permit to be issued by the MIC. The DICA will then evaluate the submitted documents, carry out its own review process and, assuming that these are in order, will grant the temporary Permit To Trade and the Certificate of Incorporation (the final Permit To Trade and Certificate of Incorporation will be issued once the foreign investor has deposited the first installment of the initial minimum capital and fulfilled other conditions).

Myanmar does not have any legal restrictions on debt-equity ratios or thin-capitalization rules. There are minimum foreign capital requirements however. Upon the issuing of the temporary Permit to Trade and Certificate of Incorporation, the company can start its set-up operations. During this phase, a foreign investor will receive instructions to bring 50% of the minimum capital into the country. Currently the standard minimal capital amounts are USD 150,000 for manufacturing, construction, and industrial businesses, while service companies are required to register USD 50,000 in share capital. Currently, renewal of the Permit to Trade is required every five years.

2.6 Benefits Available to MIL Companies

One of the main advantages for foreign investors under the Myanmar Investment Law is the enjoyment of significant benefits and tax incentives. This Section gives you an overview of the most relevant benefits and tax incentives available to foreign investors once they obtain an MIC permit.

2.6.1 Land Use Rights

Foreign investors under the Myanmar Investment Law have the ability to lease land for an initial maximum term of 50 years. The lease can thereafter be extended for two additional ten-year

terms.⁶ Furthermore, a long-term lease may be sub-leased or mortgaged under the terms of the MIL with prior approval from the MIC.

2.6.2 Government Guarantees

Foreign investors enjoy three significant guarantees from the government under the Myanmar Investment Law that:

- The industry will not be nationalized during the term of the project;
- The investors permit will not be revoked without sufficient cause; and
- The investor will have the right to remit profits in the same currency in which the investment was made.

2.6.3 Transfer and Sales of Shares

The Investment rules allow a foreign investor to transfer shares to another foreign investor or Myanmar citizen subject to the approval of the MIC. The Foreign Investment Rules state that the MIC will use three criteria in deciding if it will approve a share transfer whether:

- Or not the reason to transfer all shares is correct;
- Or not the interests of Myanmar and its people would be harmed by allowing the share transfer; and
- The transferee has the ability to continue the business successfully.

If considered to be a permissible transfer then the full commission will vote to approve or deny the transfer at the next scheduled meeting.

To incorporate a company enjoying the same benefits as foreign investors under the MIL appears to suggest that the transfer of shares in these companies to foreigners is allowed. However, this right is expressed to be “in accordance with the Myanmar Investment Law” and, as has been seen, the MIL itself does not explicitly allow such transfers.

2.6.4 Tax Exemptions and Reliefs

Under the Myanmar Investment Law, a company which has received an investment permit is entitled to an exemption from corporate income tax for a period of three, five, or seven years beginning from the commencement of commercial operations. In addition, the MIC may grant any or none of the following discretionary benefits:

- If beneficial for the state, depending on the progress of investment activities, an additional corporate income tax exemption/relief may be provided for a suitable period;
- If the MIL entity reinvests profit from its business or part of its reserve funds within

⁶ The MIL provides foreign investors the right to enjoy long term land leases, however the MIC will not grant a lease term longer than the current term enjoyed by the local lessor.

one year, the tax exemption/relief may be extended to income from such reinvested profit or reserve funds;

- A right to accelerate the depreciation rate for the machinery, equipment, buildings, or other working capital and to claim the same as a deductible expense;
- If the products of any production work are exported, then the tax exemption will be allowed for up to 50% of the profits on these exports;
- Expenses for research and development may be deducted from income;
- A right to carry forward and set-off also up to three consecutive years from the year the loss is sustained, if the loss is sustained within two years of exemption or relief from income tax becoming applicable;
- A right to exemption/relief of duty, other internal tax or both on imported raw materials for three years after establishment;
- A right to exemption or relief from duty, other internal tax or both on the imported machinery, equipment, tools machinery parts and accessories necessary for the expanded work with the approval of commission; and
- Exemption and relief of commercial tax on the products manufactured for export.

It should be noted that the MIC will not automatically grant these exemptions. Most of the exemptions and reliefs must be sought by applying to the MIC.

The non-tax exemption investment businesses also comprise other businesses such as renting forest areas for agriculture and logging; construction of buildings and selling them; vehicles and machinery rental; restaurants, and food and beverage businesses.

However, the food industry which is related to milk and dairy products will be granted exemption from custom duties, while commercial tax remains in place.

2.7 Continuing Obligations after Obtaining an Investment Permit

There are a number of post-approval obligations imposed on investors that register a branch or incorporate a subsidiary in Myanmar. These obligations include the filing of numerous forms either annually or periodically, reporting on proposed changes that the entity intends to undertake, and seeking approval before certain transactions or changes to submitted proposals can be effected. The post-approval obligations of foreign investors will vary based on whether the entity has received an investment permit or not, but obligations exist under both the Myanmar Investment Law and the Myanmar Companies Act.

The MIC requires that all construction activities take place within the construction period specified as part of the initial investment proposal, and that business activities only commence once the construction period is completed. In addition, the investor must obtain all required approvals needed to carry out the project lawfully, observe environmental conservation laws, adhere to high-quality standards so as not to harm consumers, and conduct the business in a socially responsible manner.

2.8 Special Economic Zones

A Special Economic Zone (SEZ) includes zones designated for high-tech, information and telecommunications technology, export processing, port area, logistics and transportation, scientific and technological research and development, service business, and sub-trading industries. There are currently three SEZs in Myanmar:

- Thilawa;
- Kyaukphyu; and
- Dawei.

The Myanmar Special Economic Zones Law of 2014 repealed the SEZs Law of 2011 and the Dawei SEZ Law of 2011. Those intending to invest in Special Economic Zones must apply to the Management Committee to obtain investment permission in accordance with rules and regulations. The investor is entitled to income tax exemption and relief for the investment. After the expiry of the tax exemption and relief period, the investor must pay income tax at the stipulated rate. Insurance companies owned by a citizen, foreign national, or jointly owned by a citizen and a foreign national are entitled to operate their agency offices and insurance activities within the SEZ. The investor must abide by the environmental standards described in the Myanmar Environmental Conservation Law and international standards. Investors may carry out 100% foreign ownership and lease land or use land for 50 years, renewable for a 25 year period. The following tax incentives for investors and developers in SEZ:

a. Exemptions and relief for the investor:

- Income tax exemption for the first seven years from the commencement of the commercial operation for the investment business in the Free Zone;
- Income tax exemption for the first five years from the commencement of commercial operations for the investment business in the Promotion Zone;
- 50% relief on the income tax rate for the second five year period for the investment business in the Free Zone and Promotion Zone;
- 50% relief on the income tax rate for the third five year period on profits obtained from the business if it is reinvested within one year in the business as a reserve fund;
- Exemptions from customs duties and other taxes for five years from the commencement of importing equipment and instrument required for the business, 50% relief of custom duty and other taxes for five consecutive years; and
- Carry forward losses for five years after they were sustained.

b. Exemptions and reliefs for the developer:

- Income tax exemption for the first eight years from the commencement of business operations;
- 50% relief of the income tax for the second five year period;
- 50% relief of the income tax for the third five year period on profits earned from the

business if it is reinvested within one year in the business as a reserve fund;

- Exemptions from customs duty and other taxes for raw materials, machinery, and equipment and certain types of imported goods; and
- Carry forward losses for five years after they were sustained.

2.9 Sector Specific Analysis

Below we present a brief overview of some of Myanmar's business sectors that are currently attracting acute interest from foreign investors. Given the recent moves made towards making foreign investment easier in Myanmar, these sectors each offer unique opportunities to the knowledgeable investor. An investor undertaking a project in any of the business sectors discussed below will be eligible (and is recommended) to apply for an MIC Permit.

2.9.1 Hospitality Sector

The huge increase in the numbers of business and tourist visitors to Myanmar since 2012 has led to both shortages in available hotel rooms and substantial price increases for those available rooms. The government projects that by 2020, the number of tourists will rise to over 7.5 million, which the current hotel infrastructure capacity cannot support.

The number of new hotels coming on stream is growing to meet the current and expected demand, and there are significant numbers of major international hotel projects in the four- star or five-star range already planned or underway, with many more expected in the coming months and years. As mentioned elsewhere in this guide, land prices are increasing rapidly, and for many investors, are already at unsustainable levels– this could be a constraining factor of new developments unless the government takes concerted action to cool the market.

2.9.2 Mining Sector

The DICA has stated that mining is the third largest industry contributing to the country's GDP behind oil and gas, and energy. One of the major reasons for optimism when it comes to the future of Myanmar's economy, is its abundance of natural resources. The country possesses a wealth of unexcavated gems, precious stones, coal and more, presenting great opportunities for foreign investors with the technical resources and know-how.

Investments for the small and medium scale production of minerals and exploitation of minerals including gold are generally prohibited. Mining projects must seek permission and approval from the Ministry of Natural Resources and Environmental Conservation. Where permitted to operate, foreign investors are held to rigorous time schedules for each phase; this includes generally two to three years for exploration and an extendable 15 year period for production. All mining activities require an Environmental Impact Assessment.

2.9.3 Manufacturing Sector

One of the stated principles of the Investment Law is to develop the manufacturing sector through the acquisition of high technology. However, the same law also explicitly states that the

rules are to prohibit foreign investment in manufacturing businesses which can be carried out by Myanmar citizens and entities.

The MIC Notifications list a number of manufacturing businesses that may be carried out with 100% foreign investment, but which will require prior approval from the relevant ministry overseeing the sector in which the manufacturing is to occur.

2.9.4 Retail Sector

MIC Notification 15/2017 marked a policy change in the restrictions on retail trading for foreign investors. Remaining is the restriction on convenience stores and small retail areas under 10,000 square feet. However, retail and whole services are now specifically permissible, subject to the approval of the Ministry of Commerce.

2.9.5 Electric Power Sector

As mentioned, Myanmar has an abundance of natural resources, and immense potential to harness hydropower. Despite a wealth of power-generating resources, less than 40% of the population of Myanmar has access to electricity. The country currently has roughly 5,500 MW of available electrical capacity of which 58% comes from hydropower with the remainder being produced by coal and gas powered plants. It is expected that the nation's first utility-scale solar farm will come into commercial operation in 2018.

The Myanmar electrical power sector has attracted more investments than any other sector according to the DICA. At the same time there are several challenges related to the power sector that also provide opportunities for foreign investors:

- Insufficient generating capacity;
- Significant inefficiency of gas and coal-fired plants;
- Low reliability of transmission facilities with poor voltage regulation and significant line losses; and
- Tariffs not reflecting actual costs.

The Myanmar Electricity Law was enacted on 27 October 2014. It replaced the old Electricity Law of 1984. One of the main features of the Electricity Law is to establish the Electricity Regulatory Commission (ERC). However, the ERC's most significant regulatory function became the provision of advice to the MOEE, and the region and state governments with respect to electricity rates. The ERC is not entitled to either set tariffs or grant licenses to entities involved in the electric power sector. In practice, foreign nationals can invest in power projects up to 30 MW only as joint ventures with local citizens, and in hydro and coal power projects as joint ventures with the government as BOT projects. The MOEE, with the approval of the Union Government, has the authority to grant electricity business permits to local and foreign investors for power projects with generating capacity of more than 30 MW and all other power projects connected to the national grid. The region or state governments may approve and

administer power projects up to 30 MW connected to their regional and state grids. The MOEE sets, with the approval of the cabinet of the Union Government, tariffs for the national power grid. Region or State Governments determine, through coordination with MOEE tariffs for off-grid power in their respective regions and states. The new electricity rules and a grid code have not yet been issued, however drafts have been undertaken, and both are anticipated to be released in 2018-2019.

2.9.6 Oil and Gas Sector

It is widely speculated that Myanmar's oil and natural gas fields are ripe with potential natural resource reserves. It is thought that crude oil reserves are minimal but that natural gas output could be substantial. The gas exploration that has been done so far has yielded great successes for foreign investors.

In October 2013, Myanmar awarded 18 onshore oil and gas blocks and in March 2014, it awarded 20 offshore oil and gas blocks, of which ten are deep water blocks and the other ten are shallow water blocks. Per the terms of the bidding, a local partner will be required to assist foreign investors in all but the deep water blocks in respect of which it is recognized that local companies are unlikely to have the necessary expertise. Of the 16 onshore blocks, 13 will be carried out under the terms of a PSC with the Ministry of Gas and Electrical Power (MOGE) whether the foreign investor has a local partner or not. The three remaining blocks are improved petroleum recovery (IPR) blocks. The terms of the model PSC with the MOGE are considered to be relatively standard, and in some cases even more beneficial than the terms of PSCs used in other oil-rich countries. The most salient provisions of the model PSC are:

- Cost recovery of up to 50% from available petroleum per year with the ability to carry forward any unrecovered cost petroleum to succeeding years;
- A signature bonus payable to the MOGE;
- Production bonuses payable to the MOGE upon reaching certain levels of production; and
- A 12.5% royalty payable to the MOGE.

As exploration for oil and gas begins in the vast onshore and offshore blocks, there will be a definite opportunity for all manner of investors. In the short term, foreign investors specializing in the upstream oil and gas industry will likely be in high demand given the immense exploration task that will face the winners of the two offers for tender. Once a discovery is made, there will likely be an opportunity for midstream oil and gas investors as well as the potential for farm-ins by other operators. Lastly, downstream specialists will be needed for refining, purifying, and processing the discoveries.

Chapter 3

Company Law

3.1 Categories of Companies

Myanmar has recently enacted the new Companies Law of 2017 (“Companies Law”), replacing the previous Myanmar Companies Act of 1914 (Companies Act). The Companies Law is expected to enter into force by August 2018. Like the old Companies Act, the new Companies Law distinguishes between private and public companies. A private company is one which, by its constitution restricts the right to transfer its shares, limits the number of its shareholders to below 50, and prohibits any invitation to the public to subscribe for the shares. Under the Companies Law, there must be at least one shareholder in any company. A public company is any other company formed under the Companies Act. Under the Companies Law there are three categories of companies whether public or private:

- A company limited by shares (a company having the liability of its shareholders limited by its constitution to the amount unpaid on the shares held by those shareholders);
- A company limited by guarantee (a company with the liability of its shareholders limited by its constitution to the amount that each shareholder undertakes to contribute to the assets of the company in the event of a winding up); and
- An unlimited company (a company with no limit on the liability of its shareholders).

In practice, private companies limited by shares are the only forms that are used by foreign investors in Myanmar and this Guide will focus on this type of company. However, with the coming into force of the Companies Law, there will be possibility for foreign investors to invest up to 35% in a Myanmar company (see below for details), which may be either a public or private company. In addition to the above types, Myanmar also recognizes “special companies” which are companies that contain one or more government shareholders and are formed under the Special Company Act 1950 and registered under the Companies Act. Special companies, however, must comply with the provisions of the Companies Act, except for certain provisions which are repealed by the Special Company Act and its constitution.

A company is defined as a foreign company if up to 35% of a shareholding is held by a foreign individual or entity. Using the definition of the Companies Law, a foreign company is a company incorporated in Myanmar in which an overseas entity or individual (or a combination of these) directly or indirectly owns or controls an ownership interest of more than 35%. The “ownership interest” is defined as a legal, equitable or prescribed interest in a company which may arise through any means, including:

- A direct shareholding interest;

- A direct or indirect shareholding in a company which holds a direct or 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 on any resolution of the company

Under the Companies Law, an offshore company is not allowed to conduct business in Myanmar unless it is registered with the DICA as an offshore company. However, an offshore corporation or other body corporate will not be deemed to be conducting business in Myanmar merely because it:

- Is a party to legal proceedings or other disputes in Myanmar;
- Holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs in Myanmar;
- Maintains a bank account in Myanmar;
- Effects a sale of property through an independent contractor;
- Lends money, creates evidence of a debt or creates a charge on property in Myanmar;
- Solicits or procures an order that becomes a binding contract only if the order is accepted outside of the Union;
- Secures or collects any of its debts or enforces its rights in relation to securities for those debts;
- Conducts an isolated transaction that is completed within a period of 30 days, that is not part of a number of similar transactions repeated periodically; or
- Invests its funds or holds property.

Importantly, an overseas corporation may not be registered with the DICA if the name is identical to an existing corporation in Myanmar or closely resembles the name of an existing corporation in Myanmar (which may be deceiving, misleading, or creates confusion).

3.2 Objects of a Company

The Companies Law has removed the mandatory requirement of prescribing the permitted activities of a company. This was compulsory under the Companies Act and it is now optional, subject to the decision of the company shareholders. The shareholders may elect to include the company's permitted activities in its constitution. If they do so, the company may not do anything beyond the powers conferred on it by its constitution. The company can later elect to either change the permitted activities or remove them completely from its constitution. Any act performed or any contract entered into by a company, beyond the scope of the permitted activities will be unlawful, and such a contract will be void.

A company's permitted activities cannot include anything which is illegal. Foreign companies' permitted activities cannot include any sector that is prohibited to them. Foreign companies are generally forbidden by government policy to engage in "trading," which involves import and export activities, along with wholesale and retail activities. At present, there is a limited

exception for trading in six different commodities, and trading in these can be included in a foreign company's permitted activities.

3.3 Minimum Authorized Capital and Minimum Capital Requirements

There is no minimum authorized capital or minimum capital requirement provided in the Companies Law. In practice, for foreign companies or registered overseas corporations, the minimum capital to be brought in is as follows:

- Services: USD 50,000;
- Industrial, Hotels, and Construction: USD 150,000; and
- Bank Representative Office and Insurance Representative Office: USD 50,000.

3.4 Members or Shareholders

The expressions "members" or "shareholders" are synonymously used in the Companies Act. Shareholders may be companies or individuals and the second shareholder may hold only one share as a nominee for the majority shareholder. The rights of shareholders differ according to the class of shares and the constitution. Ordinary shares are the norm, but preference shares with special rights are permitted under the Companies Law.

3.5 Directors

A board of directors must be set up to manage the company according to the Company Law. In the case of a public company, it must have minimum of three directors, at least one of which must be a Myanmar citizen, ordinarily resident in the country. In case of a private company, at least one director is required on the board. No share qualification is required for a director, but this must be stated in the company's constitution. For foreign companies, at least one director must be ordinarily resident (at least 183 days of residence in a year) in Myanmar, although there is no citizenship requirement.

The directors have the powers to manage the company's business and may exercise all powers of the company that are not required by the Companies Law or by the constitution of the company to be exercised in general meeting. Under the Companies Law, directors have the power to approve share transfers, issue and allot shares, and make capital calls. The board of directors may appoint a managing director (MD), who must be a director. Subject to the constitution of a company, the directors may confer any power on a managing director, which the directors can exercise under the Companies Law. As noted in 3.6 below, there is flexibility in the Companies Law to vary many of the provisions of the constitution (e.g. dividends and voting rights). Legal advice should be sought on tailoring the constitution to the investor's requirements.

3.6 Constitution of the Company

The Companies Law requires every company to have a constitution, to bind a company and its shareholders (including their heirs and legal representatives) to the terms of its constitution.

The company, its board, each of its directors, and shareholders are generally guided by the Companies Law in the discharge of their rights, obligations, and duties except to the extent that these are modified by the company's constitution. Any such modification must be within the parameters laid down by the Companies Law. The Companies Law prescribes the following content that may be contained in a constitution:

- The constitution may contain the matters contemplated by the Companies Law for inclusion and other such matters that a company may wish to include, provided that no such inclusions prohibited by the Companies Law will have any legal effect.
- At the option of the shareholders, the company may set-out its permitted activities in the constitution, although this is not obligatory.
- The constitution must state the registered office of the company in the Union of Myanmar.

The DICA has recently published a model constitution, which is not mandatory to follow and can be modified. The memorandum of association and the articles of association of a company established under the Companies Act, will be deemed to be the constitution of a company under the Companies Law to the extent they are not inconsistent with the Companies Law and are not replaced by the shareholders. Also, the permitted activities as detailed in the memorandum of association and the articles of association of a company established under the Companies Act will continue to be valid, until the shareholders vote to remove the permitted activities as per the provisions of the Companies Law.

The constitution of a private company limited by share must state the words "Limited" or "Ltd." as the last word in its name and "Public Limited Company" or "PLC" in the case of a public company. The constitution must expressly state that the liability of the members is limited. It should define the classes of shares that the company proposes to issue and the currency denomination of such shares. The constitution must also mention that initial subscribers for shares in the company and any subsequent subscriber must hold at least one share.

The constitution of a company limited by guarantee must state the words "Limited by Guarantee" or "Ltd Gty" as the last word in its name. It should also state that the liability of the members is limited by the amount of the guarantee. The constitution of the company limited by guarantee should specifically state that each shareholder undertakes to contribute to the assets of the company in the event of its winding-up. Shareholder liability should be limited in the constitution to a one year period or more of shareholding regarding payment of debts/liabilities under any contract entered into before the ending of their shareholding. If a company limited by guarantee is to have share capital, it should define the classes of shares that the company proposes to issue and the currency denomination of such shares. The constitution must also mention that subscribers to the constitution must hold at least one share in the company.

The constitution of an unlimited company must state the word "Unlimited" as the last word in

its name. It should also explicitly mention that the liabilities of its members are unlimited, and the classes of shares that the company proposes to issue and the currency denomination of these shares. The constitution must also mention that the initial and any subsequent subscribers for shares in the company must hold at least one share.

The constitution of a company must be prepared in Myanmar language and at the option of the shareholders, may also be prepared in English. It must be divided into paragraphs numbered consecutively. A company may by special resolution, alter or add to the provisions of its constitution any condition which the members deem fit. In order to alter the constitution, a notice in the prescribed form along with the company's amended constitution must be filed with the DICA within a 28 day period from the passing of the special resolution. The registrar will then register the amended constitution and issue a certificate of registration. This will serve as conclusive evidence that all requirements under the Companies Law regarding the amendment of the constitution have been complied with. The amended constitution will not have valid legal effect until it is registered with the DICA.

3.7 Shares

A share is moveable property, transferable in the manner provided in a company's constitution and distinguished by its appropriate number. As a default, a share in company confers on its holder the right to one vote on poll at a company meeting, a right to share dividends, and rights equal to the share in the distribution of company assets. However, such rights 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.

The Companies Law provides the following powers to a company in the issuing of shares and other securities:

- Shares of different classes;
- Shares which may be redeemable;
- Shares which have preferential or restricted rights in terms of the distribution of capital or income;
- Shares which have special, limited, or conditional voting rights; and
- Shares which have no voting rights.

Subject to the Companies Law or other Myanmar laws, the constitution of a company, or the terms of issue, a company may also issue:

- Options to acquire shares;
- Other securities which are convertible into shares; and
- Other interests.

3.8 How can a Company be Incorporated or Registered?

The DICA, through a division called the Companies Registry Office (CRO), which is in the process of being reformed and renamed, oversees company registration requirements for both new applications and ongoing regulatory matters. Any person may apply to the CRO to incorporate and register a company under the Companies Law. The application must be submitted to the CRO in the prescribed format and must state the following:

- The proposed name and type of the company;
- Full name and address of each applicant;
- The full name, date of birth, gender, nationality, and address of every director and any secretary of the proposed company;
- That each individual named as a director or secretary of the proposed company has given their written consent to act as a director or secretary of the proposed company;
- the address of the registered office of the proposed company, which in the absence of any other notice, will be deemed the address for the service of process and documents to the proposed company; and
- Address of the company's principle place of business if different from the registered office.

There are additional requirements based on the form of the company. In the case of a private, public, or unlimited company, the following additional details will be required:

- The full name and address of every member of the proposed company;
- That each member of the proposed company has given their written consent to be a member and subscribe for the shares to be allotted to them;
- The number and class of shares to be issued to each member;
- The currency in which the company's share capital is to be denominated;
- The amount (if any) each member agrees to pay for each share;
- Whether these shares will be fully paid on registration;
- Whether the proposed company has an ultimate holding company; and
- Whether the proposed company will, on incorporation, be a foreign company.

Similarly, in the case of a company limited by guarantee, the following details must be submitted to the CRO:

- The full name and address of every member of the proposed company;
- That each member of the proposed company has given their written consent to be a member;
- The proposed amount of the guarantee that each member agrees to provide;
- If the company is to have share capital:
 - the number and class of shares to be issued;
 - the currency in which the company's share capital is to be denominated;
 - the amount (if any) each member agrees to pay for each share; and

- whether these shares will be fully paid on registration.

The registration application must be signed by each applicant, including the declaration of correctness and truthfulness, and whether the company proposes to adopt a constitution that differs from the model constitution provided by the DICA (a copy of the altered constitution must accompany of the application). Upon filing the completed application, the registrar will approve or decline the registration of the application and issue a certificate of incorporation. After the registration of the company, it will be capable of exercising all the functions of an incorporated company.

3.9 Obligations after Incorporation/Registration

Registered Office: Every company/overseas corporation must open a registered office in Myanmar within 28 days of the date of incorporation/registration. **Allotment of Shares:** After making any allotment of shares or other securities, the details of the holder of such a share or other securities must be entered in the relevant register within 21 days, and a notice must also be submitted to the DICA. The notice to the DICA must record the amount and whether the shares or other securities are fully or partly paid up. The shares or other securities are deemed to have been issued when the name of the holder is entered in the relevant register of the company. **General Meeting:** Shareholders conduct their business at general meetings by passing resolutions. Resolutions are categorized as ordinary resolutions (requiring a simple voting majority) and special resolutions (requiring 75% of all votes). A copy of every resolution, printed or typewritten and duly certified with the signature of an officer of the company, must be submitted to the DICA. An annual general meeting must be held within 18 months of the date of incorporation and thereafter at least once in every calendar year and not more than 15 months after the holding of the last general meeting. Small companies with under 30 employees, and with revenue less than MMK 50 million, will be exempted from holding AGMs. The quorum for a private company (except for a company with only one shareholder) consists of two shareholders personally present at the meeting (unless otherwise provided for in its Constitution). The director(s) may call a special general meeting and, unless otherwise provided by the constitution, the director(s) must call a special general meeting at the request of those shareholders holding not less than one-tenth of the company's share capital. The minutes of all proceedings in general meetings are to be entered in a minute keeping book, which must be kept at the registered office and open to inspection by any member without charge.

Board of Directors Meeting: The board of directors conducts its business at a meeting by passing resolutions. A written resolution signed by all directors also constitutes a resolution passed at a meeting. Minutes of all proceedings of directors are to be entered in a minute keeping book. The DICA permits the practice of holding board meetings by telephone or other electronic means by which all directors can see and/or hear each other. Single director companies need not have directors' meetings, and may instead pass any necessary resolutions by recording them in writing and signing them.

Annual Filing Requirements: For a company that is formed under the Companies Act, there is a

requirement that, on a yearly basis, certain documents must be submitted to the DICA. These documents include the annual return indicating the directors and shareholders on the date of the return, the minutes of the annual general meeting, and audited financial reports. For an overseas corporation, a balance sheet made up to the end of its last financial year, a copy of its cash flow statement for its last financial year, and a copy of its profit and loss statement for its last financial year, must all be submitted. These documents must be prepared as per the law of its home jurisdiction and filed on a yearly basis. Change of Directors and Officers: Every company must file a form containing the particulars of directors, managers, and managing agents, and of any changes therein to the DICA within 21 days of such appointments or changes. For an overseas corporation in Myanmar, changes of the officers in the overseas corporations in Myanmar, or of the directors and officers in its head office, must be filed with the DICA within 21 days from the date of such changes.

Winding up or Removal from the Register: A company may cease to exist either through the procedure of winding up, or by the removal of its name from the Registry of the Companies as a defunct company. A company can be wound up in three ways:

- a. By the court;
- b. Voluntarily; or
- c. Under the supervision of the court. If a company no longer carries on its business it may be removed from the Registry of the Companies after being given the opportunity to show cause and why it should not be removed as a defunct company.

Chapter 4

Land and Real Estate

The Myanmar Investment Law allows foreign entities or individuals to enter long-term leases for immovable property under a Myanmar Investment Commission (MIC) permit or endorsement approval. The MIL continues to exert a strong effect on the real estate market. Many real estate developments, critical infrastructure, and hotel projects are under development. While land prices have soared tremendously over the past few years, we are currently seeing a trend of real estate lease rates plateauing.

4.1 Ownership Rights

In accordance with the Myanmar Constitution of 2008 (Constitution), all lands are ultimately owned by the government.

The Transfer of Property Act of 1882 (TPA) is the basic law governing movable and immovable property in Myanmar. Immovable property is defined under the Transfer of Immovable Property Restriction Act of 1987 (TIPRA) as *“land and benefits from the land, buildings and things constructed or situated on that land and things installed on those buildings.”* The TIPRA restricts foreign ownership, stating that immovable property may not be transferred to, or by, a foreign person or a company owned by a foreign national. While the prohibitions are framed in terms of “transfer” to or by a foreign national or foreign entity, it is almost impossible⁷ for foreigners and foreign entities to become owners of land and buildings in Myanmar.

4.2 Lease Acquisition Structures

Given the foreign ownership restrictions under the TIPRA, immovable property can be leased from the Myanmar government directly or sub-leased from a local citizen who has obtained sub-lease rights from the state.

The TIPRA also restricts the lease term for foreign nationals, prescribing a maximum term of one year for any lease of immovable property by a foreign individual or entity, or leasing of immovable property from a foreigner or foreign entity by any person.

However, an exemption to the one-year lease restriction exists for a foreign entity formed under the MIL, having obtained an MIC Permit or an endorsement (MIL Company). Such a Company can secure long-term leasehold interests in either state or privately owned land for an initial term of up to 50 years, with two possible extensions of ten years each. It must be noted that the initial lease term for foreign investors under the MIL is “up to” 50 years, the

⁷ Except with approval of the relevant ministry – at present, practically never given, other than to missions of foreign governments and, in some limited cases, under inheritance.

current MIC practice being to only grant a lease term to foreign investors which does not exceed the unexpired term of the underlying grant or lease given to the Myanmar citizen who is proposing to sublease the immovable property to the MIL Company.

As mentioned under Chapter 3 of this guide, the MIL Notification further lists details of the business activities allowed or prohibited to foreigner investors under the MIL, broadly classified into four categories. With regard to real estate development projects, the foreign investor may be required to comply with different conditions in accordance with the scope of the project. Examples include the requirement to obtain a recommendation from the relevant ministry or government, or the obligation to conduct an EIA and SIA for large-scale projects or to convert the permitted usage of land in order to satisfy the purposes of the proposed business.

In addition to the MIL, there are other exemptions to the one-year lease restriction under the TIPRA:

- Under Directive 3/90, the government can confer powers to ministries and government bodies (e.g. the Yangon City Development Committee or YCDC) to grant rights of use to citizens and foreign nationals with respect to land for the economic benefit of the state, usually for a term of 30 years;
- For an investment in the SEZs, one can apply for a long-term lease of 50 years, renewable for up to 25 years; and
- Finally, the TIPRA itself foresees some exemptions from ownership and lease term restrictions for those with a beneficial relationship with the state e.g. embassies or diplomatic missions, United Nations organizations, or other accredited organizations.

4.3 Types of Land

Although land is almost solely state-owned, the government may provide certain leasehold rights or land use rights to Myanmar individuals and entities. In Myanmar, several types of land coexist (such as freehold land, grant land, farm/agricultural land, garden land, grazing land, vacant, fallow and virgin land, forest land, town land, village land, monastery land, and land used for national defense and security), each having a different permitted land-use. Only a limited number of types of land may be leased to foreign nationals.

This classification of different types of land is relevant especially when the foreign investor intends to lease immovable property from a Myanmar citizen or entity (instead of leasing directly from the government). Conducting a proper land title search before leasing the immovable property in such a case is crucial. Although the landlord has a duty to inform the foreign investor of any material defect in the immovable property or in the title thereof, the landlord has no such duty if the foreign investor could easily discover such a defect. The following therefore needs to be verified: whether the landlord is competent to lease the property, whether the immovable property may be leased, and whether there are any land use limitations or encumbrances attached to the property.

The following are the most important types of land that can be leased to a foreign individual or entity:

- Freehold land is the most secure form of land title for foreign nationals seeking to develop land in Myanmar. However, this type of land is comparatively rare and mostly found in urban areas. Freehold land is privately-owned, has no term or limit of time on ownership, is transferable and leasable, and not subject to the payment of land revenue to the government;
- Grant land is granted to citizens by the government, usually by the City Development Committees (CDC) e.g. YCDC, by way of a lease contract for a term of 30, 60, or 90 years depending on the use of the land plot, i.e. residential, industrial or cultivation, and is subject to the payment of land revenue to the government. Such land is a secure type of land that is transferable and leasable to a Myanmar citizen or company and can be sub-leased to a foreign-owned company or joint venture MIL Company, upon approval of the MIC and the relevant CDC; and
- Farm or agricultural land ⁸ can only be leased through the transfer of a land use certificate (LUC) issued by the Central Farm Land Management Committee (for farm land) or a “LaNa 30” certificate ⁹ issued by the relevant Township Peace and Development Council (for agricultural land). An LUC and LaNa 30 certificate allow use of the farm or agricultural land for purposes other than agriculture, such as for a commercial real estate development. In the event that the LUC certificate is sold mortgaged, leased, exchanged, or given to a foreign national or any organization in which the foreign national is included, the permission of the government is required.

⁸ *The Land Nationalization Act of 1953, referring to agricultural land, was repealed by the Farm Land Law of 30 March 2012 and the Farm Land Rules of 31 August 2012.*

⁹ *The term ‘LaNa 30’ refers to Section 30 of the Farm Land Law. The ‘LaNa 30’ certificate replaced the ‘LaNa 39’ certificate which referred to Section 39 of the Land Nationalization Act. The Land Nationalization Act was repealed by the Farm Land Law, but it seems that for land cases dating prior to the enactment of the Farm Land Law, the reference can be regarded as still applicable.*

It should be noted, however, that even with an LUC or LaNa 30, farm and agricultural land remain at the disposal of the government and may be rescinded by the government if certain conditions are not met, for state or public interests.

4.4 Registration of Lease and Stamp Duty

Pursuant to the Myanmar Registration Act, it is compulsory to have leases of immovable property for a term of more than a year registered with the Office of the Registration of Deeds (ORD). This registration is optional for lease agreements of one year or less. In practice, lease agreements with a one-year term (e.g. a one-year lease with a monthly rent) made between a local lessor and a foreign lessee are not registered. The MIL expressly states that the lease agreement be registered in accordance with the Registration Act. The registration of lease agreements with a term longer than one year must be performed within four months of the date of execution. Registration is an important element to preserve the rights of the foreign investor, as the registration will essentially provide priority rights to the foreign investor over any third party claiming any leasehold right over the immovable property.

The stamp duty must be paid at the IRD. The stamp duty for a lease of up to three years is (0.5%) on the amount or value of the average annual rent. If the lease exceeds three years, the stamp duty is 2% for a consideration equal to the amount or value of the average annual rent. Additional stamp duty of 2% may apply in the case of instruments affecting immovable property located in Yangon, Nay Pyi Taw, and Mandalay. The Stamp Act requires the instrument to be stamped before or at the time of execution of the lease agreement.

4.5 Zoning and Construction

4.5.1 Zoning Regulation

There are specific laws relating to zoning and building though they are limited to certain metropolitan areas and are, in some instances, outdated but technically may still be in force.¹⁰

For Yangon, these include:

- The City of Yangon Municipal Act, 1922 (Yangon City Municipal Act);
- Yangon City Development Law, 2013 (Yangon City Development Law);
- Yangon City Development Committee Notification No. 2/2014, (YCDC Notification No. 2);

¹⁰ Under §83 of the New City of Yangon Development Law, prior laws, rules, regulations, notifications, orders and directive already applicable before New City of Yangon Development Law was enacted remain applicable in so far as they do not contravene the new regulations.

- For Nay Pyi Taw, the Nay Pyi Taw Development Law, 2009 (Nay Pyi Taw Development Law); and
- For Mandalay, the City of Mandalay Development Law, 2014 (Mandalay City Development Law).

YCDC Notification No. 2 outlines requirements concerning building construction, environmental protection, and sanitation, roads and bridges, civil projects, and land administration. For example, there are prohibitions against erecting buildings that have more than six storeys in prescribed areas east, west, north and south of Shwedagon Pagoda.

Furthermore, the YCDC has typically indicated that no building of more than 12 storeys may be erected in the remaining areas. If an owner wishes to construct a building exceeding this limit, a separate permit must be applied for through the YCDC. The procedures for construction of new buildings are stipulated in YCDC Notification No. 2 and usually depend on the location and type(s) of building. Car park requirements as well as building coverage ratio, and set back criteria are traditionally at the discretion of the YCDC, as opposed to prescribed requirements. A foreign investor will have dealings with the YCDC as part of its MIC permit application, at which point any building restrictions and requirements will become more crystallized before allowing for the real estate project to be duly licensed by the MIC. To this end, a foreign investor is advised to seek professional assistance when contemplating a real estate development project, as it is conceivable that new zoning and building requirements could arise depending on the area of the project.

Likewise, there are orders relating to zoning issued under the City of Mandalay Development Law, the Nay Pyi Taw Development Law and the Development Committees Law. For example, in Mandalay, there are prohibitions against erecting buildings of more than four storeys in places near Mandalay Moat. No building of more than 12 storeys may be erected in the remaining areas, but again, a separate permit may be obtained from the state to erect a building exceeding this limit.

4.5.2 Building Code

Myanmar's first building code was published in 1947 by the Yangon Trust and was revised as a national code in 1991 by the Ministry of Border Areas and National Races Development. It is not known how easily accessible this document is, or what the monitoring or enforcement mechanisms are at this time. It appears that some basic design standards and building codes are not widely known or available. No structural design calculations examining the structural safety against wind, earthquakes, etc. have been received so far. There was no standardization on the building life of permanent shelters.

The draft building code was organized by the Ministry of Construction, the United Nations Human Settlements Program, representatives from all relevant government departments, as well as private sector experts and engineers, and is now pending evaluation by the government,

relevant departments, United Nations agencies, non-government organizations, experts, and other stakeholders. The final new National Building Code is expected to be circulated soon.

4.5.3 Construction Permit

Within the city limits of Yangon, qualified persons can apply to the YCDC to become licensed contractors, architects, civil engineers or engineers. Only registered professionals can apply for construction permits. The steps required to obtain a construction permit through the YCDC is as follows:

a. Obtain a land title certificate and a cadastral map at the YCDC:

The land title certificate will prove ownership of the land that is to be developed and the cadastral map will show the land plot dimensions.

b. Request and obtain design approval:

A licensed engineer in Myanmar must prepare the design plans.

c. Site visit by the YCDC Design Department:

Design approval will require the YCDC to conduct a site visit to the land plot. A YCDC technician will visit the land plot in order to verify that it corresponds to the land certificate and designs provided, and to check the conditions for water and electricity connectivity. While there, the technician will also check with neighbors to ensure there are no land disputes or other issues. The inspector will issue a report to the YCDC, and the contractor will be informed of when they can proceed with the permit application.

d. Letter from Ward Administrator:

The ward administrator is required to issue a letter certifying the address of the contractor.

e. Obtain consent from the neighbors:

A standard consent form obtained at the YCDC must be filled out by all of the neighbors of the land to be developed.

f. Application form for the construction permit is compiled and submitted by the contractor and is comprised of the following:

- Owner ID and family certificate;
- Land title certificate;
- Cadastral map;
- Neighbor consent form completed;
- Drawings and structural designs;
- Bills of quantity;
- Letter from the Ward Administrator; and

- Undertaking of landowner, licensed contractor, licensed engineer relating to the building construction.

Upon submission of the application, the YCDC will perform a final internal review before issuing the construction permit. The entire process for obtaining the construction permit can be upwards of 120 days.

4.6 Condominium Law

The Condominium Law was enacted in 2016 and allows foreign nationals to own immovable property designated as a condominium. The Condominium Law prescribes limits on the number of units in a building which can be owned by foreigners at 40%. Under the law, the building must meet the following criteria to qualify as a condominium:

- The land must be registered with the relevant authorities as condominium land and is collectively owned by all housing unit owners in that condominium development;
- The land area must be at least 20,000 square feet;
- At least six storeys built on such land; and
- Owners of all the housing units must be collective owner of the land and all the common areas.

The law provides specific title registration scheme for each development in which ownership is recorded and any changes thereto, providing a register of title. The law also covers other provisions relating to construction, buying and selling, occupying, ownership, handover, quality control, ownership guarantees, the right to ownership of part of land, and bank loans. To implement the law, the rules have been approved in the fourth quarter of 2017.

Chapter 5

Labor and Employment

Labor law in Myanmar is still a work in progress. There is no single labor law but rather a patchwork body of labor legislation comprising a number of different laws covering different aspects of the employment relationship.

A significant amount of the labor legislation was enacted over 50 years ago and much of it was designed for specific categories of labor such as industry, mining, oilfields, shops and establishments. A number of new laws have been enacted in the last few years, although many of the implementing rules and regulations are still pending.

In addition to the myriad laws, there are also accepted practices and policies which should be followed, despite not being codified in any formal legislation.

5.1 The Employment Contract

A written employment contract must be entered into within 30 days of a job appointment; except when the employment is related to a government department or organization, or if the employment is related to a pre-training or probation period. In such cases, an employment agreement is not required by law.

To constitute a valid contract, Section 5(b) of the Employment and Skill Development Law of 2013 (ESDL), requires that the employment agreement be signed and that certain particulars be set out therein.

Additionally, the employee benefits must not be less than those provided for by existing law (see Section 5.2 below). In August 2015, the Ministry of Labor issued Notification No. 1/2015, requiring all employers in Myanmar to use the Standard Employment Contract (2015 SEC) as the employment contract with their employees. Using the SEC presented challenges for employers, given that the 2015 SEC did not account for varying levels of employees, and was overly prescriptive in some of its terms, which have no basis in legislation.

Once signed, the ESDL requires that a copy of the employment contract be sent to the relevant Township Labor Office (TLO) for approval and registration. The registration requirement is enforced in practice for entities with five or more employees.

The inability to freely add provisions within an appendix to the 2015 SEC meant that employers were forced to decide whether to leave out important provisions of management level contracts, e.g., non-compete clauses, non-solicitation; or, utilize their internal template contracts and not submit them to the Township Labor Office. Neither option was ideal.

In August 2017, the Ministry issued a revised Standard Employment Contract (2017 SEC) which is largely the same as the 2015 SEC; however, the 2017 SEC allows for the parties to agree on amendments to the template if more than 50% of the employees provide their consent.

It remains advisable for employers to observe the stipulations contained in the standard contract and the ESDL provisions to ensure that the TLO does not reject employment contracts submitted for registration. The ability to amend terms which are not applicable, and to add desired provisions to govern a particular employment relationship present a better framework for employers.

5.2 Working Conditions

The requirements for working conditions are found in the Factories Act of 1951, the Shops and Establishments Law 2016 (SEL) and the Leave and Holidays Act 1951 (as amended) (LHA). The SEL applies to shops, commercial establishments, establishments for public entertainment, and industrial establishments. The latter includes mines and oilfields, but not factories, which are covered by the Factories Act.

5.2.1 Days and Hours of Works

The SEL and the Factories Act require at least one weekly holiday. A six-day working week is standard in Myanmar with Sunday being the normal day off.

The SEL restricts the working hours of persons employed in shops, commercial establishments, and establishments for public entertainment to no more than eight hours per day or 48 hours per week. Under the Factories Act working hours at a medium physical danger risk establishment, such as factories and oil fields, must not exceed eight hours per day or 44 hours per week. However, if the factory work is part of a continuous process and cannot be stopped for technical reasons, then the maximum permitted hours at such a factory may be increased to 48 hours per week. Working hours in a higher physical danger risk establishment, such as an underground mine, must not exceed eight hours per day or 40 hours per week. Children aged 14–16 are permitted to work up to four hours per day if they have a certificate of fitness while a 16-year-old child can work as an adult. Under the Factories Act, a worker is entitled to a rest period of at least 30 minutes after working continuously for five hours; under the SEL, the 30-minute rest period applies after four hours of work.

The SEL limits work and rest per day to no more than 11 hours for employees in a shop or commercial establishment, and up to 14 hours per day in an establishment for public entertainment. The Factories Act limits total work and rest per day to ten hours.

5.2.2 Overtime

Hours worked over eight hours per day are considered to be overtime work. Pursuant to the SEL, overtime with the employee's consent, is permissible, but restricted to no more than 12 hours per week. In the event of a special occasion, overtime can be a maximum of 16 hours in a week. Employees should not work or be allowed to work after 12:00am midnight.

The Factories Act prohibits overtime of more than 16 hours in any one week and no more than 12 hours in factories where a continuous process is carried out. Factory managers must obtain the approval of the Factories and General Labor Laws Inspection Department for proposed overtime work and payment.

Overtime must be paid at twice the normal rate of pay. In addition, if a worker is required to work on a day off and this is due to urgent work-related matters, the worker is entitled to an alternative day off in the following two months in addition to the overtime pay.

5.2.3 Leave and Holidays

Under the LHA, workers are entitled to the following additional paid leave and holidays:

- Annual leave of ten days once the employee has completed 12 months continuous service and worked at least 20 days each month. There is no requirement to allocate any annual leave during the employee's first year, though some employers allow employees to take annual leave during the first year;
- Casual leave of six days per annum, intended to be utilized for emergencies and personal matters. Only three days may be taken at any one time (unless otherwise agreed with the employer) and it cannot be combined with any other kind of leave and does not accrue;
- Medical leave of up to 30 days on production of a medical certificate and provided the employee has completed six months of continuous service. If the employee has less than six months service the leave is unpaid;
- Public holidays listed in the law which total 14, however, standard practice is to provide between 21 and 26 depending on the number notified by the Government each year;
- Maternity leave of six weeks prior to confinement and eight weeks after, subject to the employee having completed six months of continuous service; otherwise the leave is unpaid.

Additional provisions relating to maternity and paternity leave are contained in the Social Security Law of 2013 discussed below.

5.2.4 Health and Safety

Under the Factories Act, the employer is bound to protect employees from occupational hazards, harmful substances, and environmental-related factors at the workplace. Depending on the number of workers employed in a factory, the employer may also be required to provide first aid and medical care, dining and rest areas, a day care center, and other benefits. The SEL requires employers to arrange appropriate and sufficient cleanliness, ventilation, light, noise levels, fire prevention, first aid boxes, and medicine at the workplace.

5.3 Wages and Salaries

The relevant legislation is the Minimum Wage Law of 2013 (Minimum Wage Law) and the Payment of Wages Law of 2016 (PWL).

5.3.1 Minimum Wage

The Minimum Wage Law applies to both national and foreign entities, and sets out a framework for a tripartite committee to determine the minimum wage in a broad range of industry sectors.

The law requires employers to inform employees of the prevailing minimum wage in the relevant sector and to pay at least that amount, although the employer may determine higher wage levels. Non-compliance is subject to a fine and up to 12 months in prison. Discrimination on the grounds of gender is not permitted and there must be equal pay for men and women.

In 2015, the National Minimum Wage Committee set the minimum wage for the private sector, regardless of place and type of work, at MMK 3,600 for an eight-hour day or MMK 450 per hour. This minimum wage does not apply to small businesses that have 15 workers or fewer or family businesses.

5.3.2 Payment of Wages

The PWL requires that no wage period may exceed one month and wages must be paid monthly at the end of the month in factories and establishments where fewer than 100 people are employed, and within five days in all other cases. All payments of wages must be made on a working day except wages following termination of employment which must be paid within two days of the date of termination.

Furthermore, all wage payments must be paid in Myanmar Kyat or any foreign currency recognized by the Central Bank of Myanmar. Payment may be made, with mutual consent of the employee, by cash, cheque, or bank transfer.

Employers must maintain registers and records of the people employed by them, the work performed by such employees, the wages paid to them, the deductions made from their wages, the receipts given by them, and any other relevant particulars. Government-appointed inspectors may visit the facilities of the enterprise and audit the status of such registers and records.

5.3.3 Deductions

The employer is responsible for withholding and claiming deductions for income tax on salary at the time of payment to employees. The PWL sets out the additional deductions which may be made from wages without written employee authorization.

The PWL provides that the total amount of deductions in any wage period cannot exceed 50% where the deductions are not due to the employee's failure to perform his/her duties.

The ESDL also introduces a levy payable by the employer of 0.5% per month on the wages and salaries of every worker at a company, which is intended to go towards a Skills and Development Fund. At the time of writing, this Fund has yet to be established and the levy is not currently being collected. When the levy is imposed in due course, the employer must remit the payment and cannot deduct the amount from employees' wages or salaries.

5.4 Termination of the Employment Contract

In Myanmar termination of employment can be with or without cause.

5.4.1 For-Cause Termination

With respect to termination with cause, Myanmar law distinguishes between minor and major offenses.

There is no specific provision under Myanmar law regulating the issuing of warnings or specifying a particular disciplinary process. However, the SEC states that a verbal warning should be issued in the first instance of minor misconduct, followed by a written warning, and thirdly a written warning combined with an undertaking from the employee that the misconduct will not occur again. If the employee commits a further infraction, employment may be terminated without compensation.

An employee can generally be instantly dismissed without compensation for serious misconduct.

5.4.2 Termination Without Cause

Under Notification 84/2015 of the Ministry of Labor, employers are obliged to make severance payments upon terminating permanent employees without cause. Severance payments are calculated on the basis of the employee's last salary (without overtime premiums) and are as follows:

Length of Service	Severance Payment (Month's salary)
From the completion of six months to less than one year	½
From the completion of one year to less than two years	1
From the completion of two years to less than three years	1½
From the completion of three years to less than four years	3
From the completion of four years to less than six years	4

Length of Service	Severance Payment (Month's salary)
From the completion of six years to less than eight years	5
From the completion of eight years to less than ten years	6
From the completion of ten years to less than twenty years	8
From the completion of twenty years to less than twenty-five years	10
From the completion of and more than twenty-five years	13

5.5 Social Security

The Social Security Law of 2013 (SSL) was signed into force on 1 April 2014 and repealed the former Social Security Act of 1954. The law covers permanent and temporary employees who earn a wage, as well as apprentices and trainees whether they are paid or unpaid.¹¹ Only insured persons¹² are eligible for the benefits conferred by the SSL. Registration is compulsory for a large number of employers including various businesses, government departments, companies, associations, shops and development and financial organizations, subject to them employing at least five employees. Certain employers, e.g., international non-governmental organizations, are exempt though their employees may voluntarily register and make contributions, which the employer must match.

5.5.1 Insurance Systems and Contributions

The SSL provides for the following social security insurance funds:

- Health and Social Care;
- Family Assistance;
- Invalidity, Superannuation, and Survivors Benefit;
- Unemployment Benefit; and
- Employment Injury Benefit.

The required contributions to the respective funds are set out in the table below.

Only three of the funds are currently accepting contributions: (i) Health and Social Care; (ii) Employment Injury Benefit; and (iii) Family Assistance Funds. In practice, the contributions to the Health and Social Care Fund cover the benefits associated with the Family Assistance Fund

¹¹ No distinction is made between local and international employees.

¹² i.e. registered with the Social Security scheme and making contributions to the relevant funds.

rather than a separate fund being in place for the latter.

The Funds which are currently not accepting contributions are: (i) Invalidity, Superannuation and Survivors Benefit, and (ii) Unemployment Benefit.

Fund	Employee Contribution	Employer Contribution
Health and Social Care <i>employee under 65</i> <i>employee over 65</i>	2% 2.5%	2% 2.5%
Invalidity, Superannuation and Survivors Benefit	3%	3%
Unemployment Benefit	1%	1%
Family Assistance	No direct contribution stipulated. A percentage to be transferred from the Health and Social Care Fund	
Employment Injury Benefit	-	1%

Employees and employers of establishments subject to compulsory registration must contribute to all of the funds accepting contributions, while voluntarily insured persons can select from among the funds accepting contributions.¹³ Employee contributions must be deducted at source and the employer bears the expenses of paying the contributions.

5.5.2 The Health and Social Care Fund

The Health and Social Care Fund covers sickness benefits as well as maternity and paternity provisions.

An insured person who has suffered a loss of income due to non-occupational illness has the right to medical treatment at a designated hospital or clinic for up to 26 weeks¹⁴ with the costs and expenses of that treatment being met by the Fund and sickness benefit from the employer for up to 26 weeks at 60% of average monthly salary in the four months preceding the onset of illness. To qualify, the employee must have been employed for at least six months, paid contributions for at least four and have provided a medical certificate.

In addition to the 14 weeks of maternity leave under the LHA, pregnant employees are entitled

¹³ However, they cannot elect to contribute to the Employment Injury Benefit Fund as contributions to this fund for non-compulsorily registered employers is solely at the employer's discretion.

¹⁴ 52 weeks or such other period as designated by the Social Security Board for chronic or recurring illness.

to certain additional benefits set out in the SSL. A man is entitled to 15 days paternity leave at 70% of his average salary for the previous year. To qualify, both he and his wife must be an insured person, he must have been employed for at least one year and paid contributions for at least six months.

5.5.3 Employment Injury Benefit Fund

The Employment Injury Benefit Fund is intended to act as a form of employer's liability insurance for the employee's injury, disease, or death arising from employment. Employers that are not subject to compulsory registration may elect to contribute to the Employment Injury Benefit Fund, which provides the following benefits to injured employees:

- Free medical treatment at designated hospitals and clinics for up to 12 months;
- Temporary or permanent disability benefit; and
- Survivor's benefit in the event of death.

Employers registered with the Fund must maintain a health and safety policy and procedures, and provide health and safety training. Failure to do so will result in the employer, rather than the Fund, bearing the costs of medical treatment and other benefits.

5.6 The Workmen's Compensation Act

The Workmen's Compensation Act of 1923 (WCA) provides that an employer will be liable to pay compensation to an employee in respect of any injury caused by an accident, and certain diseases, attributable to employment.¹⁵ The WCA does not apply to workers whose monthly wages exceed MMK 40,000 and is therefore of limited application to foreign investors. The compensation may be paid in accordance with the following general categories: lump sum death benefits, permanent total disablement, permanent partial disablement and temporary disablement.

No compensation is payable under the WCA if the injured worker has instituted a suit for damages in a civil court. Employers registered under the Social Security Law 2013 that have paid contributions to the Employment Injuries Benefit Fund are exempt from the provisions of the WCA as regards employment injury benefits.

5.7 Trade Unions and Labor Disputes

5.7.1 Dispute Settlement

The Myanmar Investment Law of 2016 requires that a dispute arising amongst employers, amongst employees, between employers and employees, or between employees and technicians or staff be settled under the relevant laws. The Settlement of Labor Disputes Law

¹⁵Subject to some exceptions (e.g. if the injury does not last for more than four days or if the worker was under the influence of alcohol or drugs at the time of the accident).

of 2012 (SLDL) creates an ascending system of dispute resolution bodies and the different processes to be adopted in individual and collective disputes.

Employers in any business or trade where more than 30 people are employed must form a Workplace Coordinating Committee (WCC) consisting of two representatives of the employer and two representatives of each labor organization (LO) or, if there are no LOs, two elected representatives of the employees. Any grievances brought before the WCC by either the employer, an employee, or an LO must be negotiated and a settlement sought within five days.¹⁶

If a settlement cannot be agreed between the parties at the WCC level, then the SLDL requires the grievance to be referred to the relevant Conciliation Body (CB).¹⁷ The CB will determine whether it is an individual or collective dispute and seek to conciliate within three days. In the case of an individual dispute, if either party is dissatisfied with the outcome they must then initiate civil proceedings in the competent court. This option is not available for collective disputes.

If the CB is unable to resolve a collective dispute to the parties' satisfaction then it must refer the matter to the Dispute Settlement Arbitration Body (AB)¹⁸ who must issue a decision within seven days. If either party is dissatisfied with the decision, the following options may be utilized:

- Either party may proceed to strike or perform a lockout in accordance with the Labor Organization Law of 2011 (LOL);¹⁹ and
- Both parties may apply within seven days of the decision from the AB to have the dispute heard by the Arbitration Council (AC).²⁰

The AC must form a Tribunal to try the case with 14 days for non-essential services and seven days for essential services. If either party is unhappy with the decision of the Tribunal then final recourse is to bring the matter before the Supreme Court.

Offences under the SLDL include the failure of an employer to coordinate and/or negotiate a dispute, the failure of either party to abide by or carry out a condition contained in any agreement, preventing a person from exercising their lawful right to strike, and forcing a person who wishes to work to participate in a strike. The stated penalties for conviction are fines of either MMK 30,000 or 100,000.

In practice, the extent to which the SLDL is being implemented and observed is unclear. It

¹⁶ *If there is no WCC owing to the small number of employees, the employer must take on the role.*

¹⁷ *Formed at the regional level.*

¹⁸ *Also formed at the regional level.*

¹⁹ *This option is not available to essential services whose only recourse (at the instance of either party) is to the Arbitration Council.*

²⁰ *Union level.*

appears that strikes are taking place without being preceded by any formal dispute resolution. Following complaints by labor activists and government officials that employers were ignoring or refusing to abide by decisions rendered by the AC due to the leniency of the penalties imposed, Parliament voted in 2014 to increase the level of the fines to MMK 500,000 and MMK 1 million respectively, but stopped short of introducing terms of imprisonment.

5.7.2 Trade Unions

- Basic - requiring a minimum of 30 members;
- Township;
- Region or State;
- Labor Federation; and
- Myanmar Labor Confederation (MLC).

The LOL requires that each LO form an executive committee, draw up a constitution or set of rules and register at the relevant township office. Labor Federations and the MLC must register with the Chief Registrar. Registered LO have the following rights:

- Freedom of constitution, election of representatives and organization of administration;
- Right to submit demands to, negotiate and settle with, and claim against employer if not granted labor rights contained in the relevant laws;
- Right to demand the re-appointment of any employee if dismissal was due to LO membership or activities, or was not in accordance with labor laws;
- Right to participate in discussions with the Government and employer groups regarding the content of labor laws;
- Right to participate in collective bargaining and to represent employees in individual disputes; and
- Right to strike and to take other collective action.

Employers must recognize any LOs of his trade, must permit any worker assigned LO duty to perform those duties for up to two days a month as if they were his normal work duties and must respond to, and assist as far as possible with, any request for help by an LO relating to the interests of his employees. An employer is further prohibited from dismissing an employee for reason of his membership in an LO, for opposing an illegal lock-out or for participating in a lawful strike.

Lock-outs and strikes are permitted for utility services (including public utility services) and other industry sectors but are prohibited for essential services which are defined as water, electricity, fire, health and telecommunications. However, the LOL provides that a non-essential service may become essential if the strike or lock-out exceeds certain duration so as to give rise to irreversible damage or is out of all proportion to the occupational interests of those involved in

the dispute. In addition to the requirement that any lock-out or strike be preceded by formal dispute resolution under the SLDL, the LOL imposes a number of additional requirements before a lock-out or strike can be considered lawful and allowed to proceed, e.g., advance notice depending on the action to be taken and the service sector.

In the case of strikes, the majority of the members of the LO must vote in favor of taking action and in the case of strikes by public services, prior to any dispute the LO must negotiate, discuss, and decide on the minimum service required to meet the basic needs of the public during a strike, and must aim to agree with the employers the number and kind of posts that need to be filled and the persons who will be required to remain at work. If an agreement cannot be reached, the minimum service will be determined by the competent court. The SLDL states that it is not necessary to pay wages to striking workers.

A lock-out or strike will be considered illegal if it is carried out by essential services, does not comply with the requirements set out above, does not relate to labor affairs such as wages, working hours, conditions, welfare or other occupational interests of employees, and/or does not conform with the particulars given in the advance notice. Lock-outs and strikes during settlement negotiations in relation to any dispute are also prohibited. The LOL further prohibits any demonstration from taking place within 500 yards of hospitals, schools, religious buildings, airports, railways, bus terminals, ports, diplomatic missions or military or police installations. Penalties for offenses under the LOL include fines and/or imprisonment of up to one year.

Chapter 6

Immigration and Work Permits

Currently, the rules and regulations regarding foreign workers are regularly changing and requirements by the authorities may vary from application to application. We understand that the Ministry of Labor, Employment and Social Security is currently drafting a Foreign Workers Act that will hopefully formalize the visa and permit requirements for all foreign workers in the future.

6.1 Visas

Pursuant to the recently updated visa policy issued by the Ministry of Labor, Immigration and Population, a foreign individual who intends to do business in Myanmar can apply for either of the following two visas:

- a. **Business Visa:** A business visa is valid for 70 days and the holder of a business visa can apply for a multiple entry visa for three months, six months, and one year.
- b. **Employment Visa:** An employment visa is valid for 70 days and the holder can apply for a multiple entry visa and stay permit in the manner as a business visa holder.

While the legislation is not completely clear and employment visas are a recent addition to the list of possible visas, we understand that a 'foreign employee' can apply for either an employment visa or a business visa; further instructions and possible restrictions may be issued in the future.

Generally, a multiple entry visa will only be issued once the foreigner has visited Myanmar at least once.

Business Visa

Foreign nationals wishing to enter Myanmar for the purpose of employment or business matters must apply for a business visa or employment visa. Despite a common practice of obtaining single-entry business visas, the proper procedure requires a stay permit and a multiple entry visa which leads to a foreign residence certificate. A company sponsoring a foreigner's business visa application must be registered and located in Myanmar or participating in a project with the Myanmar government if located outside of the country.

Applications for business visas can be made at the Myanmar embassy or consulate in a foreign national's home country or the nearest available Myanmar embassy or consulate. Exact requirements and application fees vary for each embassy or consulate, but standard

documentation requirements include a passport with at least six months' validity, an invitation letter from the employer or the employer's entity registered in Myanmar, documentation regarding the registration of the sponsoring entity, and a completed application form.

Business visas can also be obtained on arrival at Yangon, Nay Pyi Taw or Mandalay International Airports and this is the fastest and easiest option for business travelers. It is available to citizens of the US, UK, Canada, Australia, New Zealand and most of Europe and Asia, but not citizens of African or Central or South American countries. The fee is currently USD 50 payable to the immigration officials upon landing in Myanmar and the following is required:

- A passport with at least six month's validity remaining;
- Two passport photos;
- An invitation letter from a local Myanmar registered company on official company letterhead inviting you to Myanmar to do business (the sponsoring company);
- A guarantor from the local Myanmar registered company that is inviting you to visit them, either the MD or Owner of the company;
- Copies of the sponsoring company's certificate of incorporation and permit to trade; and
- Duly completed business visa application form.

Companies based in Myanmar can apply to the National Registration Department under the Ministry of Labor, Immigration and Population for business visas on behalf of foreign employees. The application must be accompanied by a letter or recommendation from either the MIC (for MIL companies) or the DICA (for MCA companies).

Employment Visa

An employment visa application requires an invitation letter or appointment letter of the Company, Labor Registration Certificates issued by the Ministry of Labor, Immigration and Population certifying payment of taxes imposed. The period of stay is 70 days which can be extended upon application in the same manner as a business visa for three/six months.

6.2 Stay Permit

Stay permit and multiple-entry business or employment visas may be issued only to businesspeople who intend to work for a company registered and located in Myanmar and upon submission of the corporate documents to the DICA.

Foreigners wishing to stay in Myanmar continually for more than 70 days will require a stay permit. Stay permits essentially remove the 70-day exit requirement for foreign nationals in Myanmar on three month, six-month or one-year multiple-entry visas, but do not operate independently as a visa. To obtain a stay permit, a foreigner must be employed by an entity established in Myanmar and be traveling to or working in Myanmar with a valid business or

employment visa. They are applied for in conjunction with multiple-entry business or employment visas and generally will initially be issued for three months followed by six months and then one year.

According to the DICA, the procedures for an MIC company to obtain stay permits for foreign employees are as follows:

- Stipulate the number of foreign experts/technicians to be employed in the investment application form submitted to the MIC;
- Once an MIC permit is obtained, apply for appointment and stay permits; and
- Apply for stay permits from the National Registration Department under the Ministry of Immigration and Population.

Companies registered under the Myanmar Companies Act only and wishing to apply for permits for foreign employees will require a recommendation letter from the DICA. Note, however, that the procedure may be different in practice and the approval of the relevant Ministry may also be required.

Stay permits and multiple entry visas are granted on a case-by-case basis, and the application process can be subject to numerous ad hoc requests from the reviewing authorities.

6.3 Foreigner's Registration Certificate

In theory, foreign nationals who are planning to stay in the country for more than 90 days continuously must obtain a Foreigner's Registration Certificate (FRC) within 90 days of their arrival for USD 9. The FRC is valid until 30 November each year after which it must be renewed for a further USD 9. The holder must return their FRC to the immigration officers at the airport when they leave the country. When they re-enter, they must revalidate their FRC at the Immigration Bureau within 30 days for a fee of USD 6. In practice, this policy may not be applied uniformly.

6.4 Citizenship and Permanent Residency

Myanmar has a stratified citizenship system and the 1982 Citizenship Law currently recognizes three categories of citizenship:

- Full Citizens;
- Associate Citizens; and
- Naturalized Citizens.

Citizens are those belonging to one of the so-called 135 'national races', who lived in Burma prior to 1823, or who were born to parents who were citizens at the time of birth. Associate citizens are those who acquired citizenship through the 1948 Union Citizenship Law and naturalized citizens are persons who lived in Myanmar before 4 January 1948 and applied for

citizenship after 1982. Foreign nationals cannot become naturalized citizens of Burma, unless they can prove a close familial connection to the country, however, a new path to citizenship has recently materialized through a permanent residency scheme.

Foreign investors, professionals, and experts as well as former citizens of Myanmar and foreign spouses of Myanmar nationals may now apply for permanent residency in Myanmar under a system which was introduced at the end of 2014. PR status will permit foreign nationals to reside in Myanmar for an initial period of five years after which an additional five year extensions may be granted. The permanent resident may leave and enter Myanmar on multiple occasions during that time, although residence outside of Myanmar in excess of one year must be justified and approved in advance.

6.5 Restrictions on Foreign Employees

The Myanmar Investment Law of 2016 has been enacted and supersedes the FIL. The MIL removes the quota requirements of the FIL which required a certain percentage of positions within an entity to be held by Myanmar citizens.

Chapter 7

Intellectual Property

7.1 Introduction

In 1994 the General Agreement on Tariffs and Trade (GATT 1994) was modified in many respects, one of which was the inclusion of the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS). GATT 1994, including the TRIPS Agreement, was adopted by the World Trade Organization (WTO) in 1995, the same year Myanmar became a member and is bound, with all WTO member nations, to abide by the provisions therein. Specifically, TRIPS mandates that all WTO member nations provide comprehensive protection for intellectual property (IP), including: patents and designs, copyrights, and trademarks. In addition, to be a member of the WTO, which mandates the protection of IP rights, Myanmar joined the World Intellectual Property Organization (WIPO) in 2001, which also requires the country to provide a level of protection to IP right-holders.

Myanmar, classified as a least-developed nation by the WTO, was given until 1 July 2013 to comply with the TRIPS Agreement, but the country failed to introduce any new legislation for the protection of IP rights by that deadline. Both the WTO and WIPO had been, and presumably still are, assisting Myanmar with drafting new IP protection laws, but until such laws are formally enacted by Parliament, IP protection in the country will continue to remain very limited. It is anticipated that new comprehensive IP legislation will be issued soon but there has as of yet been no official word on when that may occur.

7.2 Patents and Designs

In 1945, the Myanmar Patents and Designs Act was drafted, though it was never actually brought into force. The law was subsequently repealed in 1993, leaving Myanmar without a law protecting patents and designs from infringement. Patents and designs are currently afforded a level of protection under the Specific Relief Act of 1877, under which a patent holder can seek a perpetual injunction against someone infringing such a patent, and theoretically under the Registration Act of 1908. However, the only IP currently registered in practice are trademarks.

7.3 Copyright

In 1914, the Myanmar Copyright Act, based on the UK Copyright Act of 1911, was promulgated and technically came into force. No registration procedure was ever implemented, however, while the law has never been repealed, it does not offer prima facie protection for copyrights as there is no way to register a copyrighted work in Myanmar.

7.4 Trademarks

While Myanmar has no regulatory framework specifically protecting trademarks, trademarks are the one type of IP right actually afforded a genuine level of protection within the country. Section 478 of the Penal Code of 1861 does define “trademark” as “*a mark used denoting that goods are the manufacture or merchandise of a particular person.*” Furthermore, Section 18 (f) of the Registration Act of 1908 allows for the registration of all documents for which registration is not compulsory. Direction 13 issued under the Registration Act was later issued to confirm that trademarks may be so registered, stating in the relevant part that, “*trademarks may be registered under Section 18 (f) of the Registration Act.*”

Registration of a trademark is administrative in nature, and not considered an approval of the ownership rights of the mark. Hence, the act of registration is not determinative of ownership of the mark, but will be treated as prima facie evidence of ownership in any subsequent criminal or civil proceedings where the mark’s ownership is at issue.

7.5 Trademark Registration Practice

The process to register a trademark in Myanmar is threefold. First, a search of registered trademarks may be conducted to ensure that the mark has not previously been registered. If the mark or a substantially similar mark has not previously been registered then the mark may be registered at the Office of Registration of Deeds. Second, in order to register the mark in accordance with Section 18 (f) of the Registration Act of 1908, the owner of the mark must submit a signed declaration of ownership at the ORD attesting that the mark, is in fact, the property of the applicant and must include a description of the designated goods and services in connection with the trademark.

The process of obtaining trademark registration from the ORD takes at least three weeks from the date of filing the application. Trademark applications must be lodged through a local licensed agent or a lawyer. The required documents must be in English, or certified English translations provided where other languages are used.

Lastly, though not officially required, it is accepted practice to publish a “cautionary notice” in a newspaper with a wide circulation to give constructive notice that the mark has indeed been registered. The publication of a trademark cautionary notice draws the attention of the public to the fact that the mark is owned and in use by the owner or licensees. The notice should include the name of the trademark, its owner, the registration number and a cautionary warning stating that any imitation or unauthorized use will be dealt with in accordance with the law.

While there is no official prescribed period of validity for a trademark under Myanmar law, the common practice is to re-register the mark and republish a cautionary notice every three to five years. Again, once the anticipated new comprehensive IP legislation is issued we anticipate more comprehensive rules and procedures on both registration and duration of validity.

7.6 General Overview of Remedies for the Infringement of a Trademark

The holder of a registered trademark in Myanmar potentially has recourse under the Penal Code of 1861, Section 54 of the Specific Relief Act of 1877, and common law principles of equity. Under the Penal Code, any mark used to denote moveable property as having been manufactured by or as being the merchandise of a particular party is considered a trademark. Additionally, any person who uses a mark reasonably calculated to have a purchaser believe the good so marked was manufactured by or is the merchandise of another is said to be using a false trademark. The use of a false trademark, unless it is proven there was no intent to defraud, is punishable by a term of imprisonment of up to one year, a fine, or both. Criminal actions for infringement are exceedingly rare though theoretically possible. Section 54 of the Specific Relief Act provides that *“when the defendant invades or threatens to invade the plaintiff’s right to, or enjoyment of, property, the Court may grant a perpetual injunction.”* Section 54 further notes that a trademark is to be considered property for purposes of the Section.

Generally, in order to enforce IP rights in relation to a trademark, the owner of the mark must make a three-part evidentiary showing, namely that:

- The owner authentically owns the mark;
- The owner is the original inventor of the mark; and
- Prior use of the mark in Myanmar.

Complicating matters are the fact that there are no designated IP courts, therefore, civil actions for infringement must be brought to the relevant state or divisional court where the judge may not be an expert in IP law.

7.7 Future IP Protection

The draft IP Law was submitted to the Myanmar parliament in August 2017, however it has yet to be approved. It is expected however that Parliament will pass the draft IP Law, or a version of it, in 2018.

This draft IP law introduces a “first-to-file” system, meaning that the person or entity which registers a trademark first will become its rightful owner. The draft IP law, provides for registration searches, such that applicants may get a decision from the Intellectual Property office stating whether a mark is distinguishable from those trademarks previously registered. Under the draft IP law, any owner of a mark who had it registered under the current regime pertaining to the Registration Act 1909 will need to re-file an application under the new provisions once they come into force, in order to continue enjoying the rights conferred by a registered mark.

Chapter 8

Natural Resources and Environment

8.1 General Legal Framework and Policy

The Environmental Conservation Law (ECL) was enacted on 30 March 2012 after more than a decade of discussions. The intention of the ECL was to implement the Myanmar National Environmental Policy of 1994,²¹ focusing on the conservation of natural and cultural heritage for the benefit of present and future generations, the preservation of the ecosystem, the management and implementation of the reduction and loss of natural resources, the spread of environmental awareness amongst the public, and to ensure coordination and cooperation between governmental departments, agencies, and international organizations on environmental matters.

The ECL defines the environment as, “the physical factors in the human environment, including land, water, atmosphere, climate, sound, odor, taste, the biological factors of various animals and plants and historical, cultural, social and aesthetic factors.”²²

The Environmental Conservation Committee was formed in accordance with the ECL. The Committee’s aims are to implement environmental conservation policies, to establish rules and guidance in order to regulate pollution, and to carry out educational activities. Potentially harmful activities for the environment have to be monitored and the ECL sets out various sanctions and penalties that may apply in case of any violation of the prescribed rules.

On 5 June 2014, the Ministry of Natural Resources and Environmental Conservation (MONREC) issued the Environmental Conservation Rules (ECRs). The ECRs define “environmental impact assessment,” “initial environmental examination,” and specify the functions of government organizations on environmental conservation, along with providing details on the environmental conservation fund.

Subsequently, MONREC on 29 December 2015 issued the Environmental Impact Assessment Procedure (EIA Procedure) via Notification 616 of 2015. The EIA procedure provides the list of activities which require an Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP) based on their EIA report. The EIA Procedure also provides for a category of business activities that only requires an Initial Environmental Examination (IEE).

²¹ Chapter 2, Objectives.

²² Chapter 1, Title and Definition, 2 (a).

Furthermore, on 22 April 2015 MONREC also delineated the National Environmental Quality (Emission) Guidelines via Notification 615 of 2016 (Emission Guidelines). Both the EIA Procedure and the Emission Guidelines are based on IFC Standards.

Environmental protection-related provisions are furthermore contained in other disparate legislation. This is, for instance, the case with the Directives for Coastal Beach Areas, applying to the construction and management of hotel beach resorts, which contain rules relating to the preservation and conservation of the local environment. Other sector-specific environmental protection-related provisions may be found in specific legislation with regards to agriculture, health, oil and gas, mining and hotels and tourism, amongst others.

8.2 Environmental Impact Assessment Requirement

In general, if an investor carries on any activity that is likely to harm or affect the environment, such as a factory or workshop, it must seek prior permission from the MONREC. The MONREC based on EIA Procedures, may require an investor to prepare an IEE or EIA, and based on the report, may further require the investor to either draft an EMP or certify that no EMP is required. As per Rule 5 of the EIA Procedure, even if an investment is not listed in Annex 1 of the EIA Procedure, the investor must file an application with the MONREC supplying details of the investment and obtain recommendations from the MONREC.

In case an EIA or IEE is required; the investor must submit this to the MIC as a component of the permit application, alternatively, an application to the MONREC under Rule 5 of the EIA Procedure may form part of the MIC application. An environmental assessment management plan must also be provided with the IEE and EIA submissions. The EIA Procedure provides a list of 141 project types that automatically trigger the requirement for an IEE or EIA, and this can be found in the draft EIA Procedure Annex. A short summary of this list is provided below:

	Type of economic activity	Criteria of IEE	Criteria of EIA
1	Hydro Power Plants	Installed capacity \geq 1 MW but < 15 MW	Installed capacity \geq 15 MW
2	Natural Gas or Bio Gas Power Plants	\geq 5 MW but < 50 MW	\geq 50 MW
3	Coal-fired Power Plants	< 10 MW	\geq 10 MW
4	Wind Power Plants	\geq 5 MW but < 50 MW	\geq 50 MW
5	Solar Power Plants	\geq 50 MW	All activities where the Ministry requires that the Project must undergo an EIA

	Type of economic activity	Criteria of IEE	Criteria of EIA
6	Petroleum Refineries or Natural Gas Refineries	-	All sizes
7	Oil or Natural Gas Terminals	-	All sizes
8	Electrical Power Transmission Lines < 230 kV	< 50 km	All activities where the Ministry requires that the Project must undergo an EIA
9	Electrical Power Transmission Lines ≥ 230 kV	≥ 4 ha	All activities where the Ministry requires that the Project must undergo an EIA
10	Natural Gas Liquefaction Plants	-	All sizes
11	Telecommunications	All sizes	All activities where the IEE process yields a recommendation to perform an EIA
12	Hospitals	All sizes	All activities where the IEE process yields a recommendation to perform an EIA
13	Industrial Zone Construction and Development	-	All sizes
14	Tourism and Hospitality Development	≥ 80 rooms but < 200 rooms and total utilization area ≥ 200,000 m ² but < 500,000 m ²	≥ 200 rooms or total utilization area is ≥ 500,000 m ²
15	Airports	Runway length < 2,100 m	Runway length ≥ 2,100 m
16	Onshore Oil and Gas Development	-	All sizes
17	Offshore Oil and Gas Development	-	All sizes

The MIL states that it would be duty of the investors to abide by the environmental laws. The MIC will also consider the environmental consequences of an investment during the application process as well.

The protection and the conservation of the environment fall within the basic principles of foreign investment under the MIL, and an investor must not cause environmental pollution or damage.²³ The MIL further provides that, while submitting an application for an MIC permit, an investor must file a conservation and prevention plan for the environment.

Should the investor fail to comply with its obligations under the MIL and the environmental laws, it could face various sanctions such as an initial warning, a temporary suspension of tax exemptions and relief, revocation of the existing MIC permit, or being definitively denied any possibility to apply for an MIC permit.

²³ *Chapter XX, Investors Responsibilities, 190.*

Chapter 9

Import, Export and Customs Procedures

9.1 Local Law Governing Export and Import Matters and Procedures

The Export and Import Law of 7 September 2012 (Export and Import Law) repealed the Control of Imports and Exports (Temporary) Act of 1947 (Control of Imports and Exports Act). However, the procedures, regulations, by-laws, notifications, orders and directives issued under the Control of Imports and Exports Act may still be applicable, as long as they are not in conflict with the Export and Import Law.

In accordance with Myanmar Law, an agreement for the sale of goods for import into Myanmar should be concluded under Myanmar law. However, in practice, the Directorate of Trade will only require viewing the purchase order from the Myanmar importer (rather than the underlying contract) and this will be subject to Myanmar law.

9.2 Exporter-Importer Registration

An entity, i.e. a company or branch, is first required to register as an importer/exporter by obtaining an exporter-importer card (EI Card), in order to import into and export out of Myanmar.

Generally, foreign-owned entities are prohibited from engaging in “purely” trading and import/export activities. As a matter of a general policy, only foreign-owned companies in the manufacturing and industrial (and not service) sectors will be granted an EI Card and usually only allows the import of products for their own use. A notable recent exception, via the issuing of Notification 36/2017 by the Ministry of Commerce allows foreign companies to engage in the trading of fertilizer, pesticide, seeds, hospital equipment, and construction materials, in line with international trading procedures, the WTO’s procedures, Union policy, and prescribed health and safety codes.

With respect to MIL Companies, foreign imports (as part of a larger investment project into Myanmar) may be pre-approved by the MIC, in which case the EI Card is automatically approved along with the issuing of the MIC Permit. The entity may apply to the Directorate of Trade under the Ministry of Commerce for the EI Card upon receiving the temporary or final Col. Other documents to be submitted include the Articles of Association and the MIC Permit (if applicable). To support the need for foreign imports, the business objectives and activities of the company must be clearly stated. Additionally, the imports must not be solely for trading purposes. Other external factors may also affect the approval of the EI Card, such as whether the goods are readily available in Myanmar, or whether the goods have certain customized features for a specific customer.

After the EI Card is issued, a manufacturing company must register with the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) which issues a country of origin certificate.

9.3 Export and Import License

An entity that has obtained the EI Card may apply for an import/export license (EI License), which is valid for three months and can be extended twice. An EI License is required for each good and must be issued prior to the shipment of such a good. The application can be made by a director of the company or an authorized person or representative. The entity must have a USD account with either a government bank or with any private bank that offers foreign currency accounts.

9.4 Business Representative and Agency Agreements

Considering that purely import/export and trading are still prohibited for foreign entities, except for the five allowed materials mentioned above (unless an MIC Permit is granted for a manufacturing project, in which case the foreign investor may market, sell and distribute the products from that project in accordance with MIC Permit limitations), a foreign investor will have to appoint a business representative or enter into an agency agreement with a Myanmar citizen or 100% Myanmar-owned company.

A business representative is defined under Paragraph 1(a) of the Registration of Business Representatives Order of 1989 as *“an agent engaged in accepting indents and placing orders for goods from the suppliers abroad on a commission basis, or any business representative employed to do any business transaction for any individual or organization abroad or to represent another person in dealings with third person.”*

9.5 Items Prohibited from Import or Export

According to the Sea and Land Customs Act, the following items are prohibited from being imported into Myanmar:

- Counterfeit coins and currencies;
- Pornographic material;
- Piece goods or garments without stamped measurements;
- Goods having counterfeit trademarks;
- All kinds of narcotics and psychotropic substances;
- Playing cards;
- Goods bearing the imprint or reproduction of the flag of the Union of Myanmar; and
- Goods bearing the emblem of the Buddha and pagodas of Myanmar.

The following items are prohibited from being exported from Myanmar:

- Arms and ammunition;
- Pornographic articles;
- Antiques; and
- All kinds of narcotic drugs and psychotropic substances.

Furthermore, the Myanmar government has implemented a raw timber export ban. Exports of timber must have been at least partially processed for an export license to be issued.

9.6 Customs Procedures

With respect to the customs procedures for imports, all incoming goods must be cleared through the Customs Department under an Import Declaration Form (CUSDEC-1). The CUSDEC-1 must be accompanied by the following documents: import license or permit, invoice, bill of lading or air consignment note, packing list, and other certificates and permits issued by the relevant government departments as a condition for import. Subject to applicable free trade agreements or free trade area rules, customs duty is payable according to the tariff schedule.

Import duty is levied on the tax base, assessable value, which is the sum of Cost Insurance and Freight (“CIF”) value and landing charges of 0.5% of CIF value. Together with customs duty, commercial tax is levied on the imported goods based on the landed cost, which is the sum of assessable value and import duty. These taxes are collected at the point of entry and at the time of clearance. A MIL Company may be exempt from customs duty and commercial tax for a certain period of time.

With respect to exports, an Export Declaration Form (CUSDEC-2) must be submitted to the Customs Department together with the following documents: export license or permit, invoice, packing list, sales contract, shipping instruction, letter of credit or general remittance exemption certificate, payment advice detailing the inward telegraphic transfer private number or inward telegraphic transfer government number, sample of goods, forest pass for the shipment of forestry products, health certificate for the export of live animals, forest permit for the export of wild live animals, and other certificates and permits as required by the government agencies concerned.

Customs duty is levied on exported goods according to the tariff schedule and the export duty is levied on the tax base Free on Board (FOB) value.

9.7 ASEAN Membership

The Association of Southeast Asian Nations (ASEAN) is comprised of ten member states: Brunei Darussalam, Cambodia, Indonesia, the Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Myanmar joined ASEAN on 23 July 1997.

As a member of ASEAN, Myanmar is part of the ASEAN Free Trade Area (AFTA) which is a trade bloc agreement that promotes free trade among the ASEAN members, implemented in 1993. The ASEAN Trade in Goods Agreement (ATIGA) signed in 2009, is an improvement of AFTA with respect to the preferential tariff scheme. In that regard, items that are imported from an ASEAN country may have reduced customs duty rates pursuant to ATIGA. Furthermore, there are also unilateral free trade agreements between Myanmar and China, Korea, Japan, Australia, and other countries or trading blocs.

Trade between AFTA countries themselves and between those non-AFTA countries/blocs which have entered into a free trade agreement with ASEAN, will further reduce import duties and tariffs on many goods that can be imported into Myanmar from the country concerned at reduced (or zero) tariff rates. Please check the relevant HS Codes for details of the rates applicable to specific products into and out of that country.

Chapter 10

Banking and Finance

The financial sector in Myanmar is continuing to develop and put in place the necessary infrastructure and capacity to support a comprehensive banking and finance system.

10.1 Financial Institutions

The banking sector is overseen by the Central Bank of Myanmar (CBM) which was established in 1948 following independence. Under the 2013 Central Bank of Myanmar Law, the CBM is an autonomous institution, although it nominally remains within the Ministry of Planning and Finance. The CBM acts as the licensing authority and regulator of all state-owned and private banks in Myanmar, as well as having statutory responsibility for developing capital markets.

Under the Financial Institutions Law of 2016 (FIL), the CBM may license four kinds of financial institution: banks, non-banking financial institutions (NBFI), scheduled institutions, and credit bureaus. Banks have been defined in the FIL as a company licensed under FIL by the CBM to carry on ordinary banking or development banking activities in Myanmar and includes a foreign bank branch licensed under the FIL. Similarly, NBFI has been defined in the FIL as a financial institution that carries out the business activities of (i) a finance company, (ii) leasing, (iii) factoring, (iv) credit tokens, or (v) financial services. Scheduled institutions are defined as institutions governed by a separate law that provide financial services for a specific group and a community that include:

- i. Rural Development Banks;
- ii. Agricultural Banks;
- iii. Microfinance institutions;
- iv. Credit societies; and
- v. Postal saving banks.

There are currently four specialized state-owned banks, 24 Myanmar privately owned banks, 13 branches of foreign banks, and almost 200 microfinance institutions (MFI), of which more than 20 are foreign owned. Currently, there is no credit bureau or credit ratings agency in Myanmar. However, the CBM is in the process of establishing a credit bureau.

Domestic banks are currently not well capitalized and do not engage in the typical lending and financial services that you would find in more developed countries. They offer very little in the way of consumer banking products, predominantly deal with savings and have very little working capital. Domestic bank lending is mostly in the form of overdraft facilities or short-term loans that are restricted to one year and loans must be collateralized, usually by a mortgage by way of deposit of title deeds over immovable property. Domestic banks are further hampered

by government-set interest rates for kyat loans and deposits (maximum of 13% for loans and a minimum of 8% for deposits).

10.2 Forms of Foreign Banks Permitted

Previously, foreign banks were only able to establish a Representative Office in Myanmar and were not permitted to undertake any substantive financial services activities in the country. However, on 1 October 2014, nine foreign banks and on 4 March 2016, four additional foreign banks were granted provisional operating licenses in Myanmar, demonstrating a shift in government policy. All of the 13 foreign banks have now commenced operations and have financed several high value investments individually or in syndication.

The provisional licenses granted to the 13 winning foreign banks by the CBM allow each bank to form one branch office in Myanmar, although permitted activities remain restricted. The foreign branch office may only provide deposit accounts, term loans or working capital and trade financing and currency exchange to foreign entities and domestic banks in foreign currency.²⁴ They may not provide loans in kyat and are currently prohibited from engaging in retail banking in the local market or lending to local companies. They may only deal in six currencies²⁵ and are prohibited from hiring staff from domestic banks. However, foreign branches are permitted to provide some local banking services in association with a local bank.

It is anticipated that further reforms in the future will allow an expansion of the permitted activities and, possibly, the granting of more licenses. In particular, it is hoped that foreign banks will be allowed to engage in retail banking and participate in project financing with Myanmar partners.

10.3 Foreign Exchange Controls

Foreign exchange in Myanmar is regulated by the CBM and governed by the Foreign Exchange Management Law of 2012 (the FEML), the Foreign Exchange Management Regulation Notification No 7/2014 (the FEMR) together with a number of other notifications and directives issued by the CBM. Only banks with authorized dealer licenses may open and manage foreign currency accounts, and trade in foreign currency.

The FEML distinguishes two types of foreign currency transaction: a) current account transactions; and b) capital account transactions.

²⁴ The CBM recently indicated that government-set interest rates would not apply to loans extended by the foreign banks to foreign investors.

²⁵ USD, SGD, EUR, THB, MYR, and MMK.

10.3.1 Current Account Transactions

Current account transactions are defined as payments for purposes other than the transfer of capital and the FEML lists the following examples:

- Payments to be made in connection with foreign trade, other ongoing business including services, short-term banking and credit facilities;²⁶
- Payments of interest on loans and as net income from other investments;
- Payments in a reasonable amount to amortize loans and depreciate direct investment; and
- Reasonable remittances for family expenses.

Chapter 8 of the FEML states that no restrictions, direct or indirect, will be placed on payments and other transfers for current account transactions into and out of Myanmar from/to overseas. However, the FEMR outlines the procedures for foreign currency remittances and transactions, particularly the documentary evidence requirements for accepting and remitting foreign exchange to or from overseas, and effectively regulates all kinds of foreign exchange transactions including those which the FEML said were “free of restrictions direct or indirect.” CBM directive № 13/2012 also imposes a cap of USD 10,000 on the amount which may be drawn from current accounts, further restricted to no more than twice a week.²⁷

The FEMR permits authorized dealers to undertake the following current account transactions:

- Payment of invoices for imported goods;
- Receive payments from abroad for exported goods;
- Trade finance, including the provision of short-term loans, in support of international transactions;
- Advance payments for goods and services under certain conditions;
- Transactions relating to IP rights and business licenses;
- Remittances for family expenditure from Myanmar to abroad;²⁸
- Remittance of lawful income; and
- Transfer of profits and dividends of foreign investors.²⁹

²⁶ Despite the short-term banking and credit facility being under Current Account transaction, Rule 48 of the FEMR mandates that any funds being borrowed from overseas would require prior approval from CBM.

²⁷ Section 9 of CBM directive № 13/2012.

²⁸ E.g. remittances for education fees and medical treatment.

²⁹ Provided the investment was reported to the CBM at the time of being brought into Myanmar.

Documentary evidence must be submitted for scrutiny by the bank for each of the above. Advance payments without sufficient documentation must be sent to the CBM for approval. Remittances for family expenditure in excess of USD 10,000 must be referred to CBM by the authorized dealer.

Up to USD 10,000 or equivalent foreign currency which has been obtained legally may be brought into the country without restrictions. Any amount above USD 10,000 being brought in cash will have to be declared to immigration authorities. If this foreign currency in hand is not used within six months it must either be converted to kyat by being sold to an authorized dealer licensee or be deposited in a foreign currency bank account.

10.3.2 Capital Account Transactions

Section 26 of the FEML states that the CBM must scrutinize all incoming foreign investment in order to have a frame of reference for outward payments aimed at repatriating the principal, interests, profits and dividends i.e. capital account transactions. Section 27 requires foreign investors to declare funds brought into the country and provide documentary evidence to the CBM. Failure to do so may result in an inability to repatriate funds at the end of the investment term.

In July 2014, just prior to the issue of the FEMR in September 2014, the CBM sent out a circular letter to Myanmar banks which detailed a list of elements that Myanmar banks must consider when evaluating foreign loans, including size of loan and tenure, whether the interest rate is market-based, the type of collateral and whether the repayment schedule and business plan of the resident borrower are appropriate.

The FEMR distinguishes between capital account transactions by residents and non-residents.³⁰ Residents must obtain prior CBM approval before taking an offshore loan, engaging in other means of offshore borrowing or executing loan instruments. Under Section 46, any resident wishing to make a direct or indirect investment overseas must first obtain the approval of the CBM³¹ by reporting the type of investment to be made, the amount of capital and any other relevant information.

In order to obtain approval for offshore borrowing, a copy of the loan agreement, along with relevant security documents must be submitted to the CBM, together with such other documentation as may be specified from time to time. The resident must also advise the CBM of the purpose of acquiring a loan, the repayment terms, and any other conditions as may be directed, unless the same are clearly spelled out in the loan agreement. The resident must also

³⁰ Residents are corporations domiciled in Myanmar and individuals present in Myanmar for at least 183 days out of the previous 12 months.

³¹ Section 45 of the FEMR suggests that overseas investments by individuals under USD 10,000 do not require approval, but we doubt that this is the case in practice.

provide verification that the interest rate is a market rate.

Recently, CBM has published criteria for approving offshore loans in Myanmar on its website (Criteria). The Criteria does not seem to be by way of any government notification or of any directive, regulation or rule officially issued by Ministry of Planning and Finance (MOPF). Furthermore, there is no date provided on the CBM for the issuance of the Criteria.

The Criteria generally reiterate some of the provisions of the FEML and its regulation vide Notification 7 of 2014 (Notification 7), like prior approval of the CBM etc. Additionally, the Criteria lists the documents which would be required for submission to the CBM for approval purposes, being:

- a. An application for approval of a loan addressed to CBM at Office Building No. (55), Nay Pyi Taw;
- b. Corporate documents of the applicant (Certificate of Incorporation, Form VI, Form XXVI, MOA and AOA);
- c. Annual financial statement for relevant fiscal year and most recent audited financial statement of the applicant;
- d. Draft loan agreement, including complete information regarding loan;
- e. Repayment and draw down schedules;
- f. Credit advice that shows the amount of equity has been brought into Myanmar as paid-up capital; and
- g. Other necessary documents as CBM may require.

The Criteria do not specify what other documents would be required, however, from our understanding it would be all the documents specific to the transaction in question. For example in a secured loan, the draft copies of security documents may be required.

The Criteria further states that while approving the loan, CBM would consider the following factors:

- a. Whether the applicant has generally brought into Myanmar equity of USD 500,000;
- b. Whether the applicant has regular income in foreign currency;
- c. Where the applicant does not have income in foreign currency, will the applicant be able to repay the loan amount with the income in Myanmar currency and whether the applicant has taken any measure to factor currency risks;
- d. In case of a Myanmar Investment Commission (MIC) permitted company being the applicant, whether it has brought 80% of foreign capital (equity amount) stated in MIC application, into Myanmar;

- e. Whether the debt to equity ratio of the applicant ranges from 3:1 to 4:1;
- f. Whether the terms and conditions regarding the loan in the transaction documents are accurate or not; and
- g. Whether the tenure of repayment is mid-term or long-term and the repayment schedule is in accordance with the loan agreement.

Despite not having the sanctity of law by way of a gazette notification, the above mentioned Criteria would generally be followed by CBM when considering all of its approvals.

Once an investment has been approved by the CBM and/or the MIC then banks may remit profits, dividends, capital, and interest payments as current account transactions without the need to obtain further CBM approval.

Non-resident foreign investors must submit documents to the CBM which verify that all the funds prescribed as investment, are brought into the country from abroad through an authorized dealer via bank account transaction.

Requests by resident individuals to make unilateral payments into or out of Myanmar in respect of gifts, donations, maintenance payments, bequests under a will, funds received from the transfer of property and other stipends and cash assistance may be authorized by banks up to the value of USD 10,000 annually. Transactions in excess of that amount require the prior approval of the CBM. Requests by companies to make such payments must obtain CBM approval regardless of the amount.

In summary, CBM approval is required for the following:

FEMR Section	Transaction
11	Opening an overseas bank account by a resident. ³²
25	Advance payments for which there is insufficient supporting documentation.
29	Expenditures relating to overseas trips, medical treatment, education fees, exam fees, attending conventions and workshops and living costs of family members residing abroad in excess of USD 10,000.
46	Resident wishing to invest directly or indirectly overseas.
48	Resident wishing to take an offshore loan or other offshore borrowing.

³² Note that Section 12 of the FEML also requires that all overseas earnings by a resident be repatriated to Myanmar.

FEMR Section	Transaction
53	Overseas investment by commercial banks, insurance companies, pension providers, and other investment organizations.
54	Unilateral payments by individuals into or out of Myanmar in respect of gifts, donations, maintenance payments, bequests under a will, funds received from the assignment of immovable property and other stipends and cash assistance in excess of USD 10,000.
56	Unilateral payments of any amount under s. 54 by a company.

10.4 Insurance

Insurance is not a common concept in Myanmar though as foreign companies expand into Myanmar, the demand for insurance policies is growing and the market, which stood at around USD 35 million in 2013, is estimated to grow 80-fold by 2030 to USD 2.8 billion.

10.4.1 Providers

Prior to 2013, State-owned Myanmar Insurance was the sole insurer in Myanmar. In September 2012, the market was opened up to private domestic insurers with 12 being granted licenses (underwriting a more limited range of risk classes than Myanmar Insurance). Due to its limited capital and capacity, Myanmar Insurance currently does re-insure some offshore risks, foreign insurance companies are excluded from the Myanmar market and are only permitted to establish representative offices. However, insurance companies are allowed to operate in special economic zones at Thilawa, Dawei, and Kyayukpu. There are three insurance companies licensed to operate in Thilawa at the moment. All the companies established in the special economic zones are only allowed to take insurance from the licensed companies in that special economic zone. Furthermore, each of the licensed insurance companies in the special economic zones must have reinsurance of 10% of each of their insurance underwriting with Myanmar Insurance. This means that licensed insurance companies in the special economic zones only have direct insurance underwriting for 90% of each policy. Myanmar Insurance reserves the right to accept such reinsurance or reject the same. In case Myanmar Insurance rejects any such reinsurance, licensed insurance companies in the special economic zone can hold 100% of the underwriting for that specific policy.

10.4.2 Regulator

The Insurance Business Supervisory Board, which reports to the MOPF, is responsible for licensing insurers, underwriting agents, and insurance brokers. It is able to limit the premiums set by companies. Myanmar Insurance performs the work of the Supervisory Board. Re-insurers and this is increasing as foreign investors bring their projects to Myanmar and require larger and more sophisticated insurance cover than local insurers can provide.

10.4.3 Insurance Requirements

The Myanmar Insurance Law of 1993 mandates that certain compulsory insurance be held with Myanmar Insurance:

- Government civil servants' life assurance;
- Owners of motor vehicles are required to have third party liability insurance; and
- An entrepreneur or organization operating a business which may cause loss to state-owned property, damage to the life or property of the public, or which may cause pollution to the environment is must hold compulsory general liability insurance.

There is also a catch-all provision whereby the Government can unilaterally define whether an entrepreneur or organization fits the definition of one which must purchase general liability insurance.

With respect to foreign investors, the 1993 Law simply states that foreign investors must hold classes of insurance which Myanmar Insurance (the State-owned insurer) will determine from time to time. However, the 1993 Law has been superseded to some extent by the Myanmar Investment Law of 2016 and the Myanmar Investment Rules of 2017.

Section 72 of the MIL states that an investor must hold stipulated types (in the MIR) of insurance with any insurance provider permitted to carry on business in Myanmar. Rule 212 of the MIR stipulates that permitted enterprises (i.e. investments granted an MIC permit or tax incentive) must hold the following types of insurance (as applicable) from the companies that hold an insurance license in Myanmar:

- Property and Business Interruption Insurance;
- Engineering Insurance;
- Professional Liability Insurance;
- Professional Accident Insurance;
- Marine Insurance; and
- Workmen Compensation Insurance.

Rule 213 of the MIR also stipulates that permitted enterprises must, in addition to those stipulated under Rule 212; hold any other form of insurance under any existing laws, regulations, and procedures according to the type of business, which would, in appropriate circumstances, include the requirement to hold general liability insurance.

Despite the provisions of the MIL and MIR, the MIC does not currently issue any compliance procedures for holding insurance.

While both the MIL and the MR allow investors to place insurance with any licensed provider authorized to operate in Myanmar, only Myanmar Insurance is likely to be able to offer all of

the above insurance policies and be able to offer the level of cover required by foreign investors. Private domestic insurers often lack the requisite know-how or sufficient capital. Additionally, Myanmar Insurance is the only provider permitted to offer policies which offer compensation in foreign currency.

Although foreign insurance providers are not currently permitted to operate in Myanmar, it is possible for foreign investors to effectively insure their risks offshore through the use of “fronted policies” where a licensed, admitted insurer in Myanmar (usually Myanmar Insurance) issues an *insurance policy* on behalf of a foreign insurer without any transfer of risk. The risk of loss is retained by the foreign insurer with an indemnity or reinsurance agreement.

Chapter 11

Taxation

11.1 Income Tax

The Income Tax Law of 1974 (ITL) as amended is the governing law on income taxation in Myanmar. The ITL is supplemented by the Income Tax Rules, the Income Tax Regulations and Notifications issued by the tax authorities from time to time. The Union Tax Law of 2018 provides the applicable tax rates.

The Internal Revenue Department (IRD), under the MFR, administers taxation in Myanmar.

11.2 Definitions

The definitions of following terms under Section 2 of the ITL outline some of the basic principles of income tax law in Myanmar:

- “Income received” means income received or deemed to be received, or income accrued or arisen or deemed to have accrued or arisen;
- “Resident foreigner” means;
 - In the case of an individual, a foreign national who resides in Myanmar for not less than 183 days during the income year;
 - In the case of a company, a company formed under the Myanmar Companies Act or any other existing law wholly or partly with foreign share-holders; and
 - In the case of an association of persons other than a company, an association formed wholly or partly with foreign individuals and where the control, management and decision making of its affairs are situated and exercised wholly in the Union of Myanmar.
- “Non-resident foreigner” means any (other) foreign national in the Union of Myanmar;
- “Non-resident citizen” means any citizen of the Union of Myanmar who resides and earns income outside Myanmar for any time in a year;
- “Total income” means the following income received in the income year;
 - In the case of a resident citizen or a resident foreigner, all income received within and without the Republic of the Union of Myanmar;
 - In the case of a non-resident citizen, all income as prescribed by the Rules; and
 - In the case of a non-resident foreigner, or a foreign individual or a foreign economic organization investing under the Myanmar Investment Law, all income received within Myanmar.

- “Capital Asset” means is “any land, building and the rooms therein, vehicles and any assets provided as a contribution to an enterprise. In this expression, shares, bonds, security papers and similar instruments are also included”; and
- “Capital gain” means any profit realized from the sale, exchange or transfer of any capital asset. Any inheritance, gift without consideration and donation will not be included within the meaning of the term “transfer”.

11.3 Classes of Taxable Income

Section 8 of the ITL provides that income must be computed under each of the following classes or “heads of income”:

- *Salaries* - income from salary, wages, annuity, pension, gratuities; any fees, commissions, or perquisites received in lieu of or in addition to any salary and wages.
- *Profession* - income from fees, other than salaries, received from rendering a service using one’s skill, and includes services rendered by a doctor, a nurse, a lawyer, an engineer, an architect, a film artist, a theatrical artist, a writer, a painter, a sculptor, an accountant, an auditor, a teacher, etc.
- *Business* - income from all types of businesses and includes income from securities, bonds, and debentures investments made for the purposes of earning interest.
- *Rental of property* - income received by leasing out land, or land and buildings.
- *Capital gains* - the gains realized from the sale, exchange, or other ways and means of transfer of one or more capital assets within a year.
- *“Income which has escaped assessment”* - income in respect of any immovable property or movable property including money for which a person is unable to account for accurately as to how he or she has acquired it.
- *Other sources of income* - income that is not included under any of the preceding heads of income.

Salaries and all other classes of income will be aggregated and assessment must be made on the total income. Other income such as capital gains and income from leases are accounted for separately.

11.4 Income Tax Returns

Individual and Corporate Annual tax returns must be filed with the IRD within three months of each financial year (i.e. 30 June for the financial year ending 31 March 2018). Income taxes are paid on a monthly or quarterly basis. Hence, monthly or quarterly interim returns are also filed. If a business is discontinued, the tax returns are to be filed within one month from the discontinuation of the business.

The employer is responsible for withholding and claiming deductions for income tax on salary at the time of payment to employees. A statement of monthly deductions must be furnished to the revenue office within seven days from the date of deduction. In practice, the tax office allows the quarterly filing of returns. The employer must also provide an annual finalization statement of salaries paid to employees.

Withholding taxes are also reported within seven days from payment, although in practice, monthly returns are filed.

Income tax returns on capital gains are to be filed within thirty days from the date of sale or disposal of the capital assets concerned.

11.5 Applicable Tax Rates

Corporate Income Tax (CIT)

The CIT rate is 25% for resident companies and branch offices. For companies listed on the Yangon Stock Exchange, the CIT rate is reduced to 20% effective 1 April 2017.

Personal Income Tax (PIT)

For citizens and resident foreign nationals, tax on salary is withheld by the employer at a graduated rate of 0%-25% of worldwide income.

Citizens and resident foreign nationals are entitled to deduct the following from taxable income:

- Basic relief of 20% of total income, up to a maximum of MMK 10,000,000;
- Spouse relief of MMK 1 million, provided the spouse has no assessable income;
- Relief for a parent living with taxpayer of MMK 1 million;
- Relief for children below 18 or are above 18 but still receiving full time education MMK 500,000 per child;
- Life insurance payments on taxpayer and spouse; and
- Social security contributions.

Individuals are not liable for tax if their annual income is less than MMK 4.8 million in a tax year.

Citizens and resident foreign nationals earning income from the exercise of a profession, business, and other sources are subject to the same graduated rate of 0% - 25%. Non-resident foreign nationals are subject to 0-25% PIT on Myanmar-source compensation income. All other income of non-resident foreign nationals is subject to a flat rate of 25%.

Income from rental of property is subject to 10%.

The tax rates for income that has escaped assessment are as follows:

Income (Kyat)			Income Tax Rate
a	1	30,000,000	15%
b	30,000,001	100,000,000	20%
c	Above 100,000,001		30%

Previously, there was a proposal to provide a tax amnesty for resident citizens and non-resident citizens with undisclosed sources of income (on which tax was previously unpaid or underpaid). However, the 2018 Union Tax Law did not provide such an amnesty. Therefore, undisclosed sources of income are still subject to progressive tax rates of 15-30% based on the undisclosed amount.

Capital Gains Tax (CGT)

Gains from the sale, exchange, or transfer by any means of capital assets, in MMK or foreign currency, are taxed at the rate of 10%, if the proceeds of all assets disposed exceed MMK 10 million. In the case of a non-resident foreign national, tax at a rate of 10% is to be paid in the same currency as the disposal or transfer transaction.

Companies carrying on businesses in the oil and gas exploration sector in Myanmar are taxed at a progressive rate of 40% to 50% on gains realized from the sale, exchange, or transfer by any means, of any capital assets including shares, capital assets, ownership, and benefits.

Withholding Tax (WHT)

MOPF enacted a WHT Notification 47/2018 on 18 June 2018 outlining the rules on payments to resident and non-resident taxpayers in Myanmar. This Notification is effective from 1 July 2018 and supersedes WHT Notification 51/2017 that was issued on 22 May 2017.

The major change in Notification 47/2018 is the removal of 2% WHT on payments to residents for services rendered, goods purchased, and leases within Myanmar. Effective 1 July 2018, the following are the WHT rates applicable on payments to residents and non-residents:

Withholding tax	WHT Rate for payments to residents	WHT Rate for payments to non-residents
Interest	None	15%
Royalties paid for the use of licenses, trademarks, patent right, etc.	10%	15%

Withholding tax	WHT Rate for payments to residents	WHT Rate for payments to non-residents
Payments by Union level organizations, Departments of Union Ministries, Nay Pyi Taw Council, Regional or State Governments, State-owned enterprises, Municipal organizations for the purchase of goods, work performed or supply of services within the country under a tender, bid, quotation, contract, agreement, or other forms.	2%	2.5 %
Payments by enterprises carried out jointly with the State on a mutual-benefit basis, joint ventures, partnerships, companies, associations of individuals, organizations, or associations registered and organized under the existing law, cooperatives, foreign companies, foreign enterprises for the purchase of goods, work performed, or supply of services within the country under a contract, agreement, or other forms.	None (Subject to 2% WHT until 30 June 2018)	2.5%

There is no WHT on dividends, whether paid to a resident or a non-resident.

WHT on the income of residents, as well as branches of foreign companies in Myanmar, is creditable. This will be a final tax if the recipient is a non-resident.

11.6 Tax Treaties

Myanmar's Agreements for Double Tax Avoidance (DTA) with India, the Lao PDR, Malaysia, Singapore, South Korea, Thailand, the United Kingdom, and Vietnam have been ratified.

Taxpayers need to apply administrative procedures to claim tax exemptions under a DTA with the IRD. In practice, Myanmar tax authorities and the MFR need to be consulted by the payer of the fee on a case-by-case basis in order to obtain tax treaty relief. The authorities will examine the contracts and the facts of the case before making its decision.

11.7 Commercial Tax

CT (equivalent to Value Added Tax in other jurisdictions) is imposed on goods, produced in, imported into, and services rendered in Myanmar. The tax rate is generally 5% based on sales proceeds (or landed cost in the case of importation) unless specifically exempted or governed by a lower rate under the CT Law.

There are 86 types of goods exempt from CT consisting mainly of agricultural and marine products. On the other hand, there are 30 types of services exempt from CT as listed below:

No.	Types of Services
1	Parking space rental services
2	Life insurance services
3	Microfinance services
4	Health care services (except body embellishment)
5	Education services
6	Freight transport services
7	Capital market services
8	Banking and financial services (as approved by Central Bank)
9	Customs, port clearance services
10	Service consisting in the renting out of objects for social functions
11	Contract manufacturing
12	Funeral services
13	Child nursery services
14	Traditional massage or massage performed by a blind therapist
15	Home furniture moving services
16	Toll collection services
17	Animal health care services
18	Public toilet fees collection services
19	Air transport services

No.	Types of Services
20	Services concerning culture and art
21	Public transport services
22	License fees to be paid to state organizations
23	Publishing related to national defense
24	Services obtained by embassies
25	Donation and charitable services
26	Services granted relief by law
27	Intra-government services
28	State lottery business
29	Industrial farming services
30	Services for publication of book, magazine, journal and newspaper

There is an input CT system for the trading of goods and provision of services.

Both resident taxpayers and non-resident service providers are generally required to register for CT. In the case of a non-resident service provider, its representative in Myanmar will be required to register on its behalf.

CT is payable on a monthly basis before the 10th of the month following the month where payment is due. Quarterly and annual CT returns are to be submitted within one month from the end of the quarter or within three months of the financial year end, respectively.

11.8 Special Goods Tax (SGT)

SGT (equivalent to excise tax), which became effective on 1 April 2016, is a tax imposed on importers, exporters, manufacturers and storage providers of tobacco, alcohol, wood, gems and jewelry, cars, and fuels.

SGT is levied on:

- the landed cost in the case of importation;
- the higher value between the sales proceeds or the estimated selling price set by the tax authorities in the case of locally produced goods; or
- the cost incurred until the time of loading in the case of export of special goods.

SGT is imposed under the following rates:

Types of special goods	Rate
Various kinds of cigarettes and tobacco products	Various
Various kinds of alcohol products	Various
Wood logs and wood cuttings (referred to as “Rough Sawn”)	5% (10% upon export)
Raw jade, rubies, sapphires, and other precious gemstones (excluding diamonds and emeralds)	15% if jade (10% for other stones)
Processed jade, rubies, sapphires, and other processed gemstones (excluding diamonds and emeralds)	5%
Vehicles above 1500 CC such as vans, saloon, sedans and estate wagons, coupe vehicles except double cab four-door pickup trucks	10%-50%
Kerosene, Petrol, Diesel, Jet fuel (octane)	5%
Natural gas	8%

Both CT and SGT will be charged when importing, manufacturing, exporting special goods.

SGT is payable before withdrawal of goods at the time of importation, and within ten days after the end of the month when the goods are manufactured or exported. A quarterly SGT return must also be filed with the tax office within ten days after the end of the quarter.

11.9 Border Trade

There are three main taxes on the importation of goods:

- Customs duty ranging 0-40% based on the assessable value per Customs’ tariff schedules;
- CT on importation of 5% based on landed cost (which is the sum of value of imported goods, CIF value, port dues, customs duties, and SGT); and

- Advance income tax of 2% based on the value of imported goods.

The advance income tax shall not apply to:

- Ministries and departments, state-owned economic organizations (exporting/importing for co-operative societies by co-operative export import enterprises is excluded);
- Importing motor vehicles in the name of an individual who has returned the old vehicles;
- Construction materials and raw materials imported during the initial construction period;
- Goods imported due to the donations from local and foreign organizations;
- Fire engines, hearses, ambulances (apart from hospital-used vehicles for private businesses);
- Raw materials imported for CMP-based activity;
- Imported goods by draw back system;
- Temporarily imported goods; and
- Goods exported by taxpayers under the self-assessment system at the Large Taxpayer's Office and Medium Taxpayer's Office No. 1.

The advance income tax will be offset from the final assessment of CIT, and the excess payment can be refunded to the taxpayer, or be carried-over to the subsequent CIT return.

11.10 Stamp Duty

Stamp duty is imposed on the execution of various types of documents and is collected by affixing judicial and non-judicial stamps.

Judicial stamp duty is for use in judicial proceedings while non-judicial stamps are for general purposes. The rates vary depending on the subject matter of the document. Taxable documents include complaints, probates of a will, letters of administration, succession certificates, petitions, applications for leave to sue, memoranda of appeal, bail-bonds, etc.

Non-judicial stamp duty is levied on various kinds of instruments that are required to be stamped under the Myanmar Stamp Act. Instruments chargeable to duty and the corresponding rates are mentioned in the schedule annexed to the Act.

Among the common instruments subject to stamp duty are as follows:

Types of instrument	Rate
Conveyance of immovable properties	2%
Lease of immovable properties	0.5%-2% (based on the term)
Bonds (including mortgage deed)	0.5%
Transfer of shares	0.1%

Stamp duty must be paid at the date of execution of the document (if executed locally) or within three months at the time the agreement was brought in Myanmar (if executed outside Myanmar).

11.11 Property Tax

Foreign companies are prohibited from owning immovable property in Myanmar, and hence property tax would not be relevant to foreign investors. Immovable properties (land and buildings) situated within the Yangon development area are subject to property tax as follows:

- General tax not exceeding 8% of annual value;
- Lighting tax not exceeding 5% of annual value;
- Water tax not exceeding 3.25% of annual value (depending on township); and
- Waste tax not exceeding 8.5% of annual value (depending on township).

The “annual value” pertains to the gross annual rent for which the land and building may be expected to be leased unfurnished. It also includes the value of the result of a percentage determined by the local development committee from time to time on the value of property to be taxed.

Property taxes are imposed by the local development committees and hence, may vary from place to place within the country.

Chapter 12

Securities

The passage of the Securities Exchange Law 2013 (SEL) and the drafting of the Securities Exchange Rules have paved the way for the development of Myanmar's first modern-era stock exchange.

The Rangoon Stock Exchange, the first stock exchange in Myanmar, was established prior to independence in the 1930s and was closed up thirty years later when a military government seized power and nationalized most of the enterprises in Myanmar. In 1996, the Myanmar Securities Exchange Centre (MSEC) was founded as a joint venture of the state-owned Myanmar Economic Bank and the Japanese Daiwa Securities Group. However, only two companies listed their shares, which are rarely traded.

Alongside this nascent stock exchange functions a flourishing "over-the-counter" (OTC) market for stocks in Myanmar companies. There are very few public offer rules or regulations in Myanmar and the OTC market, while popular, is largely opaque. It is the intention of the Securities Exchange Law and Rules to launch a modern stock exchange and capture and regulate this OTC market. It is expected that the OTC market will remain robust in the short to mid-term future.

The Yangon Stock Exchange (YSX), was opened on 9 December 2015, is run by Yangon Stock Exchange Joint-Venture Company Limited, a joint venture company with Myanmar Economic Bank (51%), the Daiwa Institute of Research Ltd of the Daiwa Securities Group (30.25%), and Japan Exchange Group (18.75%). The YSE replaced the MSEC with three companies already committed to listing on the stock exchange when it was launched: Asia Green Development (AGD) Bank, First Myanmar Investment Co. Ltd. (FMI), and the Myanmar Agribusiness Public Cooperation Limited (Mapco). Subsequently, Myanmar Thilawa SEZ Holding Public Limited was also listed on 20 May 2016.

12.1 Securities Business Supervising Commission

The government-appointed Securities Business Supervising Commission (SBSC) was formed in September 2014 with seven members and is the key oversight body for the operations of the YSX. The powers of the SBSC are to license securities-related businesses, grant permits to companies to operate a stock exchange or OTC market, appoint auditors for the stock exchange or OTC market, and advise the government and issue directives, amongst other powers.

The YSX is governed by the board of directors, comprising five directors appointed by the SBSC. The chairman of the board of directors is elected by the board of directors itself.

In January 2015, the Ministry of Planning and Finance issued the Securities Exchange Rules (Rules), exercising the authority conferred under the section 71, sub-section (a) of the Security Exchange Law with the approval of the Union Government. The Rules articulate the procedures and processes of the SBSC, including its penalty powers.

12.2 Securities Business

The SBSC is empowered to issue the following types of licenses for businesses dealing in the securities sector:

- a. Securities dealing business license;
- b. Securities brokerage business license;
- c. Securities underwriting business license;
- d. Securities investment advisory business license (this activity may be carried out without obtaining a separate business license if the security company obtained any of the above licenses);
- e. Securities company's representative business license (recommendation of the relevant securities company is required); and
- f. Securities business license prescribed by notification issued by the SBSC.

Important for foreign investors is the need to have any securities investment advisory business licensed and regulated by the SBSC. The Rules define investment advisory businesses as ones that partake in *“providing advice, from one person to another, regarding the value of securities or investment decisions based on assessment/evaluation of securities, on remuneration under any contract or agreement executed between those parties. In this regard, a form of giving advice shall be orally or in written”* (section 74).

Licensed securities businesses will also be required to keep a reserve fund out of the net profit in accordance with the stipulations after the end of each financial year annually and to utilize the reserve fund for compensation only to any loss or damage in respect of operating the securities business; obtain the prior permission of the Commission, if desired, to utilize it for other purposes.

Early in 2015, the SBSC issued Announcement No (1/2015) containing stipulations subject to categories of Securities Transaction License, including the license fees for each category, prescribing minimum capital requirements for the various license categories and setting out board member and staffing requirements for applicants. Furthermore, the SBSC has also issued the format of application form bearing number A1 (the “A1 Form”), under the provisions of section 25 of the SEL.

12.3 Listing Public Companies

Under the SEL a public company, in order to issue its shares, stocks, bonds and debentures and other securities, must submit to the SBSC the procedures of a public offering of its securities before the public offering, and obtain the approval of the SBSC.

Once the public company has the approval of the SBSC, it must publish the prospectus containing the material particulars of the company together with its memorandum and articles of association.

The Rules provide detailed regulations for prospectuses and public offers. Until these Rules are passed, the relevant regulation is found in the Myanmar Companies Act 1914 (also soon to be replaced). Section 92 of the Myanmar Companies Act requires that all prospectuses to be circulated in Myanmar must first be registered with the Registrar at the Companies Registry Office. Every prospectus must be signed by all the directors to the issuing company or their agents, or representatives, and dated.

Section 93 of the Myanmar Companies Act sets out the content requirements of prospectuses. At present, no foreign companies are registered as public companies in Myanmar. Consequently, no foreign companies (incorporated in Myanmar) can be listed on the YSX.

12.4 Over-The-Counter Market

The SBSC also licenses and oversees OTC Markets. An OTC Market may be established by a consortium of three or more licensed securities businesses and governed by a board of directors of not more than five elected from its founding member companies.

Chapter 13

Contract Law

The contract framework in Myanmar is driven by three main pieces of legislation – the Contract Act of 1872, the Specific Relief Act of 1877, and the Sale of Goods Act of 1930.

13.1 General Rules of Contract

The Contract Act of 1872 remains the applicable law in respect of contracts. Despite the age of the text, as it is based on English law, it provides standard common law definitions and concepts recognizable in a modern business context. It also affords the parties wide freedom of contract.

A contract is defined under the Preliminary Title of the Contract Act as “an agreement enforceable by law”. Chapter II, Section 10 of the Contract Act, also states that, “*all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*”

Issues which make agreements void or voidable such as uncertainty, incompetence of the parties to contract, absence of consideration, unlawful object, free consent, coercion, undue influence, fraud, misrepresentation, mistake of essential fact, or severability are duly addressed by the Contract Act. Concerns such as the obligations of the parties to the contract, termination of contract, stipulation of time as the essence, novation, rescission and alteration of contract, consequences of breach of contract, liquidated damages, and indemnity are dealt with by the Contract Act. Albeit, the courts in Myanmar analyze the legal provisions very well, but the availability of legal precedent from Myanmar courts on the interpretation of contracts is very limited at this stage, with most of the cases being more than 60 years old, and having been rendered by Indian courts.

13.2 Drafting of Contract

Agreements may be declared void for uncertainty, or if the consideration or the object of the agreement is unlawful. Therefore, any contract should be carefully drafted and the provisions stated therein should be explicit and clearly defined. A contract or any provision of that contract is ambiguous if it is susceptible to more than one interpretation. The intention of the parties should be clearly inserted in the contract leaving no space for ambiguity.

13.2.1 Innominate Terms in a Contract

Innominate terms in a contract that treat the question of whether the contract can be terminated hinges upon on the seriousness of the consequences of the breach rather than on the importance of the term broken. It is neither a condition nor a warranty. A condition in a contract certainly assures the innocent party that it can terminate the contract in the case of a

breach of such a provision. This is the reason why commercial contracts have ‘time clauses’ as conditions. However, the default position is that time is not of the essence in contracts of sale.

The Myanmar Contract Law does not recognize innominate terms in the contract and even the description of terms conditions and warranties can only be found in the Sale of Goods Act of 1930.

13.2.2 Law of Unjust Enrichment

When the defendant has been unjustly enriched at the expense of the claimant, restitution is to reverse the unjust enrichment. The situations stated under section 68-72 of the Myanmar Contract Act is included under this. However, there are many situations which are not covered under sections 68-72 as Myanmar law does not generally recognize the law of unjust enrichment.

13.3 Breach of Contract

The Contract Act states that when a contract has been broken, the party who suffers due to such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused thereby, which naturally arose in the usual course of things resulting from such a breach. Such compensation is not to be given for any remote and indirect loss or damage. In estimating the loss or damage arising from a breach of contract, the means which existed for remedying the inconvenience caused by the non-performance of the contract must be taken into account.

If a sum is named in the contract as the amount to be paid in case of such a breach (as a default penalty or as liquidated damages), or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated.

13.4 Non-Competition Clauses (Restraint of Trade)

The Contract Act refers to the concept of fair business practices and provides that, “*every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.*”³³ The only exception to this provision is in the sale of business and a partner leaving the partnership.³⁴

³³ Section 27 of the Contract Act, 1872; Section 57 of the Specific Relief Act. The case of Mohamed v. Ona Mohamed Ebrahim, Civil Second Appeal No. 197 of 1920, dated 4 January 1922; 6 UBR 186, where the Court held that the obligation not to sell products, except on the agreed days, constituted a restraint of trade. Such restraint of trade falls within the purview of section 27 Myanmar Contract Act.

³⁴ Agreements which restrain the freedom of action in the exercise of business (such as exclusive dealing provisions) are not prohibited by this Act.

Until Myanmar enacted its Competition Law, the 2008 Constitution of the Republic of the Union of Myanmar provided the only regulation of competition in stating that: *“the Union shall protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities”*.

In addition to preventing acts of monopolization and manipulation of prices in the market, to control unfair competition, and to prevent the abuse of dominant market power, the Competition Law of 2015³⁵ aims to combat restrictive agreements and arrangements among businesses. It explicitly prohibits the following acts which cause restraint on competition:

- a. directly or indirectly fixing the purchase price or selling price;
- b. entering into agreements on restraining competition in the market;
- c. abusing market dominance;
- d. market restraint by individuals or organizations;
- e. restraining and preventing sharing of markets or resources;
- f. restraining or controlling production, market acquisition, technology and development of technology and investment; and
- g. collusion in tendering or auctioning.

The Competition Law states the exemption to the agreement on restraint on competition³⁶ when the specific agreement is entered to:³⁷

- a. reform formation and type of any business to improve its capability;
- b. upgrade technology to improve quality of goods and services;
- c. to uniformly develop technological standards ensuring quality of different products;
- d. to maintain uniformity in carrying out business;
- e. to raise competition of small and medium enterprises; and
- f. to raise the competitiveness of Myanmar business in the international market.

Even the Telecommunications Law in Myanmar prohibits the Service Licensee from carrying out any activity which has the effect of decreasing competition in the telecommunications market. The Service Licensee is not allowed to enter into any understanding, agreement, or arrangement or contract with any person, department or organization in respect of:³⁸

- fixing prices according to his or her will;
- sharing the market with an intention to combat competition;

³⁵ The Competition Law of 2015 came into force in February 2017.

³⁶ The Competition Law may allow the agreement on restraint on competition for a specific period of time under the situations stated in the Law.

³⁷ Section 14 of the Competition Law of 2015.

³⁸ Section 35 and 36 of the Telecommunications Law of 2013.

- boycotting suppliers or vendors of Telecommunications Equipment; and
- unfair opposition to any competitor.

13.5 Contract of Sale of Goods

Where the seller transfers or agrees to transfer the property in goods to the buyer for a price as agreed between them, it gives rise to a contract of sale of goods. Every type of movable property falls within the definition of goods.³⁹ The seller is under an obligation to sell the goods, whereas it is the duty of the buyer to accept the goods thereof.⁴⁰

The time of payment under the contract of sale is not of the essence, unless stated otherwise in the contract. However, stipulations as to the time of delivery are usually of the essence for contracts of sale of goods. The delivery of goods must be made within the time period as agreed between the parties in the contract.

13.6 Conditions and Warranties

A stipulation in a contract of sale with reference to goods may be a condition or a warranty. A condition is essential to the main purpose of the contract, whereas a warranty is only collateral to the main purpose of the contract. However, in some cases, even a condition can be treated as a warranty, such as:⁴¹

- Where the buyer altogether waives the performance of the condition, a party may for his or her own benefit waive a stipulation;
- Where the buyer elects to treat the breach of the conditions as one of a warranty, that is when he or she only claim damages instead of repudiating the contract;
- Where the contract is non-severable and the buyer has accepted either the whole of goods or part thereof; or
- Where the fulfilment of any condition or warranty is excused by law by reason of impossibility or otherwise.

The following conditions are implied in a contract of sale unless the circumstances of the contract show a different intention:⁴²

- a. The seller has a right to sell the goods and that in the case of an agreement to sell, he or she will have a right to sell the goods at the time when the property is to be transferred;
- b. The buyer may have and enjoy quiet possession of goods;
- c. The goods must be free from any charge or encumbrance in favor of any third party unknown to the buyer before or at the time when the contract is made; and

³⁹ Actionable claim and money have been excluded from the definition of goods under the Act.

⁴⁰ Section 31 of the Sale of Goods Act of 1930.

⁴¹ Section 13 of the Sale of Goods Act of 1930.

⁴² Section 14 and 15 of the Sale of Goods Act of 1930.

- d. In the case of a sale of goods by description, the goods must correspond with the description, and in the case of a sale of goods by sample, the bulk must correspond to the sample in terms of quality.

13.7 Rule of Caveat Emptor

The Rule of Caveat Emptor is laid down under section 16, which states that, *“Subject to the provision of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.”* This rule is subject to the following exceptions:

- Where the particular purpose of the goods is made known to the seller by the buyer and buyer relies on the seller’s skill or judgment, and the goods are of the description which is in the course of the seller’s business to supply, the seller has a duty to supply goods which are reasonably fit for that purpose;
- Where the goods are purchased under its patent name or brand name. There is no implied condition that the goods must be fit for any particular purpose;
- Where the goods are sold by description, there is an implied condition that the goods are of merchantable quality. But the rule of caveat emptor will be applicable if the buyer has examined the goods and the defects were such which ought to have been revealed by ordinary examination;
- An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- In the case of a contract of sale by sample, there is an implied condition that the bulk must correspond to the sample, the buyer must have a reasonable opportunity to compare the bulk to the sample and the goods will be free from any defect rendering them un-merchantable.

13.8 Transfer of Ownership and Delivery of Goods

In a sale of specific or ascertained goods, the property passes to the buyer at the time when the parties intend to pass and their intention to pass the property must be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case.⁴³ In the case of a contract for unascertained or future goods, ownership of the goods will not pass to the buyer, unless and until the goods are ascertained.

Under the Sale of Goods Act, there is a risk of the goods being associated with ownership and not with mere possession of the property. The goods are the owner’s risk if the property rights in them have not been transferred to the buyer. If the property has been transferred to the buyer then the goods are the buyer’s risk.⁴⁴ However, there is an exception to this general law in the case where delivery of the goods has been delayed due to the fault of either party. In such a case, if the seller has failed to deliver the goods as agreed by the parties and the goods

⁴³ Section 19 of the Sale of Goods Act of 1930.

⁴⁴ Section 26 of the Sale of Goods Act of 1930.

are damaged or lost due to that, then the seller will bear the cost. If the buyer has failed to take delivery of goods despite many reminders by the seller, then the buyer will bear the cost.

Delivery of goods sold may be made by doing anything which the parties agree, will be treated as delivery or putting the goods in the possession of the buyer or any person authorized to hold them on his behalf.

13.9 Suit for Breach of Contract

The seller has a right to institute a suit for breach of contract against the buyer if the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract. If the buyer refuses to pay the price of the goods on a certain day as agreed between the parties irrespective of delivery of the goods, the seller may sue the buyer albeit the property rights in the goods have not been passed to the buyer.⁴⁵ The seller may also be sued for damages for non-delivery by the buyer if the seller neglects or refuses to deliver the goods to the buyer. In the case of a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer in addition to rejecting the goods, may:

- set up against the seller the breach of warranty in diminution or extinction of the price: or extinction of the price; or
- sue the seller for damages for breach of warranty.⁴⁶

13.10 Specific Relief Act of 1877

In addition to the compensation for a breach of contract, a party⁴⁷ to a contract may institute a suit for specific performance against the other party if the other party fails to discharge its obligations under the contract.

The Courts have a discretionary power to enforce the specific performance of any contract where:⁴⁸

- a. the parties have agreed to perform the act wholly or partly of a trust;
- b. the damage caused by non-performance of the act cannot be confirmed by any standard; and
- c. the non-performance of the act cannot be compensated adequately by any monetary relief or where the monetary compensation will not be an adequate relief for the damage caused due to such non-performance.

⁴⁵ Section 55 of the Sale of Goods Act of 1930.

⁴⁶ Section 59 (1) of the Sale of Goods Act of 1930.

⁴⁷ Section 23 of the Specific Relief Act of 1877- Specific performance of a contract may be obtained by:

- Any party;
- The representative in interest, or the principal of any party where the learning, skill, solvency or any other personal quality of such party is material to the contract; or
- Any beneficiary in case of settlement on marriage or a compromise of doubtful rights.

⁴⁸ Section 12 of the Specific Relief Act of 1877.

Contracts where the monetary compensation for the non-performance of the contract is adequate; or where the contract entered is of such a nature that it is entirely dependent on the personal skills, or is volitional in nature; or where the terms of the contract are unreasonable; or where the contract requires performance of a continuous duty for a period exceeding three years; or any contract which refers any dispute to arbitration remain outside the domain of specific enforcement.⁴⁹

⁴⁹ Section 21 of the Specific Relief Act of 1877.

Chapter 14

Dispute Resolution

14.1 Court System in Myanmar

The current court system is hierarchical and was established under the 2008 Constitution. On 28 October 2010, the Union Judiciary Law was enacted to implement the operations of the judiciary, which is composed of the following courts:

- Supreme Court of the Union;
- High Courts of the Regions and States;
- Courts of the Self-Administered Areas;
- District Courts;
- Township Courts;
- Courts-Martial;
- Constitutional Tribunal of the Union; and
- Special courts to try juvenile, municipal, and traffic offenses.

14.1.1 Supreme Court

The Supreme Court is the highest court in Myanmar⁶³ for both civil and criminal matters and consists of a bench of between 7 and 11 judges, presided over by the Chief Justice of the Union. It has original jurisdiction in various matters as well as appellate jurisdiction and revisionary powers in respect of judgments passed by the lower Courts and original judgments passed by it. Only the Supreme Court has original jurisdiction in the following matters:

- Matters arising out of bilateral treaties concluded by the Government;
- Other disputes (except constitutional issues) between the Government and the Region or State governments;
- Other disputes (except constitutional issues) among the Regions, among the States, between the Regions and the States, and between the Union Territory and the Regions or the States;
- Piracy;
- Offenses committed in international waters or airspace;
- Offenses violating International law; and
- Maritime cases.

The decisions of the Supreme Court are final as well as conclusive making it the final court of appeal.

14.1.2 High Courts of the Regions and States

There is a High Court for every Region and State headed by a Chief Justice of the High Court. The bench consists of between three and seven judges. Every High Court has original jurisdiction to adjudicate in both criminal and civil suits with unlimited pecuniary jurisdiction in original civil cases, and appellate and revisionary jurisdiction on the judgments, decrees and orders passed by subordinate courts. In addition, within its State or Region, a High Court has jurisdiction to order the transfer of a case and may adjudicate a case transferred to it by its own decision, or adjudicate on the transfer of a case from one court to any other court.

14.1.3 District Courts and Courts of the Self-Administered Areas

District Courts and Courts of the Self-Administered Areas are presided over by District Judges who are appointed by the Supreme Court. Depending on the volume of work, a Deputy District Judge may also be appointed. The Supreme Court confers original, appellate, and revisionary jurisdictional powers under both the Criminal and Civil Codes. District judges have pecuniary jurisdiction to try original civil suits up to a value of MMK 500 million. A deputy district judge has pecuniary jurisdiction up to MMK 100 million. In addition, they may, within their district, adjudicate a case transferred to them by their own decision, or adjudicate the transfer of a case from one court to any other court.

14.1.4 Township Courts

Township Courts are mainly courts of original jurisdiction. Township Judges are appointed by the Supreme Court who may also appoint Additional and/or Deputy Township Judges depending on the volume of work. Township Judges are specially empowered as Magistrates and can pass sentences of up to seven years imprisonment. The pecuniary jurisdiction to try original civil suits is MMK 10 million, MMK 7 million and MMK 3 million for Township, Additional Township, and Deputy Township Judges respectively.

Township courts also exercise jurisdiction over juvenile offenses.

14.1.5 Other Courts

As stated above, Township Courts are authorized to try juvenile offenses. A special Juvenile Court has also been constituted in Yangon and Mandalay. Yangon and Mandalay also host a number of distinct Municipal and Traffic Courts to deal with those types of offenses. Courts-Martial are constituted in accordance with the 2008 Constitution and adjudicate in matters involving military personnel. No other court may adjudicate in such matters.

The Constitutional Tribunal is made up of nine members presided over by a Chairperson. Its role is to interpret the Constitution, adjudicate disputes regarding the same and to ensure that legislation promulgated and executive action taken is in compliance with it.

14.1.6 The Legal Profession

Legal professionals comprise judges, judicial officers, and lawyers. Lawyers can be classified into two types: Advocates and Pleaders. Pleaders can be subdivided into ordinary pleaders who handle criminal matters and lower grade civil disputes, and higher grade pleaders who can take on all types of suit. An Advocate is entitled to appear before any Court and tribunal in the Union whereas a Higher Grade Pleader is licensed to practice only before subordinate courts (i.e. not the Supreme Court).

Criminal prosecutions are conducted by law officers based in offices throughout the country, all of whom are subject to the direction of the Attorney General. The Attorney General is appointed by the President and advises the Government on legal matters as well as performing other legal duties.

There are an estimated 49,000 lawyers currently practicing in Myanmar, approximately divided between 40,000 pleaders and 9,000 advocates. Few have commercial dispute experience.

14.1.7 Court Procedures

Myanmar's legal system is adversarial and the practices and procedures of Myanmar courts were significantly influenced by those of their English counterparts. Court procedure in criminal suits is dictated by the Code of Criminal Procedure 1898 and procedure in civil suits is dictated by the Code of Civil Procedure 1908. Myanmar has recently enacted the Arbitration Law of 2016 for alternative dispute resolution system, which is based on the New York Convention of UNCITRAL.

A case is heard before a judge or bench of judges and argued by advocates or pleaders. Chapter XXIII of the Code of Criminal Procedure mandates a jury trial in certain criminal cases, but there have been no such trials since 1946. There is no scope for trial by jury in a civil suit. The Evidence Act applies to all judicial proceedings before any court and to all judges and other persons authorized to hear evidence, but does not apply to arbitration.

Some legal decisions are published yearly. For those decisions that are not published, individuals may request a copy from the relevant court though securing such a copy may take time.

14.1.8 Remedies

Remedies include damages, injunctions, and costs. Awards of damages tend to be conservative and courts do not make punitive or statutory "multiple damages" awards. Monetary judgments usually bear simple interest from the date the cause of action arose but there is some judicial discretion as to the rate to be applied. Damages in tort and contract claims are governed by the principles of reasonable foresee ability and causation.

Both temporary and permanent injunctions may be granted but in practice are difficult to obtain in Myanmar as the court must be satisfied *inter alia* that protection is needed to avoid

“irreparable injury” which is defined as a substantial injury that can never be adequately remedied by damages.

The amount of costs and the party liable to pay them are determined at the discretion of the court. In practice, costs normally include stamps for court fees, powers of attorney, exhibits, translation fees, witnesses’ costs, commissioner’s fees, fees for service of process, and lawyer’s fees. There are dated rules relating to advocates’ fees which remain in force, but under these rules, the amount officially permitted is very small. Due to the realities of present-day legal practice, actual legal fees awarded are much higher. Interest on costs cannot be charged at more than 6%.

14.2 Enforcement of a Foreign Judgment

The Code of Civil Procedure 1909 (CPC) regulates the enforcement of foreign judgments in Myanmar. Section 13 of the CPC provides that a foreign judgment will be conclusive with regard to any matter directly adjudicated upon, between the same parties or their legal representatives litigating under the same title except where:

- A foreign judgment has not been pronounced by a court of competent jurisdiction;
- A foreign judgment has not been given on the merits of the case;
- It appears that the foreign judgment is founded on an incorrect view of international law or a refusal to recognize the law of the Union of Myanmar, in cases in which such law is applicable;
- The proceedings in which a foreign judgment was obtained are opposed to natural justice;
- A foreign judgment was obtained by fraud; or
- Where a foreign judgment sustains a claim founded on a breach of any law in force in the Union of Myanmar.

A foreign judgment may thus be recognized and enforced if the foreign judgment does not fall within the exceptions provided in Section 13 of the CPC. In other words, a foreign judgment is conclusive as to any matter thereby adjudicated upon, except in the cases provided in Section 13 of the CPC.

However, there are only a few reported cases that deal with the judgment of a foreign court, all dating from before 1963.

14.3 Arbitration

Arbitration is the only viable form of alternative dispute resolution in Myanmar. Formal conciliation and mediation procedures are not yet available for commercial disputes. Myanmar recently enacted a new Arbitration Law of 2016, giving effect to Myanmar’s ratification on 16 April 2013 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

14.3.1 The Present System

Foreign investors seeking to include an arbitration clause in an agreement have to look to the Myanmar Arbitration Law. The Law is based on the UNCITRAL model law, with few significant changes. Overall principles of law are expressed in its Chapters 2 and 3. The general objectives of the Arbitration Law are stated in Chapter 2 as follows:

- a. To settle domestic and international commercial disputes fairly and effectively;
- b. To recognize and enforce arbitral foreign awards; and
- c. To encourage dispute settlement via arbitration.

The Arbitration Law follows a workable model and is quite clear on its face. It gives substantial discretion to Myanmar courts in enforcing foreign arbitral awards, both interim and final, which is in accordance with the model UNCITRAL law.

As per the Arbitration Law, foreign arbitral awards can be enforced under the Myanmar Civil Procedure Code, although the court may refuse to recognize the award if the party against whom enforcement of the award is sought presents proof to the court that:

- a. The parties to the arbitration agreement was under some incapacity; or
- b. The agreement is not valid under the law to which the parties have subjected it to, or, failing any indication thereon, under the law of the country where the award was made; or
- c. The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; or
- d. The award deals with disputes not contemplated by or not falling within the terms of the submission to arbitration, or it contains the decision on matters beyond the scope of the submission to arbitration; or
- e. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- f. The awards have not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Section 46 of the Arbitration Law also provides that the court in Myanmar may refuse to enforce the arbitral award if it is determined that:

- a. The subject-matter of the dispute is not capable of settlement by arbitration under the laws of Myanmar; or
- b. The enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

The Supreme Court of Myanmar will issue necessary rules, regulations, bylaws, notifications, orders, directives, procedures, and manuals, in accordance with the Arbitration Law for its implementation, which have not yet been published.

Chapter 15

Financing and Secured Transactions

With the recent rapid growth of foreign investment in Myanmar, the need for access to financing for that investment has correspondingly increased. This has thrown into sharp focus the issues that remain to be resolved in government policy and on legal reform to ensure that access to finance is made easier both inside Myanmar and from outside the country. The current restraints on that access that need to be addressed in the short and medium term are:

- The small size of the domestic banking and insurance sectors and the lack of capital and liquidity for commercial and consumer lending, which has considerably changed but many reforms are still urgently needed, especially in the stamp duty law and registration law domain.
- The shortage of credit finance in Myanmar which is still largely a cash economy.
- The inadequacy of the laws and mechanisms for taking, perfecting and enforcing securities over immovable and moveable property in Myanmar.

We have discussed some of these issues in relation to banks and insurance companies in Section 10 of this Guide, and here we focus on the issues facing lenders to businesses in Myanmar in terms of taking securities over assets. It should be said from the outset that there is no law or regulation preventing foreign banks from engaging in offshore foreign currency lending to Myanmar companies, whether locally-owned or foreign-owned. Before providing such financing, banks will usually require security for the loan in the form of guarantees, mortgages, charges, pledges or the taking of other types of collateral. DFDL has been advising on a project which is being regarded as the first ever, non-recourse, cross-border financing in Myanmar, paving the way for the expansion of commercial bank financing into the country.

Having said that, we look first at the available forms of security under Myanmar law and then at the issues relating to the perfection and enforcement of those security instruments.

15.1 Taking Security over Immovable Property

Under Section 59 of the Transfer of Property Act, 1882 (TP Act) and Section 17 (1) (b) of the Registration Act of 1909 (Registration Act), a mortgage on immovable property must be registered with the Office of the Registration of Deeds (ORD). As with a mortgage, documents creating a charge or an equitable charge on immovable property do not require registration. This is because Section 17 (1) (b) of the Registration Act applies to instruments creating rights on immovable property, while in an equitable mortgage, theoretically, there is no instrument of mortgage required. Only the original title deed of the immovable property must be deposited with

the mortgagee with an intention of creating a mortgage. Therefore, the legal term for equitable mortgage as defined in the TP Act is “mortgage by deposit of title deeds.”

In addition, Section 109 of the Companies Act of 1914 (Companies Act) relates to certain mortgages and charges created by companies on the security of their properties and other moveable assets. Section 109 of the Companies Act requires that these mortgages and charges be filed with the DICA within 21 days of their creation in order to be valid and effective against the liquidator. If they are not registered, such mortgages and charges created on the immovable or movable property of a company will be void against the liquidator of the company. However, Section 109 provides for an exception for security created by way of a pledge of moveable assets. Such security does not require registration with the DICA. In a pledge of movables, the pledgee is already in possession of the pledged goods.

Section 112 of the Companies Act further provides that *“the Registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company requiring registration under Section 109 wherein the Registrar shall enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.”*

In spite of the above, the situation for foreign investors is complicated by the Transfer of Immovable Property Restriction Act of 1987 (TIPRA), which effectively prohibits foreign ownership of land or prohibits any pawn, exchange or transfer by any means of immovable property to a foreigner or a foreign owned companies. Therefore it includes any form of mortgage in favor of a foreign bank by way of a security or otherwise. Furthermore, there is also entailing considerations of enforcement, where such property cannot be effectively sold to a foreign national. Section 3 of that TIPRL states that, *“no person shall transfer any immovable property by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a transfer by any other means to a foreigner or a company owned by a foreigner.”* It is possible that charges over immovable property remain an option for foreign lenders since such a security does not involve the transfer of land; however problems remain with perfection of this form of security (see below).

Under Section 2 (c) of the TIPRA, a foreigner is defined as a company or a partnership whose management and control is not vested in the hands of a Myanmar citizen, or a partnership whose majority shares are not held by local citizens. In practice, even one share owned by a foreign individual or entity in a company makes the company foreign-owned.

The enactment of the Foreign Investment Law, 2012 and MIL in 2016 has, however, to a certain extent, loosened this prohibition against foreign nationals from mortgaging property, provided that the foreign mortgagor has already obtained an MIC Permit. The MIL states that rights related of movable and immovable property, such as a pledge, mortgage, and liens will be included under the term of investment. Furthermore, Investment is defined in the MIL as an asset owned or

controlled by an investor in accordance with the MIL. This means that the rights arising out of movable and immovable property like mortgaging and creating security over the assets owned by the foreign investor will be allowed. However, the MIL does not expressly recognize the right of foreign lenders to hold security over assets of the investors (having an MIC permit). To circumvent the prohibition in TIPRA, a general practice of employing a Myanmar licensed bank to act as security trustee/agent on behalf of the foreign lenders has taken shape in Myanmar. However, the structure has not been tested before a court of law as of yet. It may be noted that the Foreign Exchange Management Law of 2012 (FEML) and Foreign Exchange Management Regulation of 2014 (FEMR) and the MIL at Section 63 recognize the possibility of obtaining financing assistance from foreign lenders by companies incorporated in Myanmar.

15.2 Taking of a Security over Moveable Property in Myanmar

Section 109 (1) of the Companies Act provides for a fixed and floating charge to be taken over the assets of a company, including book debts, cash flows, receivables, intangible assets, contractual rights and bank accounts. In practice, this is rarely, if ever, performed due to perfection issues described below.

Other specific security mechanisms provided for under Myanmar law include:

- “Pledge of moveable property”: as the Contract Act of 1872 (Contract Act) requires the security-holder to take delivery of and hold the goods while the pledge is outstanding, generally, pledges under Myanmar law are not viable security mechanisms;
- “Mortgage or pledge of bank accounts”: this is based on some old case-law from 100 years ago and, while a more recent decision in Myanmar concerning a joint venture case indicates that a pledge of a bank account may be possible, it is not clear how a pledge would work under the Contract Act;
- “Assignment of revenue-generating contracts”: while in some cases this will require the agreement of the counterparty to that agreement, a conditional assignment (i.e. an assignment that is contingent on an event such as default) are also possible and does not require a court order; and
- “Equitable mortgage of shares”: a very old Myanmar case indicates that an equitable mortgage may be created over shares. The appropriate security instruments consist of:
 - A blank transfer instrument signed by the owner (or an undated share transfer instrument containing full details of the shares mortgaged); and
 - A fully executed power of attorney in favor of a representative of the mortgagee granting power to execute the share transfer. The Memorandum and Articles of Association of the company may also have to be changed to ensure that there is no discretion on the part of the company/board of directors to refuse to register such a transfer of shares. In addition, it should be noted that the Registrar of companies must approve all transfers of shares - as well as the MIC, in those

cases where the investments happened under the umbrella of the Foreign Investment Law of 2012 or the Citizens Investment Law of 2013, so such approval will need to be sought prior to the granting or exercise of an “equitable mortgage” or the security is severely diminished.

And although the enforcement of any such instruments (i.e. both a mortgage and a pledge) in certain cases would require prior approval from the relevant authorities, it is possible to anticipate obtaining such approvals in advance. Accordingly, DFDL has designed and created a comprehensive Myanmar law security package which has been tested and opens up the possibility of having non-recourse, cross-border, private sector loan financing in Myanmar.

15.3 Perfecting a Security Interest – Registration and Priority

Issues in relation to perfecting a security include:

- Registrations of mortgages and fixed and floating charges over the immovable assets of a company with the ORD as per the Registration Act of 1908 are not being implemented in practice or being permitted;
- Mostly, the land use category for the land (of which the leasehold rights are being mortgaged) need to be converted for commercial purposes before registration. The process is cumbersome and not being implemented in practice;
- The stamp duty on various financial instruments is still prohibitively expensive and the Stamp Act of 1899 is ambiguous with the possibility of multiple interpretations, leading to uncertainty as to how the stamp duty officer would determine the applicable stamp duty; and
- The requirement to obtain prior approvals of various bodies prior to enforcement or creation of mortgages (e.g. MIC approval for share transfers or prior approval from the lessor and line ministry for creation of mortgage).

Perfection of security (in the form of notifications, registration and priority rights over future security-holders) is therefore difficult in Myanmar. However, there are precedents which should ease the perfection of future securities. Ultimately however, the ease of accomplishing such perfection of a security will depend on the underlying security package and approval requirements for such securities.

In practice the few mortgages that are taken out in Myanmar are rarely, if ever, registered with the ORD – the local banks’ practice is to create the mortgage by depositing a title deed, which does not require ORD registration. This would not be possible in the case of foreign companies providing such securities, since foreign companies only have leasehold rights in Myanmar, and thus the lease agreements are theoretically not in the form of a title deed.

In addition, registers at the ORD (to the extent they are functioning) are not “searchable” by the public, and in some cases not even by the holder of the registered document.

LRO are akin to cadastral registers, not registers of title (meaning that they record information filed with them in relation to land and ownership, but do not constitute a guarantee of title). These LROs cannot be searched by the public. In order to access the records and obtain copies of documents of title registered there, a special power must be granted by the registered “owner” of the land. Leases and mortgages that must be registered with the ORD are not recorded on the LRO register.

15.4 Enforcement of Security Interest

In general, a security interest in property can only be enforced by filing a suit for foreclosure or a suit to force a sale of such property, with a few exceptions including pledges over movable property. Under Section 176 of the Contract Act pledges over movable property may be sold without the intervention of the court and on giving reasonable notice of the sale to the pledger. Under the Contract Act provisions a pledge is only effective if the pledged goods are in the possession of the pledgee, which reduces the effectiveness of that form of security for many types of property.

Similarly, in the cases of a mortgage in English form, enforcement without court intervention is possible if the mortgagor is a company. In all other forms of mortgage in Myanmar, enforcement without court intervention may be possible if the mortgage deed confers such rights on the mortgagee.

It involves using an onshore agent who would hold the property title as collateral. Should the security enforcement be necessary, such an onshore agent would sell the property in the market in order to deliver the proceeds of the sale to the lender (i.e. local banks).

However, MIC companies can only mortgage leases. Even through a security agent, there cannot be a mortgage of freehold to a foreign national (the TIPRA prohibition applies and there would be a risk for the security agent being seen as part of an unlawful nominee arrangement).

All security instruments over assets and shares in a Myanmar company are ultimately subject to Myanmar law and Myanmar statutory requirements. Enforcement through the Myanmar courts, therefore, becomes a serious issue for security-holders, a situation not helped by the fact that there have been so few modern cases to give guidance and precedents for lenders and their advisers to rely on. It is also the case that judges in Myanmar lack modern commercial law knowledge and experience.

In Myanmar, the laws on taking securities are ambiguous and not yet well developed. There is no specific law for banks and financial institutions yet, and their ability to take security upon making a loan. Therefore, no special recovery and enforcement system exists for banks and financial institutions providing “step-in” rights, for example. Reform of the law and practices relating to the taking and perfection of security instruments is therefore urgently needed and

is likely to happen soon – more so, a Secured Transactions Law based on international standards is one of the priorities for the Union Government in the near future.

15.5 Transfer of Shares

Under the MIR, the transfer of shares (all or partial) requires the prior approval of the MIC if it 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.

The request must be submitted to the MIC in accordance with the official Form (VII), which will then scrutinize the proposal and grant or decline its approval after considering whether or not:

- The reason to transfer all shares is correct;
- The interest of the Union and its people could be detrimentally affected due to the transfer of the shares; and
- The transferee of all shares is in a position to keep on carrying out the business successfully.

If approval is granted, then an application to register the share transfer must be submitted to the DICA, together with the MIC approval.

Under Myanmar law, a transfer of shares is not lawful unless the proper instrument of transfer of shares is duly stamped and executed by the transferor and transferee, and delivered to the company. In this respect, an instrument of the transfer of shares prescribed under Table A of the First Schedule of the Companies Act is commonly used. The proper stamp duty for the transfer of shares is 0.1% of the value of the shares, to be paid to the Internal Revenue Department. The company must give notice to the CRO of the transfer of its shares within 21 days from the date of such a transfer in certain cases.

The Companies Act provides fines and/or penalties on companies and their officers for non-compliance with the legal obligations. There is no legal precedent as to the validity and legality of pledge or mortgage of shares in Myanmar and has developed as a practice. We believe that an equitable mortgage of shares is legally binding and enforceable under Myanmar law.

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About DFDL

DFDL was established in 1994 and built on a unique vision: to create an integrated legal, tax and investment advisory firm, with in-depth knowledge of the jurisdictions we work in, providing technical excellence across our core areas of expertise.

Over twenty years later, DFDL continues to build on its reputation as the obvious first-choice firm for sophisticated transactions in frontier markets across Asia and beyond.

As these markets continue to expand and thrive, so has DFDL and we are now uniquely positioned to help clients access investment opportunities in the world's most dynamic region.

With a diverse complement of over 140 local and foreign lawyers and advisers working within Asia, we provide versatile tax and legal services in a language that you understand. These services include:

- Banking and Finance
- Corporate, Mergers and Acquisitions
- Employment
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- Real Estate and Construction
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Since its foundation, DFDL has acquired an outstanding reputation for providing integrated and solution-oriented legal and tax services to establish, structure and protect our clients' business interests in dynamic and challenging markets. DFDL is also actively involved in developing the legal and regulatory environments of the frontier markets in which we operate.



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