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MYANMAR | 2020  
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# MYANMAR

## LEGAL, TAX & INVESTMENT GUIDE

### 2020



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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over the last few decades of "policies and practices," which are not detailed in any laws or regulations, and are often unpublished.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 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 No 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. The government by allowing foreign investment up to 35% in companies listed in the Yangon stock exchange have further liberated the regime of foreign investment in Myanmar.

2017 witnessed the passing of the Myanmar Companies Law. The implementation of this important Law marks policy change in the amount and extent of foreign investment that may be held in Myanmar companies. By virtue of this law an online registry has been established in Myanmar and 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 (“**MIL**”). The new MIL provides for greater incentives in an attempt to attract heightened levels of foreign direct investment into Myanmar. In 2017, the Myanmar Investment Rules (“**MIR**”) 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 is registered with DICA.

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

- Under the MIL and Myanmar Companies Law 2017 (“**MCL**”);
- For projects falling under the sectors identified by the MIL, the MIR, 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 MIL (MIC Companies). Importantly, these MIC Companies must still obtain a Certificate of Incorporation (“**CoI**”) from the DICA, in addition to the MIC Permit;
- Under the MCL alone;<sup>1</sup> or
- In regard to projects for which an MIC permit is not required, or when such a project is not eligible for an MIC Permit (e.g. for the provision of services), foreign investors can apply for a CoI from DICA only without needing to go to the MIC.

## 2.2 Investment Vehicles

A foreign investor may establish a 100% foreign-owned company, register as an overseas corporation, 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 MIL and the MCL although, as will be discussed later, the FIL places limitations on the use of certain investment vehicles in various sectors.<sup>2</sup>

A 100% foreign-owned company may be incorporated, which is usually a subsidiary of an overseas entity. In practice, the foreign investor seeking an MIC permit will need to incorporate a company in Myanmar. Furthermore, the distinctions in potential liability between a foreign company and an overseas corporation are not clearly specified in the MCL. The only advantage of opting to register an overseas corporation over incorporating a foreign company is the less onerous filing and corporate secretarial compliance obligations and a certain flexibility as to how much “onshore” activity the overseas corporation can perform. There are two types of limited liability company in Myanmar: (i) a private limited liability company; and (ii) a public limited liability company. Currently, there is no public foreign-owned 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

<sup>1</sup> with sector specific license, for e.g. trading.

<sup>2</sup> See more on Chapter 3.

MIL requires ministry approval, which has previously been 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 MIC approval for the activity has been attained.

### **2.3 The Role of the MIC**

The MIC is the government agency that administers the MIL 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 MIL.

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 decline) an MIC permit within 90 days. The MIC has broad discretion in approving or declining foreign investment proposals, and these timeframes may not be adhered to in actual practice.

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

The MIC issued 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 permitted under MIC Notifications must be conducted under the FIL, i.e. an MIC Permit is required. The major categories of business activities are below:

Some of the businesses which are to be carried out only by the Union Government are:

- Manufacturing and related services of arms and ammunition for national defense;
- Managing and conserving natural forests;
- Administration of the electrical power system;
- Inspection of electrical work;
- Air traffic control services;
- Pilotage services; and
- Feasibility study and production of radioactive metals such as uranium and thorium.

Some of the businesses which are prohibited and restricted for foreign investors:

- Small and medium scale production of minerals;
- Prospecting, exploration, and production of jade and gem stones;

- Pet care services;
- Publishing and distributing periodicals in ethnic languages including Myanmar;
- Fresh water fisheries and relevant services;
- Establishment of quarantine station for exportation and importation of animals; and
- Performing shallow oil wells up.

Some of the 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) include:

- 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 sweets/candy, 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 aerosols (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 gases including compressed, liquefied and solid forms;
- Development, sale 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 narcotics and psychotropic substances, and applying the necessary excise license for typical brewery/manufacturing activities.	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 marketing of seeds, and production of fertilizers and insecticides, laboratory	Ministry of Agriculture, Livestock, and Irrigation (“MOALI”)

No.	Type of Economic Activity	Permitting Authority
	and service on research and surveillance for animal health, and laboratory service for agriculture and research on agricultural products.	
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 (“ <b>MOTC</b> ”)
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 (“ <b>MONREC</b> ”)
6	Construction, implementation, and importing of oil and gas equipment and power projects for over 30 MW.	Ministry of Electricity and Energy (“ <b>MOEE</b> ”)
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 and Sports (“ <b>MOHS</b> ”)
8	Wholesale and retail services.	Ministry of Commerce (“ <b>MOC</b> ”)
9	Manufacturing of Vaccines	Ministry of Planning, Finance and Industry (“ <b>MOPFI</b> ”)
10	Construction of elevated express way, tunnel, inner ring road, outer ring road, interchange, underpass, over pass or flyover, semi underground road and submersible tunnel and bridge which is over 180 ft. and above etc.	Ministry of Construction (“ <b>MOC</b> ”)
11	Private basic education school, Private technical, vocational and training school, private higher education school, private subject based school; and private school designated by the Ministry.	Ministry of Education (“ <b>MOE</b> ”), however, stopgap measure via MIC
12	Facilitation of businesses by formulating and operating effective and efficient procedures between different Ministries, region and state governments and central organizations in process to improve investments. To cooperate harmoniously between foreign direct investment (FDI), technical assistance, official development assistance (ODA) and investment from abroad and within Myanmar, and DICA.	Ministry of Investment and Foreign Economic Relations (“ <b>MIFER</b> ”)

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).<sup>3</sup>

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;

<sup>3</sup> 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.

- Industrial, not involving 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);
- 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,<sup>4</sup> 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 MIL under which the MIC must scrutinize every application made for an MIC permit or an Endorsement.

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 Activities in the Education Sector

The MIC issued Notification 7/2018 regulating investment activities in education services. As per the Notification, the MIC may permit investors to carry out investments in the following types of education services in the form of private schools:

- Private basic education schools;
- Private technical, vocational and training schools;
- Private higher education schools;
- Private subject-based schools; and
- Private schools designated by the Ministry.

One of the prerequisites for allowing the investment is that private schools must follow a curriculum prescribed by the Ministry of Education and relevant Ministries of Myanmar or an international curriculum. Further, these schools must comply with the MIL, MIR, Notifications issued by the MIC and National Education Law (2014).

## 2.6 Foreign Investment in local banks

The Central Bank of Myanmar (“CBM”) passed an order on 29 January 2019 which allowed foreign banks and financial institutions to invest in local private banks at up to 35% of the equity interest of such banks. This has been done to be in line with the specifications of a “Myanmar Company” under the MCL. Local private banks require authorization from the CBM for such investment.

## 2.7 Investment Licensing Process

The process of establishing an entity in Myanmar and obtaining an investment permit from the MIC can be seen as

<sup>4</sup> Under the Transfer of Immovable Property Restrictions Act of 1987 (TIPRA).

having four individual stages, collectively taking approximately four months to complete. Both the DICA application process for obtaining a Col, as well as the application for an investment permit could be performed in parallel, although the requirements to obtain a Col from the DICA<sup>5</sup> 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 depending 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, financials, anticipated exports and copies of key contracts affecting 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 proposal assessment team will scrutinize the application to ensure its compliance with the requirements of the MIL. The MIC has broad discretion in deciding 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 Chapter VIII 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 an investment permit will be issued.

The incorporation of a company with the DICA could be achieved simultaneously with the MIC application process or before initiating the procedures to obtain MIC approval.

## **2.8 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.

### **2.8.1 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.<sup>6</sup> Furthermore, a long-term lease may be sub-leased or mortgaged under the terms of the MIL with prior approval from the MIC.

### **2.8.2 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.

<sup>5</sup> While the entire process of incorporation of a company is online through Myanmar Companies Online.

<sup>6</sup> 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.

### 2.8.3 Transfer and Sales of Shares

The MIL and MIR allow a foreign investor to transfer shares to another foreign investor or Myanmar citizen subject to the notice/approval of the MIC.

### 2.8.4 Tax Exemptions and Reliefs

Under the MIL, 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 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.

Investment activities that are not exempt from tax also comprise other activities such as renting forest areas for agriculture and logging; the construction and sale of buildings; vehicle and machinery rental; restaurants, and food and beverage services.

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

## 2.9 Continuing Obligations after Obtaining an Investment Permit

There are a number of post-approval obligations imposed on an investor that registers as an overseas corporation 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 affected. 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 MIL and the MCL.

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.

## 2.10 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 the rules and regulations. The investor is entitled to income tax exemption and relief for the investment. After 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 as set out in 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 are available to investors and developers in an 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 a Free Zone;
- Income tax exemption for the first five years from the commencement of commercial operations for the investment business in a Promotion Zone;
- 50% relief on the income tax rate for the second five-year period for the investment business in a 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 into the business as a reserve fund;
- Exemptions from customs duties and other taxes for five years from the commencement of importing equipment and instruments required for the business, 50% relief on custom duty and other taxes for five consecutive years; and
- Carry forward losses for five years after they were sustained.

### b. Exemptions and relief 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.

## 2.11 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 taken 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.

### **2.11.1 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, they are already at unsustainable levels– this could be a constraining factor on new developments unless the government takes concerted action to cool the market.

### **2.11.2 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. Based on statistical records as of February 2019, USD2.9 billion had been invested in 71 projects within Myanmar’s mining sector accounting for some 3.66% of total foreign investment in the country. Amendments were made to the Mining Law in 2015 and the Mining Rules were enacted and brought into 2018 which relaxed requirements for permits and re-organized the regulatory regime, thereby increasing the scope of investment.

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 vast opportunities for foreign investors with the technical resources and know-how to exploit them.

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 (“**MONREC**”). Where permitted to operate, foreign investors are held to rigorous time schedules for each phase, this generally includes two to three years for exploration and an extendable 15 year period for production. All mining activities require an Environmental Impact Assessment. Recently, eight foreign mining companies have applied for permits to conduct large-scale mining exploration projects in Myanmar.

### **2.11.3 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.

### **2.11.4 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 wholesale services are now specifically permissible, subject to the approval of the Ministry of Commerce under Notification No. 25/2018 issued by the Ministry of Commerce.

### 2.11.5 Electric Power Sector

As mentioned, Myanmar has an abundance of natural resources, and immense potential to harness hydropower. The Asian Development Bank estimates Myanmar’s potential solar resources at 27 GW. However, to-date very little of this has been tapped. Despite a wealth of power-generating resources, approximately 50% of the population of Myanmar has access to electricity as of December 2019. Electricity availability is targeted to reach 55% by the 2021-2022 fiscal year. The percentage is expected to reach 75% by 2025-2026, and 100% by 2030-2031. The country currently has roughly 5,500 MW of available electrical capacity of which approximately 70% comes from hydropower with the remainder being produced by coal and gas powered plants.

The Myanmar electrical power sector has attracted more investments than any other sector according to the DICA. Numerous solar projects and gas-fired projects have been set up in Myanmar to cater to the ever-increasing demands for electricity. 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. The Electricity Rules have been enacted in 2015 and it lays down a set of rules for power projects in Myanmar. The accessible permits for generation, transmission and distribution of electricity have been outlined under the Electricity Rules.

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 grid codes have not yet been issued, however drafts have been undertaken and are anticipated to be released in the recent future.

Five emergency power projects to produce about 1,040 MW of energy have been initiated and scheduled for completion by summer 2020. The Union Government is requesting investors to accelerate the implementation of these power projects as well as other feasible power projects.

### 2.11.6 Oil and Gas Sector

It is widely speculated that Myanmar’s oil and natural gas fields are rich in potential natural resource reserves. It is thought that crude oil reserves are minimal but that natural gas output could be substantial. Gas exploration conducted 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.

In 2019, the MOEE released a draft bill entitled “The Exploration Prospecting Development and Production of Petroleum Bill” for public comments and opinions. This seeks to comprehensively reform Myanmar’s upstream petroleum sector. Various sectors have levelled comments and proposed changes to the draft law. However, as of now there has been no update to the draft law and no timeframe has been set for its adoption. The Myanmar Government is expected to announce major new bidding for natural gas exploration which may include 15 offshore and 18 onshore blocks.

#### **2.11.7 Foreign Investment in listed Myanmar companies**

The Securities Exchange Commission of Myanmar issued Notification No. 1/2019 dated 12 July 2019 which allows foreign nationals as well as foreign entities to invest in Myanmar companies listed on the Yangon Stock Exchange (“**YSX**”). The effective date of this would be 20 March 2020 as per the Instruction No. 1/2020 issued on 6 March 2020. The percentage of foreign investment in the listed companies would be at the discretion of the companies and subject to approval from the SECM and line ministries.

## 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). 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.

### **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, make capital calls and pay dividends. 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 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 and an Overseas Corporation 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 via the online platform; the Myanmar Companies Online ("MyCO") 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.

In the case of an overseas corporation, the following details must be submitted to the CRO:

- The name of the overseas corporation;
- The full names, date of birth, gender, nationalities and residential addresses of the directors and any secretary of the overseas corporation on the date of the application;
- The full name, date of birth and residential address of the authorized officer appointed by the overseas corporation (who will be authorized to accept service of documents in the Union of documents on behalf of the overseas corporation);
- The person named as the authorized officer has given their written consent to act as authorized officer the overseas corporation;
- The full address of the registered office in the Union of the overseas corporation;
- the full address of the place of business in the Union of the overseas corporation (if it is different to the registered office) or, if the overseas corporation has more than one place of business in the Union, the full address of the principal place of business in the Union of the overseas corporation;
- The full address of its registered office or principal place of business in its place of origin;
- A declaration by the overseas corporation that all matters stated in the application are true and correct;
- The evidence of incorporation of the overseas corporation; and
- A copy of the instrument constituted in its place of origin (a copy of the Myanmar language translation and a summary statement in English duly certified by a director)

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 company's 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 ("CoI"). 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.

#### **For a Company Limited by Shares -**

**Allotment of Shares or change to the member register:** After making any allotment of shares, the details of the holder of such a share 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 are fully or partly paid up. The shares are deemed to have been issued when the name of the holder is entered in the relevant register of the company and the company must file a notice using the prescribed form with the Registrar detailing any changes it makes to its register of members within 21 days of the relevant change.

**Transfer of Shares:** Every company must file the notice of the transfer of shares within 21 days using the prescribed form with the Registrar. If as a result of the transfer the company has either become or ceased to be a foreign company, the notice must state this.

**Change of directors and secretary:** The initial directors of a company will be the persons named on the application for incorporation thereafter, the directors of the company must be appointed by the members passing an ordinary resolution in a general meeting; and any casual vacancy occurring among the directors may be filled by the directors but the person so appointed must be subject to approval of the members at the next general meeting of the company held after their appointment, which must be called within six months of the appointment. The company must also file with the Registrar a notice using the prescribed form of any change among its directors, alternate directors or secretaries, or in any of the particulars contained in the register within 28 days of the date of the change.

**Alteration of Constitution:** If any additional conditions are contained in its constitution, a company may, by special resolution, alter or add to the provisions of its constitution, and any alteration or addition so made must be as valid as if originally contained in the constitution, and be subject in like manner to alteration by special resolution. It must be filed with the Registrar within 28 days from the date of the passing of the special resolution to amend it.

**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 Return 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 date of the annual general meeting if applicable. Every overseas corporation that carries on business in the Union must notify, within 28 days, the change or alteration notice of the details of overseas corporation to the Registrar of an alteration to its constitution, a change in the directors or in the names or residential addresses of the directors, the address of the registered office or principal place of business. Notice of the proposed change must be given prior to the company effecting the change in the address. The change of the authorized officer or his/her particular information must be filed within 7 days. The annual return must be filed with the Registrar within 28 days of the end of its financial year (at its place of origin). The parent company's 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.

**Winding up or Removal from the Register:** A company may cease to exist either through the winding up procedures, 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:

- By the court;
- Voluntarily; or
- 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.

### **Disclosure of information on Beneficial Ownership**

The DICA issued a directive on Disclosure of Information on Beneficial Ownership on November 2019 ("Directive"), which will be effective from 1 January 2020. The primary objective of this Directive is to effectively increase the transparency and accountability of beneficial ownership of a legal entity or an arrangement (in the form of a trust or similar arrangement), and also to combat tax evasion, money laundering and terrorist financing activities. The Directive obligates the legal entities or arrangements to disclose information pertaining to their beneficial ownership to DICA and the Internal Revenue Department.

"Beneficial ownership" has been defined as ownership by a natural person(s) who owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. The Directive further defines a "beneficial owner" as any individual who:

- directly or indirectly holds more than 5% of the shares and/or voting rights;
- directly or indirectly have the right to appoint and remove the majority of the board; or
- either have the right to exercise or actually exercises significant influence or control over the public or private company or corporate entity.

The legal entities and arrangements are required to cooperate with the competent authorities in determining the beneficial owner and are required to authorize one or more natural persons resident in Myanmar, as accountable to DICA for providing information and required assistance to the authorities. These legal entities and arrangements are also required to authorize a Designated Non-financial Business and Professions ("DNFBP"), including service providers such as agents, directors or secretaries of a company, partner of a partnership firm, lawyers, accountants and companies providing registered offices, accommodation, business address, correspondence or administrative address services for a company, responsible for providing required information and assistance to DICA and the

competent authorities.

The beneficial ownership information will be submitted on an online form which will be made available on DICA's website in due course. At the request of the individuals, the information related to beneficial ownership will only be made available to the competent authorities.

The legal entities and arrangements are required to maintain the information and records for at least five years from the date of dissolution of the entity or from the date that the entity ceased to exist. In the event that the entity ceases to be a customer of the professional intermediary or the financial institution, then records have to be maintained for up to five years from such a date.

## 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 impossible<sup>7</sup> 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 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;

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<sup>7</sup> 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.

- 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<sup>8</sup> 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<sup>9</sup> 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.

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.

<sup>8</sup> 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.

<sup>9</sup> 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.

#### 4.4 Registration of Lease and Stamp Duty

Pursuant to the Registration Law, 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 Law. 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 Internal Revenue Department (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.<sup>10</sup>

For Yangon, these include:

- The City of Yangon Municipal Act, 1922 (Yangon City Municipal Act);
- Yangon City Development Law, 2018 (Yangon City Development Law);
- Yangon City Development Committee Notification No. 2/2014, (YCDC Notification No. 2);
- 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.

<sup>10</sup> 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.

Likewise, there are orders relating to zoning issued under the City of Mandalay Development Law and the Nay Pyi Taw Development 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 Myanmar National Building Code (**MNBC**) 2016 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. The MNBC consists of seven parts as follows:

- i. Planning, Environment, Administration and Legislation
- ii. Architecture and Urban Design
- iii. Structural Design
- iv. Soil and Foundation
- v. Building Services
- vi. Building Materials; and
- vii. Construction Practices and Safety.

The MNBC applies to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures.

#### 4.5.3 Construction Permit

A construction permit is required to obtain from the relevant city development committee for the construction of buildings within the limits of cities, for example, the YCDC within the city limits of Yangon, the Mandalay City Development Committee (**MCDC**) within the city limits of Mandalay and the Nay Pyi Taw City Development Committee (**NCDC**) within the city limits of Nay Pyi Taw.

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. The steps required to obtain a construction permit from the MCDC and NCDC is similar to the steps required to obtain a construction permit from YCDC.

#### **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. The Condominium Management Committees were formed in 11 States and Regions, which are responsible for monitoring the condominium developers and issuing licenses to them.

#### **4.7 Apartment Law**

The Apartment Law was drafted by the Myanmar Licensed Contractors Association (MLCA) and submitted it to the Pyithu Hluttaw. The draft Apartment Law aims to regulate apartment buildings developed on the land areas of less

than 20,000 square feet. The sale, transfer and mortgage of the apartments by the owners can be legally done if the Apartment Law is enacted. The draft Apartment Law is not publicly issued yet and it is expected to be issued soon.

#### **4.8 Land and Property Bank**

On 30 August 2019, the President Office issued Directive no. 2/2019 (“**Land and Property Bank Notification**”) to facilitate easier access of investors to land information. The Land and Property Bank Notification sets out how the Land and Property Bank will be established, the role of the relevant governmental departments and individuals in retaining information at the Land and Property Bank along with the applications and approval procedures to lease land and property held by the Land and Property Bank.

The Land and Property Bank will serve as an interactive online database for information on state-owned land, buildings, premises, apartments, shops, residential rooms, factories, workshops and warehouses. The Land and Property Bank Notification also stipulates the conditions to be included in the lease agreement to directly lease state-owned land and buildings.

The launch of the Land and Property Bank will hopefully have a positive effect on Myanmar’s land and property sector and streamline the process for investors to search for and trace land titles for their investment purposes.

## 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 6.2 below). In August 2017, the Ministry of Labour, Immigration and Population (“**MOLIP**”) issued Notification 140/2017 together with a revised Standard Employment Contract (“**SEC 2017**”) which repeals and replaces the SEC 2015. This Notification requires all employers in Myanmar to use the SEC 2017 with their employees.

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 March 2018, the National Minimum Wage Committee set a new minimum wage for the private sector, regardless of the place and type of work, at MMK 4,800 for an eight-hour day or MMK 600 per hour. This minimum wage does not apply to small businesses with fewer than 10 workers, and 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 the employee should be given three written warnings in the event of minor misconduct 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
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.<sup>11</sup> Only insured persons<sup>12</sup> 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 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

<sup>11</sup> No distinction is made between local and international employees.

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

contributions.<sup>13</sup> 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 weeks<sup>14</sup> 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 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.<sup>15</sup> 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.

<sup>13</sup> 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.

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

<sup>15</sup> Subject 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).

## 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 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, three elected representatives of the employees and employer. Any grievances brought before the WCC by either the employer, an employee, or an LO must be negotiated and a settlement sought within seven days from the date of received the grievances.<sup>16</sup>

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).<sup>17</sup> The CB will determine whether it is a dispute for employment right and privileges or a dispute for benefits and seek to conciliate within seven days in the event of a dispute for benefits. In the case of a dispute for employment right and privileges, either party can submit complaint directly to the relevant Department of Labour Relation or to a competent court.

If the CB is unable to resolve a dispute for benefits to the parties' satisfaction then it must refer the matter to the Dispute Settlement Arbitration Body (AB)<sup>18</sup> 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);<sup>19</sup> and
- Both parties may apply within seven days of the decision from the AB to have the dispute heard by the Arbitration Council (AC).<sup>20</sup>

The AC must form a Tribunal to try the case with 14 days for non-essential services and seven days for essential services. The Tribunal will make the final decision.

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 from MMK 300,000 to MMK 2 million.

### 5.7.2 Trade Unions

In practice, the extent to which the SLDL is being implemented and observed is unclear. It 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, in 2019, the level of the fines are increased to MMK 100,000 and MMK 3 million respectively.

- Basic - requiring a minimum of 30 members;

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

<sup>17</sup> Formed at the regional level.

<sup>18</sup> Also formed at the regional level.

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

<sup>20</sup> Union level.

- 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, USA, Canada, Australia, New Zealand and most of Europe and Asia. 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 business license; and
- Fully 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 MCL 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 Law 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 extension 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 not least of which was the inclusion of the Agreement of Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”). GATT 1994 including the TRIPS Agreement were adopted by the World Trade Organization (“**WTO**”) in 1995, the same year that Myanmar became a member and like all other WTO member nations subject to its provisions. TRIPS specifically mandate that all WTO member states provide comprehensive protection for intellectual property (“**IP**”) rights, including: patents and designs, copyright and trademarks. Myanmar subsequently joined the World Intellectual Property Organization (“**WIPO**”) in 2001 which also requires the country to provide an additional 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 failed to introduce any new IP protection legislation by that deadline. However, there was a major shift in Myanmar’s IP landscape in 2019 as Myanmar enacted the following new IP laws; The Trademark Law, Copyright Law, Industrial Designs Law and Patents Law. As at the time of writing, enforcement of these laws has been deferred to a later time when all the systems and administrative frameworks are in place. Nonetheless, it is a step in the right direction as the country now has a comprehensive IP legislative framework in place.

## 7.2 Patents

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 forms of IP currently registered in practice are trademarks.

The new Patent Law (enacted but not yet in force) introduces a well-defined system for registration and recording of patent rights with the Registrar. The law also provides for examiners to administer and carry out specific functions and duties related to patents along with executing other IP-related duties. However, it may be a while before the law in its totality is enforced owing to technical capacity issues faced by Myanmar and its relevant enforcement agencies.

The requirements (particularly those related to filing) follow international best practices. Points to note are that that the patent application must be in Myanmar or English (or as prescribed, with a verified translation); be accompanied by a written agreement in the case of joint applicants or any request for early publication; and the payment of prescribed fees. Priority may be claimed under the Paris Convention for the Protection of Industrial Property (“**Paris Convention**”) or WTO as well as one year’s exhibition priority.

The applicant will be notified if the patent filing requirements are not met and then have 60 days to revise the application accordingly. Otherwise, the application shall be deemed withdrawn, but with the possibility to re-apply, subject to an explanation being provided along with the prescribed fees.

The Registrar will make a public announcement by the end of the 18th month (or before if early publication is requested) from the filing date. Any third party that wishes to contest an application must submit an objection to the Registrar within 90 days from the announcement date along with payment of the required fees. Substantive examination must be requested within 36 months of the filing date. The term of a granted patent in Myanmar is 20 years from the filing date.

### 7.3 Copyright

In 1914, the Myanmar Copyright Act, based on the UK Copyright Act of 1911, was promulgated and technically came into force.

The Copyright Law 2019 (enacted but not yet enforced) repealed and superseded the Myanmar Copyright Act 1914 and accords copyright protection to foreign works unlike its predecessor. Works created by non-citizens or non-residents are protected if they are first published in Myanmar, or published in the country within 30 days of first publication elsewhere.

In line with international practice, copyright over literary and artistic work subsists throughout the life of the author and for 50 years after their death, whereas works of applied art are protected for a period of 25 years. Audiovisual works and films are protected for 50 years from the date of publication only. While copyright protection will take effect automatically without the need for registration, it is possible to file for the voluntary recording of copyright. Further, the law identifies the protection of an author's moral rights.

Under the Copyright law, unauthorized reproduction, transmission and distribution of copyrighted works, the possession of infringing goods for commercial purposes and the importation of infringing items into Myanmar are penalized. The minimum penalties stipulated for specified offences are imprisonment not exceeding one year and a fine not exceeding MMK 1 million (approx. USD 660). Repeat offenders may be subject to imprisonment of up to ten years and a maximum fine of up to MMK 10 million (approx. USD 6,600).

### 7.4 Industrial Designs Law

The Industrial Design Law 2019 (enacted but not yet enforced) is the first time Myanmar has recognized the protection of industrial design. The law has prepared a detailed and well-regulated framework for the protection of rights over the visual design of objects [i.e. the aesthetic design (external)]. The provisions of the law will be implemented through administrative bodies that are to be established under the law.

For an industrial design to be registrable under the law, the most important criteria is that it must be domestically and *internationally* novel before the application is made, or novel before the date of a priority right application from another jurisdiction was made.

Applications which are accepted will receive protection for five years from the application date, renewable within six months of expiry for a further five years, twice (i.e. up to a maximum of 15 years in total). Applications filed within six months from the date of filing in a member country of the Paris Convention, or in another World Trade Organization member state, will enjoy a right of priority, and be accorded the same priority date.

Protection will be enforceable through civil action by the owner(s) of the industrial design, as well as their heirs and assignees where appropriate. The law also establishes several criminal offenses related to fraudulent or dishonest registration and to unauthorized disclosure of an industrial design. These are subject to imprisonment of up to one year and/or fines of up to MMK 2 million.

### 7.5 Trademarks

While Myanmar previously had no regulatory framework specifically protecting trademarks, trademarks were traditionally afforded a genuine level of protection within the country. For example, 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.*"

One of the most significant developments in the spectrum of IP rights in Myanmar has been the enactment of the Trademark Law 2019, though this is not yet in force.

The law introduces a “First-to-File” system (for fresh trademark applicants) through which trademark owners that submit their applications first can prevent identical or similar marks being filed for identical/similar goods and services. Nonetheless, the law does provide an exception to this called the “right of priority”.

Those trademarks already recorded with or registered at the Office of Registration of Deeds (“**ORD**”) under the previous regime would be afforded a “right of priority” wherein they would be given priority to register within the prescribed period (which we assume would be six months from the passing of the law).

Additionally, it must be noted that Myanmar, as a member of the WTO must abide by the principles of National Treatment accorded therein. Therefore, giving effect to international treaties such as TRIPS (Article 3) as well as the Paris Convention (Article 6), the Trademark Law has also introduced a “right of priority” for marks already registered with signatories of the Paris Convention and WTO.

The Trademark Law introduces an application process and it is imperative to note that provisions of the law will be implemented and enforced through administrative bodies that are yet to be established.

## 7.6 Trademark Registration Practice

Pending enforcement of the Trademark Law, the existing registration system is still being followed to register new trademarks. The process to register a trademark in Myanmar is threefold:

- i. A search of registered trademarks may be conducted to ensure that the mark has not been previously registered. If the mark or a substantially similar mark has not previously been registered then the mark may be registered with the ORD;
- ii. In order to register the mark, the owner of the mark must submit a signed declaration of ownership to the ORD attesting that the mark, is in fact, the property of the applicant and a description must be submitted 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; and
- iii. Though not officially required, it is accepted and customary 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.

The authorities had previously announced that there would be two phases of trademark registration. One would be a soft opening for re-registration of previously registered trademarks (in January 2020) and the other being a grand opening for all new registrations in the middle of 2020. However, these phases have not yet been initiated and it is understood that the ORD is presently developing an online system for registrations. Only once the online system is well coordinated will the new registration system under the new law begin to be enforced. It must also be noted that due to the massive societal and economic disruption being caused by the Coronavirus global pandemic (“**COVID-19**”), as so declared by the World Health Organization (“**WHO**”) on 11 March 2020, indefinite delays in rolling out this system to can be expected until this crisis passes.

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. Once the anticipated new IP legislation is issued, we expect more clarity to ensue with regard to rules and procedures on both registration and duration of validity.

## 7.7 General Overview of Remedies for the Infringement of a Trademark

Pending enforcement of the Trademark Law and until civil and criminal remedies under the law take effect, a 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 in a reasonably calculated manner 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 subject to a term of imprisonment of up to one year, a fine or both. Criminal actions for infringement are very 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 the purposes of this Section.

Generally, in order to enforce IP rights in relation to a trademark, the owner of the mark must provide evidence to the effect that:

- The owner authentically owns the mark;
- The owner is the original inventor of the mark; and
- There has been prior use of the mark in Myanmar.

Complicating matters are the fact that there are at present 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. Nonetheless, the IP laws which have been enacted do envisage the establishment of IP courts that would be set up in regions to specifically deal with IP matters. Once the laws are enforced and administrative bodies duly established, the IP mechanisms in Myanmar are expected to be much more systematic.

## 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,<sup>21</sup> 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.”<sup>22</sup>

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).

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.

<sup>21</sup> Chapter 2, Objectives.

<sup>22</sup> Chapter 1, Title and Definition, 2 (a).

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
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 $\geq$ 230 kV	$\geq$ 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	$\geq$ 80 rooms but $<$ 200 rooms and total utilization area $\geq$ 200,000 m <sup>2</sup> but $<$ 500,000 m <sup>2</sup>	$\geq$ 200 rooms or total utilization area is $\geq$ 500,000 m <sup>2</sup>

Type of economic activity		Criteria of IEE	Criteria of EIA
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.<sup>23</sup> 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.

<sup>23</sup> 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.

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.

Though foreign entities are generally prohibited from engaging in exclusively trading and import/export activities until April 2018, liberalization of the wholesale/retail sector was put into action through the issuing of Notification no. 25/2018 by the MOC (“**Notification-25**”) on 9 May 2018. Under Notification-25, 100% foreign investment in retail/wholesale activities is allowed subject to minimum capital requirements of USD 5 million for wholesale and USD 3 million for retail activities. After Notification-25 was issued, the MOC then released Notification no. 23/2019 putting six items (fertilizer, pesticides, seeds, hospital equipment, construction materials and agricultural machinery) that were formerly allowed for trading under Notification no. 36/2017 and 55/2017 of the MOC under the governance of Notification-25. The timeframe on fulfilling capital and shop space requirements under Notification-25 for these items is five years from the registration date of the wholesale/retail license.

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 CoI. Other documents to be submitted include the company’s constitution 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 the entity holds wholesale/retail license under Notification-25 or 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 material;
- 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 Procurement



There is no specific law on procurement. Nonetheless, the following notifications generally govern the procurement process:

- i. Tender Rules for Business Activities under the Contracting System 2016 issued by the Ministry of Construction (“**MOC Tender Rules**”);
- ii. Directive No.1/2017 of the President’s Office on Tender Procedures to be Followed by Government Departments and Organizations in Construction, Purchase, Procurement of Services, Lease and Sale (“**Tender Directive**”); and
- iii. Notification No. 2/2018 of President Office (“**Project Bank Notification or PPP Notification**”).

### 10.1 MOC Tender Rules

The MOC’s Tender Rules embody the details to be prepared for tender procedures including but not limited to the preparation of the bill of quantities, preparation of a price book, preparation for a list of estimated project costs, setting out the project value for tender invitations, setting prices for bid forms, modes of payment and stipulations and fines for being late, quality control inspections and supervision.

### 10.2 Tender Directive

Generally, the Tender Directive was issued by the President’s Office in order to make the tender procedures more transparent, create fair competition and mitigate abuses of power, authority and influence.

In respect of permission for national projects, the Tender Directive states that permission from the Union Government and the President’s Office is required by Union level departments and organization. Regional and State departments and organizations must obtain permission from the relevant Region or State government.

Generally, the Tender Directive governs the following tender procedures:

- Formation of a Tender Committee;
- Actions of the Tender Committee such as ways of calling for construction tenders, the purchase and procurement of services with a value from MMK 10 million to 100 million, and those with a value of more than MMK 100 million;
- Actions of the Tender Committee on tenders for a lease or sale value of less than MMK 10 million for a year and those lease or sales of MMK 10 million or above for more than one year;
- Responsibilities of the Tender Committee include but are not limited to screening permitted budgets for the projects, specifying tender forms, specifying information on the proposed contract, criteria for quality evaluation and financial information announcing the tender winner;
- Formation of a Committee for calculating floor price;
- Formation of Tender Acceptance and Evaluation Committee and functions.
- Tender Procedures to be complied with by the Union, Region and State government departments and organizations:
- Screening whether there are permitted budgets;
- Making a purchasing plan and obtaining confirmation;
- Developing tender documents including the documents related to the contract;
- Calling and announcing the tender;
- Screening and accepting the tender;
- Notifying the reports which shall include suggestions for the contents of the contract and evaluations by the tender;
- Announcing the tender winner;

- Contracting and amending the contract;
- Capacity of local and international bidder;
- Grounds for rejecting a tender; and
- Formation of a complaint resolution team.

### 10.3 Project Bank Notifications or PPP Notifications

Generally, PPP notifications include establishing two main items: (i) a **Project Bank** that is an interactive, web-based, publicly accessible database or project information bank that includes projects which Implementing Government Agencies (“IGAs”) plan to develop to implement the Myanmar Sustainable Development Plan (“MSDP”) and its strategic action plans and (ii) a **PPP Centre** that is a specialized unit formed within the Ministry of Planning and Finance (“MOPF”) to strengthen the capabilities of IGAs to effectively identify, develop, procure, implement, monitor and audit PPPs.

In respect of procurement, PPP Centre may itself or through transaction advisers provide advice and support to IGAs on procurement processes including preparation of tender documents, producing proposal requests, developing criteria for bidder selection and selecting the winning bidder either via a competitive tender process or Swiss Challenge tender process.

#### PPP Structures

The PPP Notification sets out an open list of seven types of PPP structures:

- a. **Availability Payment:** A payment mechanism to the private sector for a type of PPP project whereby the public sector pays the private partner a pre-established maximum period payment to design, build, finance, operate and/or manage project facilities.
- b. **Build-Own-Operate (“BOO”):** A BOO contract to build, operate, and maintain a facility. After the completion of the facility, the investor shall own and have the right to commercially operate such a facility in perpetuity, unless by mutual agreement, the government decides to purchase the asset at the end of a specified period of time.
- c. **Build-Operate-Transfer (“BOT”):** A BOT contract to build a facility. After completion of the construction of the facility, the investor shall have the right to commercially operate such a facility for a fixed term. At the end of such a term, the investor shall transfer the facility to the government.
- d. **Build-Transfer-Lease (“BTL”):** A BTL contract to build a facility, then transfer its ownership to the government after the facility’s construction. This is after the private investor executes its right to operate the facility for a specified period of time, leasing the facility to the IGA from which lease payments are made to the investor for a period of time specified in the BTL contract.
- e. **Build-Transfer-Operate (“BTO”):** A BTO contract to build a facility. After completion of the construction of the facility, the investor shall transfer such a facility to the IGA and have the right to commercially operate such a facility for a fixed term.
- f. **Operation and Management (“O&M”):** An O&M contract to commercially operate part of a facility or the entire facility for a fixed term, where the private sector operator would not have any investment responsibility.
- g. **Other forms of PPP:** Forms of PPPs other than the above and may also include but not be limited to Design-Build-Operate and Design-Build-Finance-Operate-Transfer contracts.

## PPP Centre

The role of a PPP Centre organized within the MOPF has a certain importance for PPP projects. PPP Centres are responsible for identifying projects that are capable of being delivered by PPPs from those projects submitted for inclusion in the Project Bank. Responsibilities of PPCs include but are not limited to initial strategic assessment, monitoring and reporting on the implementation of PPP projects and advising on PPP types and structures and contractual approaches to the main terms under the PPP Notification.

Even though it is mentioned in Section-13 of the PPP Notification that IGAs may establish a dedicated PPP Unit within its agency that shall be responsible for facilitating PPP transactions, PPP Units for IGAs are still not established yet. Currently, the PPC Center of the MOPF was established on 24 December 2018 and conducts activities pursuant to the PPP Notification.

In practice, while PPP units for IGAs have yet to be established, the PPP Centre under the MOPF is assisting on all PPP projects in terms of providing advice and comments upon request by the relevant government department.

# Chapter 11

## Retail and Wholesale Investment



As part of the liberalization of retail-wholesale activities, the MOC issued Notification-25 on 9 May 2018 and the detailed Standard Operation Procedures (“SOP”) on 26 July 2018. Notification—25 allows 100% foreign owned investment to conduct retail-wholesale activities.

The SOP categorizes types of companies into four groups:

- i. New 100% foreign owned companies or JV companies which will be incorporated in Myanmar for retail-wholesale activities (“**Type-1 Business**”);
- ii. 100% foreign companies or JV companies that were already incorporated in Myanmar and still not having retail-wholesale permit (“**Type-2 Business**”);
- iii. 100% foreign companies or JV companies that already granted for retail-wholesale activities (“**Type-3 Business**”); and
- iv. 100% Myanmar citizen owned companies that are conducting retail-wholesale activities with minimum capital investment of USD 700,000 or its equivalent in MMK (**Type-4 Business**”).

Generally, initial capital requirements for 100% foreign companies and JV companies in which the Myanmar citizen investment portion is below 20%, are a minimum of USD 5 million (exclusive of land rent) for wholesale activities or USD 3 million (exclusive of land rent) for retail activities under Notification-25. For JVs in which the Myanmar shareholding is above 20%, a minimum USD 2 million (exclusive of land rent) for wholesale or a minimum USD 700,000 for retail must initially be invested under Notification-25.

Under the SOPs, a company can apply for either a retail or wholesale business license or it may also apply for both. As part of the application for both licenses, the initial capital requirement for each license will be combined.

The following capital injection schedule must be followed for each type of business under the SOPs:

Type of Business	Percentage of Initial Capital to be Brought in						Remark
	1 <sup>st</sup> stage	Timeline	2 <sup>nd</sup> year	Timeline	3 <sup>rd</sup> year	Timeline	
Type-1 Business	50%	Within 30 days from the date of application	30%	Final month of the second year of operation	20%	Final month of the third year of operation	If a Type-1 Business will conduct manufacturing, distribution and importation of products, the first 50% capital injection can be injected in two instalments of 20% and 30%.
Type-2 Business	50%	Within 30 days from the date of application	30%	Final month of the second year of operation	20%	Final month of the third year of operation	
Type-3 Business	N/A	N/A	N/A	N/A	N/A	N/A	Minimum initial capital shall be injected within the first 5-year term of retail/wholesale business license
Type-4 Business	N/A	N/A	N/A	N/A	N/A	N/A	Only registration for retail/wholesale business is needed and no initial capital requirement is necessary.

Floor area for retail business shall be a minimum of 929 square meters and spaces outside of the shop building such as office space, storage space or parking spaces shall not be factored into the minimum floor area. To open shopping malls, the floor area must be above 929 square meters and be suitable for a shopping mall. Shopping mall owners must apply for a retail business license and each single seller within the shopping mall will not need to apply for a retail business license. In the event that a single seller wants to import items for his/her shop, he/she can import items through the shopping mall holding a valid retail business license or by himself/herself via importer-exporter registration together with the recommendation from the shopping mall.

Regarding the application dossier, all Myanmar companies, foreign companies, and JV companies established after the issuance of Notification-25, applications to register retail/wholesale activities with the MOC must be accompanied by the following documents:

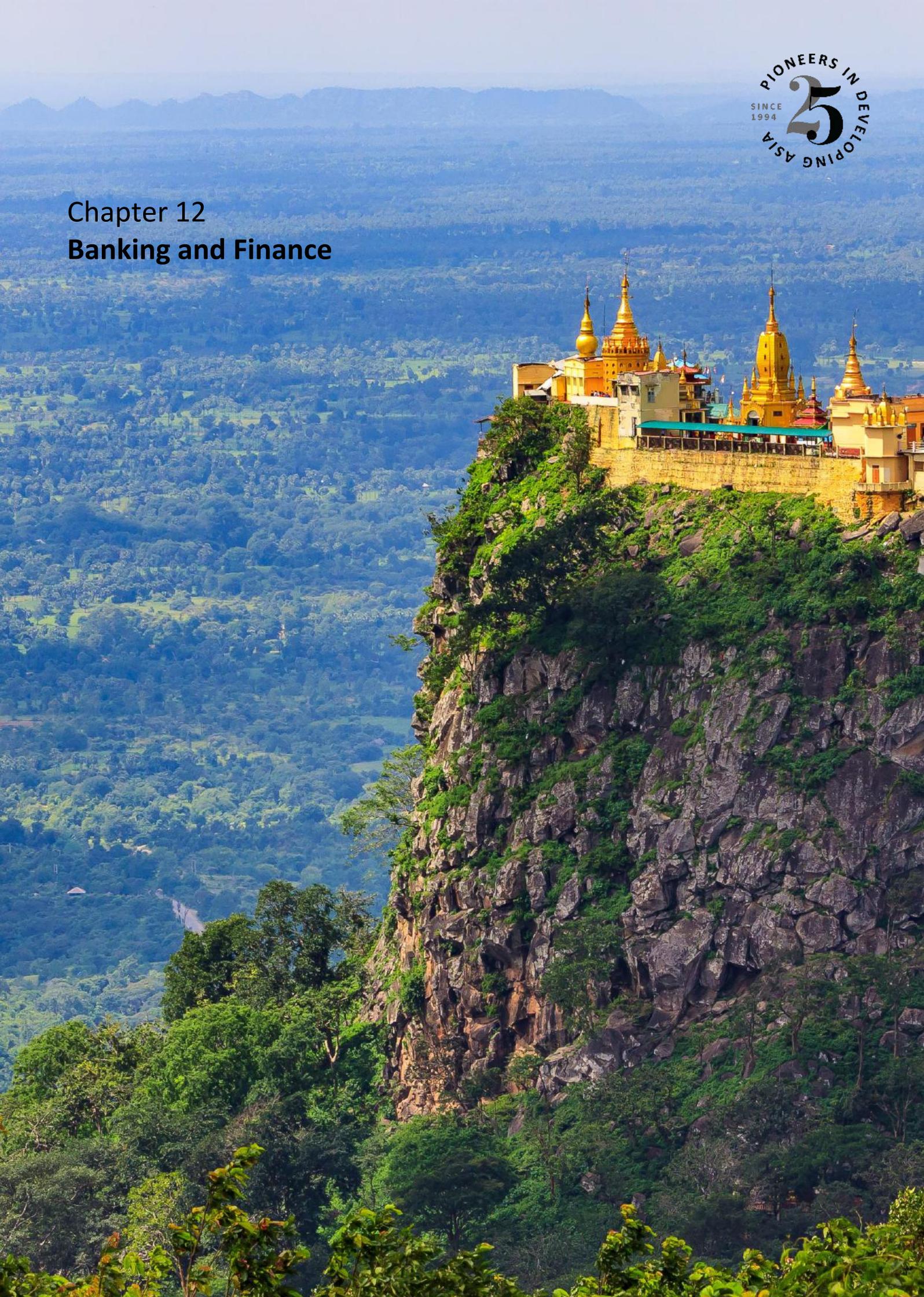
- i. Company Incorporation Certificate;
- ii. MIC Endorsement (copy) and MIC Permit (copy) for foreign companies and Myanmar-foreign ventures which are required to obtain an MIC Endorsement];
- iii. Recommendation issued by the relevant city development committee or township development committee in the State or Region;
- iv. List of categories of products to be distributed through retail or wholesale activities; and
- v. Detailed business plan for retail or wholesale activities. This includes initial investment amount, location for conducting sales, area and so on.

For Myanmar companies conducting retail or wholesale activities with an initial investment amount of USD 700,000 and above (or its MMK equivalent) before the issuance of Notification-25, the application for registration of the retail or wholesale activities at the MOC shall be made within 150 days from Notification-25's date of issuance, along with the following documents:

- i. Company Incorporation Certificate;
- ii. List of categories of products to be distributed through retail or wholesale activities;
- iii. Detailed business plan for retail or wholesale activities. This includes working capital, location for conducting sales, area and so on; and
- iv. In the case of more than one location of operations, number of branches and list of categories of goods being distributed at such operations and a detailed business plan.

# Chapter 12

## Banking and Finance



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

## 12.1 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, private banks and foreign 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 institutions: 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 include 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. A credit bureau has been defined as an entity specializing in the collection and sale of credit performance information for individuals and companies. Scheduled institutions are defined as institutions governed by a separate law that provide financial services for a specific group and a community that includes:

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

There are currently 4 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. 1 credit bureau has been issued a license by the CBM, but it is not yet operational. Currently, there is no credit rating agency in Myanmar.

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 11.5% for loans and a minimum of 6.5% for deposits).

## 12.2 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 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 provide deposit accounts, term loans or working capital, trade financing and other related banking services to local companies. Additionally,

the foreign branch office may also provide currency exchange to foreign entities and domestic banks in foreign currency.<sup>24</sup> Foreign banks are also allowed to set their own foreign currency loan interest rate. However, the interest rate for loans in Myanmar kyats should not exceed 11.5% p.a. As of now, foreign banks are prohibited from engaging in retail banking (which is expected to start from 2021) in the local market or lending to local companies. They may only deal in eight currencies<sup>25</sup> 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.

Foreign banks or institutions are allowed to hold up to 35% equity in private local banks or financial institutions. However, necessary reporting regarding the investment and equity injection levels have to be made to the CBM.

CBM has announced the 3<sup>rd</sup> phase of foreign bank licensing wherein 5 to 10 foreign banks would receive licenses to conduct business operations in Myanmar. As per the announcement, foreign banks with representative offices will be issued with either a Branch or Subsidiary License. A Branch Licensee will be allowed to operate with just one place of business and must maintain minimum paid-up capital of USD 75 million while a Subsidiary Licensee will be allowed to establish up to ten locations to conduct business that are branches or off-site ATMs and would be required to maintain minimum paid-up capital of USD 100 million. Furthermore, ATMs attached to a branch office will not be considered as additional places of business, while stand-alone ATMs would be considered as an additional place of business. Moreover, for each place of business established in Yangon and Mandalay, the foreign banks would be required to establish one additional place of business outside of Yangon and Mandalay.

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.

### 12.3 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.

#### 12.3.1 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;<sup>26</sup>
- 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

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

<sup>25</sup> USD, SGD, EUR, THB, MYR, MMK, JPY and CNY.

<sup>26</sup> 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.

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.<sup>27</sup>

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;<sup>28</sup>
- Remittance of lawful income; and
- Transfer of profits and dividends of foreign investors.<sup>29</sup>

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.

### 12.3.2 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.

The FEMR distinguishes between capital account transactions by residents and non- residents.<sup>30</sup> 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 CBM<sup>31</sup> 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

<sup>27</sup> Section 9 of CBM directive № 13/2012.

<sup>28</sup> E.g. remittances for education fees and medical treatment.

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

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

<sup>31</sup> 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.

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 provide verification that the interest rate is a market rate.

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 website for the issuance of the Criteria.

Residents may apply directly or through the Myanmar Investment Commission (MIC) for approval of an offshore loan. The Criteria lists the following documents and information which would be required for submission to the CBM for approval purposes.

- a. An application for approval of a loan addressed to CBM at Office Building No. (55), Nay Pyi Taw;
- b. Relevant corporate documents of the applicant (Certificate of Incorporation, Company Extract generated from MyCO account, company constitution);
- c. Annual financial statement for the relevant fiscal year and the previous year as approved by a Certified Public Accountant;
- d. Draft loan agreement, including repayment schedule and other relevant data;
- e. Bank Credit advice or a Bank Statement or evidence of equity being transferred to the borrower; and
- f. 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 equity capital of the applicant exceeds USD 500,000 if the applicant is an MIC company or exceeds USD 50,000 if the applicant is not an MIC company but registered with the DICA; ;
- 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 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 is within a maximum of 4:1 for an MIC company or 3:1 for a non-MIC company;
- 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. <sup>32</sup>
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.
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.

## 12.4 Insurance

The insurance sector in Myanmar is growing and the Ministry of Planning and Finance (“**MoPF**”) has taken steps to liberalize the insurance sector. In January 2019, the Financial Regulatory Department (“**FRD**”) published a Request for Proposal (“**RFP**”) for 100% foreign life insurance and Expression of Interest (“**EOI**”) letters for life and non-life insurance joint ventures (“**JVs**”). The respective EOIs invited local life/non-life insurers (applicants) that were interested in forming JVs with foreign partners to apply to the FRD. The EOIs also mentioned that the foreign JV partner would be required to have a local representative office registered for life/non-life/composite insurance activities as of 31 December 2018 to be eligible to form a JV with local life/non-life insurers.

On April 5, 2019, the MOPF identified Prudential Hong Kong, Chubb Tempest Re, Manufacturers Life Insurance Company (Manulife), Dai-ichi Life Insurance Company and AIA Company as preferred applicants for foreign life insurance licenses and granted them provisional licenses. They would be issued with Insurance Business Licenses upon meeting with the stipulated pre-licensing criteria. Additionally, the MOPF has also allowed six joint venture insurance companies to provide services in the country. They are three life insurance companies and three general insurance companies. The life insurance companies include a joint venture between Capital Life Insurance Limited

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

and Taiyo Life Insurance Company Limited, another between Citizen Business Insurance Public Limited and Thai Life Insurance Public Company Limited and the third one between Shwe Taung Group's Grand Guardian Life Insurance and Nippon Life Insurance. The general insurance joint ventures are between Max Myanmar's AYA Myanmar General Insurance and Sompo Japan Nipponkoa Insurance, Shwe Taung Group's Grand Guardian General Insurance and Tokio Marine & Nichido Fire Insurance and the final one is between KBZ Group's IKBZ Insurance and Mitsui Sumitomo Insurance.

## 12.5 SEZ Insurance Providers

While the liberalization for foreign insurance providers in Myanmar has taken place very recently, insurance companies were allowed to operate in special economic zones at Thilawa, Dawei, and Kyayukpu. The Insurance Business Regulatory Board ("IBRB") permitted three Japanese insurance business companies, Tokio Marine & Nichido Fire Insurance Co Ltd, Sompo Japan Insurance Inc. and Mitsui Sumitomo Insurance Co. Ltd., to operate within the Thilawa Special Economic Zone. There are up to 25 other overseas insurance companies which are carrying out indirect insurance activities in Myanmar by opening representative offices. 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 the event that Myanmar Insurance rejects any such reinsurance, licensed insurance companies in the special economic zone can hold 100% of the underwriting for that specific policy.

### 12.5.1 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. This is increasing as foreign investors bring their projects to Myanmar and require larger and more sophisticated insurance cover than local insurers can currently provide.

### 12.5.2 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 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 incentives) 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 undertake 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.

With 100% foreign life insurance companies operating in Myanmar and JVs between foreign local for both life and non-life insurance services, the market has certainly opened up to meet the countries insurance requirements. With the growing inflow of trade and investments, the MoPF may also evaluate the performance of the foreign insurance providers in considering whether to further liberalize the market.

## Chapter 13 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, govern 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**”) opened on 9 December 2015 and is run by the Yangon Stock Exchange Joint-Venture Company Ltd., 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 YSX 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.

### 13.1 Securities Business Supervisory Commission

The government-appointed Securities Business Supervisory Commission (“**SBSC**”) was formed in September 2014 with seven members and is the key oversight body for the YSX’s operations. 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 a board of directors, comprising five directors appointed by the SBSC. The chairman is elected by the board of directors itself.

In January 2015, the Ministry of Planning and Finance (“**MoPF**”) 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.

### 13.2 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 a 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 annually retain a reserve fund out of net profits in accordance with the stipulations after the end of each financial year and to utilize the reserve fund for compensation only for any loss or damage in respect of operating a securities business. Prior permission of the Commission must be obtained if the fund is to be used for other purposes.

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

### **13.3 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 approval from the SBSC.

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

The Securities Exchange Commission of Myanmar issued Notification No. 1/2019 dated 12 July 2019 which allowed foreign nationals as well as foreign entities to invest up to 35% of shares in Myanmar companies listed on the YSX.

On 6 September 2019, the YSX published a Framework and Schedule for implementation of trading systems for foreign investors (F&S) which set out a detailed mechanism for foreign investment in listed Myanmar companies. The YSX had also published a “Business Operation Manual Regarding Foreign Participation” on 8 November 2019 which specified further details to be complied with by listed Myanmar companies about foreign shareholding in such companies.

### **13.4 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 14  
**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 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.
- 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 successfully advised 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.

#### **14.1 Taking Security over Immovable Property**

Under Section 59 of the Transfer of Property Act, 1882 (TP Act) and Section 16 (c) of the Registration Law of 2018 (Registration Law), 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 16 (c) of the Registration Law 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 229 of the Myanmar Companies Law of 2017 (MCL) relates to certain mortgages and charges created by companies on the security of their properties and other moveable assets. Section 229 of the MCL requires that these mortgages and charges must be compulsorily filed with the Directorate of Investment and Company Administration (DICA) within 28 days of their creation in order to be valid and effective against the liquidator. However, Section 229 provides for an exception for security created by way of a pledge of moveable assets other than stock-in-trade. Such security does not require registration with the DICA.

Section 234 (a) of the MCL further provides that *“the Registrar shall keep, with respect to each company, a register of all mortgages and charges created by the company requiring registration under Section 229, and shall, on payment of the prescribed fee, 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.”*

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 company. Section 3 of TIPRA 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.”* While 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, 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.

Pursuant to Section 14 of the TIPRA, the relevant Ministry may allow exceptions from the provisions of TIPRA to any organization of individuals. Further, as per Section 15 of the TIPRA, the provisions of TIPRA will not be applicable to companies and organizations that have relevant beneficial contracts with the Republic of Union of Myanmar. Thus, we see that the enactment itself carves an exception for certain companies and organizations which may also include a foreign company.

While the TIPRA lays down stringent restrictions on foreign companies, the MIL has, however, to a certain extent, loosened the 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.

While there is a restriction under the TIPRA as mentioned above, the MCL provides for an exception under Section 228. This provision states that the grant of mortgage or charge and the registration with the DICA as required under Section 229 of the MCL will not be restricted by the provisions of the TIPRA or any other applicable law.

The MCL allows the creation of security in the form of a mortgage or charge and their due registration with the DICA even for foreign companies. This position goes against the restrictions under TIPRA as mentioned above. Thus, doubt persists and potential issues in regard to the securing and perfecting of immovable property by foreign entities remain unresolved.

## 14.2 Taking Security over Moveable Property

Section 229 (a) of the MCL 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 Constitution 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.

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.

### 14.3 Perfecting a Security Interest – Registration and Priority

Issues in relation to perfecting a security include:

- Registrations of fixed and floating charges over the immovable assets of a company with the ORD as per the Registration Law 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;
- 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.

However, in spite of such a strict regime, DFDL has successfully advised on a project which involved the registration of mortgage over leasehold interest of an immovable property in favor of a foreign lender and this is believed to be the first registration of its kind in Myanmar. We expect that this will set a precedent for future transactions of a similar nature.

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.

Land Record Office (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.

#### **14.4 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.

As of now, the laws on taking securities in Myanmar are ambiguous and not yet well developed. There is no specific law for banks and financial institutions on 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.

#### **14.5 Secured Transactions Law**

In an attempt to bring about one uniform law for the taking, securing and enforcement of security interests over movable properties, a Secured Transactions Law (“**ST Law**”) has been drafted. The Law is still at the draft stage and yet to be finalized and brought into force. The objectives of the ST Law are to develop and implement a modern secured transaction system in Myanmar, establish an electronic registry and adequate dispute resolution mechanism related to security interests. The UNCITRAL Secured Transactions Model Law has been closely followed during the drafting this law.

The provisions of this Law extend to both individuals and companies. Chapter 4 of the ST Law provides for a detailed mechanism for the perfection of security interests over movable property and mandates the registration of all forms of security created over movable properties. Additionally, priority rules that determine the order of priority of secured parties for transactions undertaken have also been set out.

The ST Law aims to set up an online registry by the Ministry of Planning and Finance which would maintain a record of all notices creating a security interest. The records would be maintained on this searchable and publicly accessible registry. The registration process would also be compulsory for companies resulting in a shift from the existing mechanism whereby companies are required to register any charge or mortgage created over a property with DICA.

Enforcement of security interests has also been covered under this law. Secured parties have the option to enforce judicial or non-judicial modes of recovery. However, this will depend on the nature of security and the transaction between the parties. Most importantly, this law has an exclusive clause which provides that this law will have an overriding effect over all other laws which may have conflicting provisions.

We believe that this law would remove the ambiguity that revolves around enforcement of security interests in Myanmar and create a uniform system under one law governing the taking, perfecting and enforcement of security interests.

#### **14.6 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 which will then scrutinize the proposal and grant or decline its approval after considering whether or not:

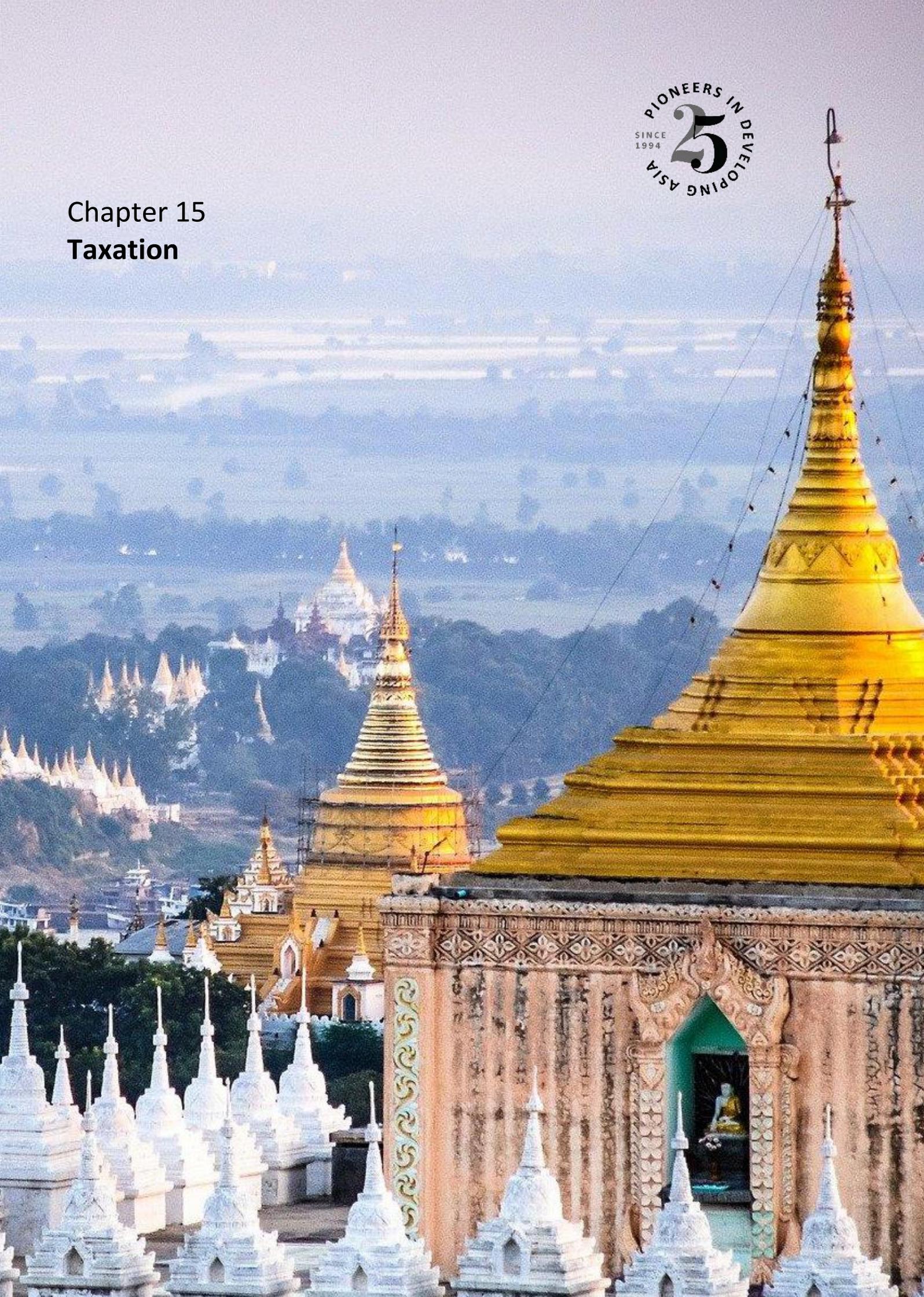
- The reason to transfer all shares is correct;
- The interest of the Union and its people could be detrimentally affected due to the transfer of the shares; and
- The transferee of all shares is in a position to keep on carrying out the business successfully.

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. 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 register the transfer of its shares within 28 days from the date of such a transfer with the DICA.

The MCL 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.

# Chapter 15 Taxation



## Overview

The major tax laws in Myanmar include:

- The Union Tax Law (“**UTL**”);
- The amended Income Tax Law of 1974 (the “**ITL**”);
- The amended Commercial Tax Law of 1990 (the “**CTL**”);
- The amended Specific Goods Tax Law of 2016 (“**SGTL**”);
- The amended Myanmar Stamp Act; and
- The Tax Administration Law of 2019 (the “**TAL**”)

The UTL is a yearly tax law that supplements the exemptions, relief, and other benefits granted under the ITL, CTL, and SGTL. The ITL is supplemented by the Income Tax Rules, the Income Tax Regulations, and Notifications periodically issued by the Internal Revenue Department (“**IRD**”). The CTL and SGTL are also supplemented by implementing regulations and notifications. The Myanmar Stamp Act is supplemented by a schedule detailing the documents subject to stamp duty and the applicable rates. The TAL is a newly enacted law that provides a uniform tax administration procedure for income tax, commercial tax, and specific goods tax effective 1 October 2019.

The IRD, under the Ministry of Planning, Finance, and Industry (previously referred to as Ministry of Planning and Finance or “**MoPF**”), administers taxation in Myanmar.

### 15.1 Income Tax

The 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 2019 Union Tax Law provides the applicable tax rates.

#### 15.1.1 Corporate Income Tax (“**CIT**”)

##### a. Tax Residency

The taxation of a corporate entity is determined by its tax residence. Under the ITL, a resident company is a company, a company formed under the Myanmar Companies Law or any other existing law of Myanmar. Further, resident entities also include associations formed wholly or partly with foreigners and where the control, management and decision making of its affairs is situated and exercised wholly in Myanmar.

Entities that do not fall in the above definitions are considered non-residents.

Myanmar resident entities are subject to tax on income accrued, derived from, or received from any sources within and outside Myanmar. Non-resident entities are liable to pay tax only on Myanmar-sourced income.

##### b. CIT Rate

Resident and non-resident entities are generally subject to a 25% CIT rate. For companies listed on the Yangon Stock Exchange, the CIT rate is reduced to 20%.

For primary cooperative societies which are registered and established under the Cooperative Society Law, income tax will be assessed under the graduated income tax rates (generally applicable to individuals).

##### c. Taxable Income

As a general rule, CIT is charged on the total taxable income or net profit obtained within the tax year.

##### d. Tax Exempt Income and Relief

Income tax does not apply to the following types of income:

- Income received by a religious or charitable organization and used exclusively for religious or charitable purposes;
- Fees charged by a local authority;
- pension, a sum received in commutation of a pension and gratuity compensation received for death or injury;
- Insurance proceeds;
- Income of a casual and non-recurring nature except for capital gains and income from an enterprise;
- Share of the after-tax profits of an association; and
- Income received by newly established small and mid-sized enterprises during their first three years from commencing operations, if their income does not exceed MMK 10 million for three years in a row.

Additionally, the Government has the right to grant exemptions or relief from income tax or other benefits related to tax on the following types of income:

- Income obtained from donations for social, religious, health or educational causes in the country from domestic or foreign donors or international organizations;
- Aid provided to the country by domestic or foreign organizations;
- Interest paid on soft loans or official development aid loans;
- Donated property or donations provided by domestic or foreign organizations in the event of natural disasters; and
- Income of public companies listed on the Yangon Stock Exchange.

Furthermore, exemptions from income tax are also granted if stipulated under any Law relating to the United Nations, Diplomats, Counsellors, International Organizations, Investment and Special Economic Zones, and other laws relating to income tax.

**e. Non-deductible Expenses**

Under the ITL, the following expenses are not deductible for CIT purposes:

- Capital expenditure;
- Personal expenditure;
- Expenditure not commensurate with the volume of business;
- Inappropriate expenditures incurred for purposes other than earning such income; and
- Payments made to a member of an association of persons other than a company and a cooperative society, provided that payments made for professional services will be deducted.

**f. Depreciation**

Depreciation is deducted pursuant to the MoPF Notification No. 19/2016 with respect to buildings, plant and machinery, furniture, vehicles, and other capital assets. Buildings are depreciated at 1.25-10% based on the types of building. Furniture and fixtures generally depreciated at 5-10%. Machinery and plant at 2.5-20%.

Tools, apparatus, and appliances or other capital assets not included in the MoPF Notifications are depreciable at the rate of 5% per annum based on the original cost.

Tax depreciation, using the rates prescribed in the Notification, may be claimed for the whole year irrespective of the date of purchase of the asset.

**g. Losses**

Tax losses may be offset against taxable income. Unutilized tax losses can be carried forward and offset against future taxable income for up to a maximum of three consecutive years.

Tax losses from capital assets or a share of loss from an association of persons (including companies and partnerships) cannot be offset against taxable gains from other sources or carried forward.

**h. Donations**

Contributions to religious or charitable institutions sponsored by the state or recognized by the MoPF may be deducted, but deductions are limited to 25% of the taxable income. Further, the Practice Statement 2/2018 dated 14 November 2018 provides qualifications for the deduction of donations:

- Donations made by individual cannot be used as deduction in the company’s taxable income.
- The 25% threshold on donation is based on the net profits before the donation was made. No deduction on donations will be allowed if the company is operating in a loss position.
- The donor is required to secure certification of the donation from religious or charitable institutions in order to claim the tax deduction.

In addition, Practice Statement 8/2019 dated 19 November 2019 provides that Corporate Social Responsibility (“CSR”) expenses can also be deducted as a charitable donation (subject to 25% limit) or as a voluntary expense (in full) if such expenses can directly be attributed to the generating of income of the company or resulting from a contractual obligation under a relevant permit.

**15.1.2 Personal Income Tax (“PIT”)**

**a. Tax Residency**

Myanmar citizens who are living in Myanmar and foreigners who reside in Myanmar for at least 183 days during an income year from 1 October to 30 September of the following year (previously 1 April to 31 March) are considered residents for Myanmar tax purposes.

Residents are subject to income tax on all income derived from sources within and outside of Myanmar.

Non-resident citizens are subject to tax on all income except on salary earned abroad. Non-resident foreigners are taxed only on income derived from sources within Myanmar.

**b. PIT Rate**

Income tax is levied at the following progressive rates on salary received by residents and non-resident foreign nationals in Myanmar Kyats (“MMK”) and foreign currency, after deductions of exemptions and relief:

	Taxable Income		Marginal rate (%)
	In MMK	In USD (estimate)*	
Up to	2,000,000	up to 1,333	0
2,000,001 –	5,000,000	1,334 - 3,333	5
5,000,001 –	10,000,000	3,334 – 6,666	10
10,000,001 –	20,000,000	6667 - 13,333	15
20,000,001 –	30,000,000	13,334 - 20,000	20
	Over 30,000,000	Over 20,000	25

\*Using estimated exchange rate of USD 1 = MMK 1,500

An individual who derives income from the leasing of land, buildings and apartments is separately subject to 10% PIT. Furthermore, a non-resident citizen is subject to 10% PIT in foreign currency, on total income earned abroad (except income on salary earned abroad).

**c. Income not subject to tax**

- An individual is exempt from income tax if his or her total income is less than MMK 4.8 million in a year. Additionally, the following types of income are not subject to PIT: Pensions, income converted from pensions or gratuities;
- Compensation for death or physical injury;
- Insurance proceeds;
- Share of the after-tax profits (including dividends) of an association;
- Rewards received from the Union (including awards for the seizure of illegal material);
- Lottery winnings received from the Aung-bar-lay State lottery;
- Remuneration awarded by the State on finding ancient artefacts; and
- Income from salary received in foreign currency by a citizen residing abroad.

**d. Relief and Allowances**

A personal allowance of 20% of each class of income but not exceeding MMK 10 million may be deducted from taxable income. In addition, the following allowances for dependents may be deducted:

- Parent: MMK 1 million per parent;
- Spouse: MMK 1 million; and
- Children: MMK 500,000 per child.

To claim relief, the parents must be unemployed and living with the taxpayer. Spouse relief is available if the spouse is unemployed. Child relief is available for every child who is unmarried, not earning assessable income, and under 18 years of age, or if above, receiving full-time education.

**e. Benefits other than salaries**

Perquisites received in lieu of or in addition to salary and wages are included in the definition of salary, and thus subject to income tax. There is no precise definition of "perquisite" in the tax legislation.

Housing allowances paid in cash, transportation allowances and personal use of motor vehicles and other benefits are considered perquisites. The use of housing facilities by employees where the lease is signed in the name of the employer is non-taxable.

PIT borne by an employer on behalf of an employee is regarded as a perquisite of the employee, and must be added to the employee's gross salary.

**f. Employer's Responsibility**

The employer is responsible for withholding and reporting the income tax on salary at the time of payment to employees.

**g. Social Security**

The Social Security Act of 2012 provides that private enterprises employing five or more workers must contribute 3% of their insured wages (maximum of MMK 9,000) to a social security fund per month. Meanwhile, the employees’ level of contribution is 2% of their insured wages (maximum of MMK 6,000) per month.

**15.1.3 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.

**15.1.4 Income that has escaped assessment**

A tax on “income that has escaped assessment” is imposed on a company or a citizen that is unable to show the source of income which was used for buying, constructing, or obtaining any assets, and establishing a new business.

The 2019 Union Tax Law introduces an income tax amnesty for citizens of Myanmar with undisclosed incomes or “income escaped from assessment.” The amnesty tax rates will be as low as 3% for unassessed income up to MMK 100 million, 5% for income between MMK 100 million to MMK 300 million, 10% for income between MMK 300 million to MMK 1 billion, 15% of income between MMK 1 billion to MMK 3 billion, and 30% for income exceeding MMK 3 billion. Prior to the introduction of the 2019 Union Tax Law, undisclosed sources of income were taxed at the range of 15% to 30%.

A comparison of the tax rates is provided below:

	Income (Kyat)		New Tax Rate (2019 UTL)
	From	To	
	MMK	MMK	
1	1	100 million	3%
2	100 million + 1	300 million	5%
3	300 million + 1	1 billion	10%
4	1 billion + 1	3 billion	15%
5	3 billion + 1 and above		30%

Taxpayers can only avail this tax amnesty within one year starting from 1 October 2019 until 30 September 2020.

**15.1.5 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%
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 payments to residents, as well as branches of foreign companies in Myanmar, is creditable. However, the WHT will be a final tax if the recipient is a non-resident.

#### 15.1.5.1 Tax Treaties

Myanmar has Double Tax Avoidance Agreements (“DTA”) with India, the Lao PDR, Malaysia, Singapore, South Korea, Thailand, the United Kingdom, and Vietnam.

Taxpayers need to apply administrative procedures to claim tax exemptions under a DTA with the IRD. In practice, Myanmar tax authorities and the MOPF need to be consulted by the payer 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.

#### 15.1.6 Taxable Period

Effective 1 October 2019, the taxable period of companies and businesses is its financial year (income year), which is from 1 October to 30 September of the following year (previously 1 April to 31 March). This change in the tax year of reporting was first adopted by state-owned enterprises and certain financial institutions on 1 October 2018 in order to align with the change in Myanmar’s budget year. Thus, all taxpayers other than state-owned enterprises will have to adopt this new taxable period effective from 1 October 2019.

#### 15.1.7 Income Tax Returns

Individual and Corporate Annual tax returns must be filed with the IRD within three months after the end of each financial year (31 December each year).

Corporate income taxes are paid on a quarterly basis. 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. 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.

## 15.2 Commercial Tax (“CT”)

CT (similar 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.

Under the 2019 Union Taxation Law, the CT-exempt goods and services are now classified into categories resulting to 42 goods consisting mainly of agricultural and marine products. Meanwhile, there are 32 types of services exempt from CT. The CT-exempt services include education services, life insurance services, microfinance services, and intra-government services, among others. Effective 1 October 2019, the CT exemption also covers postal services provided by the Union Government.

There is an input CT system for the trading of goods and provision of services. However, input CT paid on purchase of fixed and capital assets, and those attributable to damaged and unsold goods will not be allowed as input tax credit.

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.

## 15.3 Specific Goods Tax (“SGT”)

SGT (similar 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 and cars, and fuels.

SGT is levied on the following:

- In the case of importation: the higher value between landed cost or the value as determined in advance by the Management Committee of the IRD;
- In the case of locally produced goods: the higher value between the sales proceeds or the estimated selling price set by the tax authorities; or
- In the case of export of specific goods: the cost incurred until the time of loading.

SGT is imposed under the following rates:

Types of specific goods	Rate
Various kinds of cigarettes and tobacco products	Various
Various kinds of alcohol products	Various
Logs and conversions	5% (10% upon export)
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, and exporting specific goods. Previously, exports of gemstones, logs and conversions, and natural gas are subject to SGT. However, effective 1 October 2019, only the export of logs and conversions will be subject to export SGT.

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.

#### 15.4 Gemstone Tax

The importation, manufacture, and export of gemstones were previously subjected to SGT. However, effective 1 October 2019, the imposition of SGT will be replaced by Gemstone Tax.

The tax for the import of gemstones will be based on the landed cost of the imported items. Meanwhile, the tax on the sale of gemstones will be based on the higher of the actual sales value or the value as determined by the Myanmar Gems Enterprise.

The following are the tax rates applicable to importation, local sale, and export of gemstones:

Types of Goods	Old Rate under SGT	New Rate under Gemstone Tax
Raw Jades	15%	11%
Raw Ruby, Sapphire, and other precious stones (excluding diamond and emerald)	10%	9%
Processed Jade, Ruby, Sapphire and other precious stones (except diamond and emerald), and the jewelries which entail Jade, Ruby, Sapphire and other precious stones (excluding diamond and emerald)	5%	5%
Products made with gemstone	NA	5%

## 15.5 Border Trade

There are three main taxes on the importation of goods:

- Customs duty ranging 0-50% 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:

- goods imported or exported using the budget allowance by the ministry, departments, and state-owned enterprises;
- motor vehicles imported by individuals after returning the permit for old vehicle;
- For MIC-registered enterprises, machines, equipment, and spare parts imported to be used during the construction period and raw materials imported within the first three years after the construction period;
- goods imported with donation of local or foreign organizations;
- fire engines, funeral engines, ambulance (except hospital vehicles imported by private businesses);
- raw materials imported for contract-manufacturing services; and
- Goods imported under draw-back system or under temporary importation.

Previously, goods exported by taxpayers who are under self-assessment system at the Large Taxpayers Office and Medium Taxpayers Office No. 1 are also covered by the advance income tax exemption. However, this exemption was removed by the MOPF effective 1 May 2019.

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.

## 15.6 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). Penalty for late payment of stamp duty is three times (previously 10 times prior to 26 November 2019) of the basic tax due.

### 15.7 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 16  
**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.

## 16.1 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.

## 16.2 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.

### 16.2.1 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.

### 16.2.2 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.

## 16.3 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.

#### 16.4 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.”*<sup>33</sup> The only exception to this provision is in the sale of business and a partner leaving the partnership.<sup>34</sup>

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 2015<sup>35</sup> 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 competition<sup>36</sup> when the specific agreement is entered to:<sup>37</sup>

- 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;

<sup>33</sup> 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.

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

<sup>35</sup> The Competition Law of 2015 came into force in February 2017.

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

<sup>37</sup> Section 14 of the Competition Law of 2015.

- 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:<sup>38</sup>

- fixing prices according to his or her will;
- sharing the market with an intention to combat competition;
- boycotting suppliers or vendors of Telecommunications Equipment; and
- unfair opposition to any competitor.

### 16.5 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.<sup>39</sup> The seller is under an obligation to sell the goods, whereas it is the duty of the buyer to accept the goods thereof.<sup>40</sup> 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.

### 16.6 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:<sup>41</sup>

- 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:<sup>42</sup>

- 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;

<sup>38</sup> Section 35 and 36 of the Telecommunications Law of 2013.

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

<sup>40</sup> Section 31 of the Sale of Goods Act of 1930.

<sup>41</sup> Section 13 of the Sale of Goods Act of 1930.

<sup>42</sup> Section 14 and 15 of the Sale of Goods Act of 1930.

- 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
- 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.

### 16.7 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.

### 16.8 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.<sup>43</sup> 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.<sup>44</sup> 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 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.

### 16.9 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

<sup>43</sup> Section 19 of the Sale of Goods Act of 1930.

<sup>44</sup> Section 26 of the Sale of Goods Act of 1930.

to the buyer.<sup>45</sup> 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.<sup>46</sup>

## 16.10 Specific Relief Act of 1877

In addition to the compensation for a breach of contract, a party<sup>47</sup> 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:<sup>48</sup>

- 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.

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.<sup>49</sup>

<sup>45</sup> Section 55 of the Sale of Goods Act of 1930.

<sup>46</sup> Section 59 (1) of the Sale of Goods Act of 1930.

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

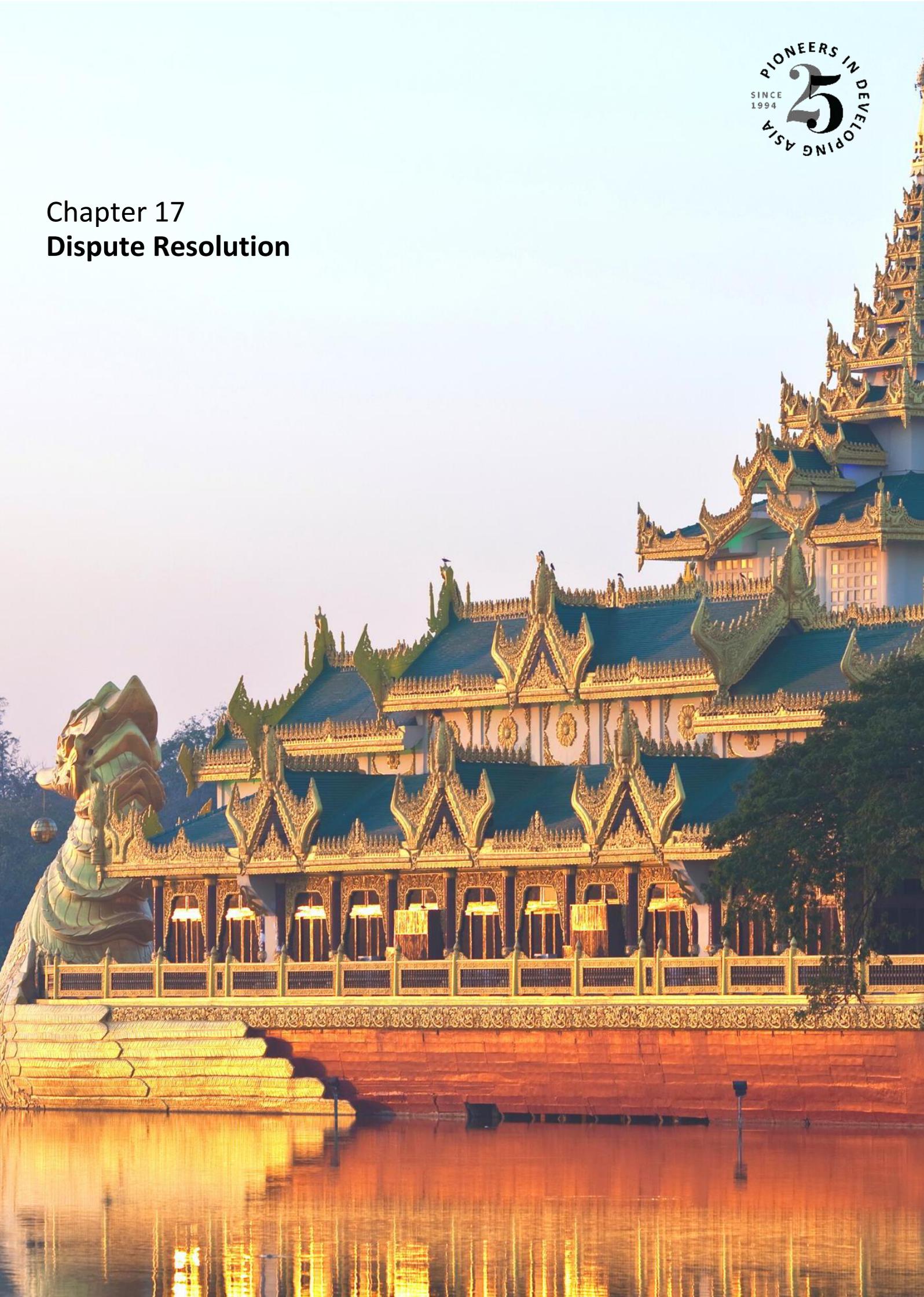
- Any party;
- The representative in interest, or the principal of any party where the learning, skill, solvency or any other personal quality of such party is material to the contract; or
- Any beneficiary in case of settlement on marriage or a compromise of doubtful rights.

<sup>48</sup> Section 12 of the Specific Relief Act of 1877.

<sup>49</sup> Section 21 of the Specific Relief Act of 1877.

# Chapter 17

## Dispute Resolution



## 17.1 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.

### 17.1.1 Supreme Court

The Supreme Court is the highest court in Myanmar<sup>63</sup> 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.

### 17.1.2 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.

### 17.1.3 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.

#### **17.1.4 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.

#### **17.1.5 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.

#### **17.1.6 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.

#### **17.1.7 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.

#### **17.1.8 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 foreseeability 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%.

## 17.2 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.

## 17.3 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.

### 17.3.1 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.

### **17.3.2 Myanmar Arbitration Centre**

The Union of Myanmar Federation of Chambers of Commerce and Industry (“**UMFCCI**”) launched the Myanmar Arbitration Centre (“**MAC**”) on 3 August 2019 in Yangon. The MAC will be the central seat for Arbitration disputes in Myanmar in accordance with the Myanmar Arbitration Law 2016.

Myanmar-based companies which have been at a severe disadvantage due to the costs and expenses associated with foreign arbitration (requiring frequent travel abroad and the hiring of foreign counsel) now have a local center to settle disputes which makes settlement of disputes easier.

With the establishment of the new MAC, both foreign and local companies alike can resolve their disputes in Yangon, saving significant time and money, and allowing Myanmar-based arbitrators to resolve more disputes based on local laws.

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