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MAGAZINE FOR THE **IN-HOUSE COMMUNITY** ALONG THE NEW SILK ROAD

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By William D. Greenlee, Jr and Vinay Ahuja, ***DFDL Mekong***

A nascent market

Although in its infancy, M&A activity in Laos is on the rise, driven by government market reforms encouraging openness to foreign investment. William D. Greenlee, Jr and Vinay Ahuja, of *DFDL Mekong*, look at the relevant legislation.

Market trends and outlook

In comparison to its neighbouring countries, M&A culture is a fairly nascent concept in the Lao PDR. However, there has recently been an increase in activity. A recent example of such activity being the establishment of the Lao Securities Exchange (LSX), which is the newest securities exchange in the world. The more common form of M&A activity in Laos is the acquisition of equity in Laos PDR limited companies by foreign based international companies. Apart from various joint ventures (including public-private) and acquisitions in the mining and hydro sectors. Another key M&A transaction has been the acquisition of Millicom International Cellular S.A. by VimpleCom Ltd in the telecommunication sector.

The LSX is a joint venture between the Government of the Lao PDR and the Korean Securities Exchange. EdL Generation (the state owned power company) and Banque pour le Commerce Exterieur Lao (the largest state owned bank) were the first companies to have conducted an initial public offering and be listed on the LSX. Although trading has been limited, liquidity may soon improve as there appears to be a number of additional state owned companies that are also considering being listed on the LSX. For example, it is rumoured that Lao Telecom, Enterprise of Telecommunications and Lao Airlines are also considering IPOs.

Law related to merger and acquisition

The Enterprise Law

The Enterprise Law is the key Lao legislation regulating mergers and acquisitions in the Lao PDR. It provides the basics, including the types of enterprises that can be formed in Laos, the rights and benefits of the owners/shareholders of such enterprises, capital contributions, type of shares and share acquisitions (including transfer of shares), transfer restrictions, notifying and filing requirements as a result of change of shareholders, directors and officers and change of company name. The key provisions relating to mergers and acquisitions are as follows:

- *Mergers:* The Enterprise Law recognises four types of merger: (i) Merger of general partnership enterprises; (ii) Merger of limited companies; (iii) Merger of public companies; and (iv) Merger of state-owned companies. Subject to the condition precedents provided for in the Enterprise Law (including unanimous consent of all partners, notification of merger in mass media, etc). A general partnership enterprise may merge with one or several other general partnership enterprises into either the existing partnership enterprise or into a new general partnership enterprise. In the case of such a merger, if a creditor objects to the merger of a general partnership enterprise, the general partnership enterprise cannot merge, unless all debts have been settled. A merger of general partnership enterprises does not result in the

dissolution of the enterprises or the lapse of previous rights or responsibilities. Similarly, with the same procedure and effect, a limited company may merge with another company to become either the existing company or a new company. However, in the case of merger of a limited company, prior approval of the shareholders through special resolution is required.

Public companies may merge with another company to become either the existing public company or a new company. However, in the event that shareholder(s) of a public company oppose the merger, the public company shall be required to purchase the shares held by such opposing shareholder(s) at the prices appearing at that time on the stock exchange. In the event that there is no reference price on the stock exchange, the price to be applied shall be assessed by independent appraisers appointed by a special resolution of a shareholders' meeting. In the event the opposing shareholder(s) still refuse to sell their shares, the relevant public company may carry out the merger regardless of whether the shareholder(s) opposing the merger agree to the estimated prices or not and such shareholder(s) shall become de facto shareholders of the merged company. A merger of public companies shall be completed within 150 days from the date all the companies to be merged pass resolutions of the merger.

A state-owned company at the central level shall obtain approval from the Government, and a state-owned company at the provincial level shall obtain approval from the provincial governor or city mayor for a merger among state-owned companies, or a merger of a state-owned company with other types of enterprises to become a state-owned company

- *Acquisitions:* Existing shareholder(s) have pre-emptive rights in respect of a transfer or sale of shares by a shareholder to a third party. In the case of an investment through subscription, the Lao accounting rules do not recognise the issuance of "no par" shares, "low par" shares, "additional paid-in capital", "capital surplus" or "share premiums". Any sale or transfer of all or a substantial part of the business of a limited company to another person, or any purchase or acceptance of a transfer of the business of another enterprise would require the prior approval from the other shareholders by way of special resolution.

As a procedure, to effect the revised shareholding or the purchase of shares, a company/existing shareholder will be required to complete the following actions: (i) existing shareholder(s) to pass appropriate shareholder resolutions approving the share transfer, (ii) amend the company's Articles of Association (AoA) to reflect the change in shareholding, (iii) submit the share purchase agreement and amended AoA to the Investment Promotion Department (IPD) for approval and accordingly – the IPD will issue a certificate acknowledging the change in shareholding (alternatively may also amend the Foreign Investment License) and issue a certificate approving the amended AoA, (iv) cancel previous share certificates and issue new share certificates representing the paid and unpaid proportions of the shareholders new shareholding, (v) amend the company's Shareholders Registry and submit the same to the Enterprise Registry Office.

The Decree on Securities and Exchange

The Decree on Securities and Exchange provides that the supervising authority for securities in the Lao PDR is the Securities and Exchange Commission of the Lao PDR (SEC), which was established in late 2009, and sets out the preconditions for what type of company is permitted to list its shares on the LSX.

The procedures for an IPO in the Lao PDR are generally similar to those in other countries. Firstly, the issuing company must obtain approval from the SEC. Once approval has been obtained, a prospectus for potential investors must

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be prepared and publicly advertised within 60 days of the issuance of the SEC's approval to issue securities. Securities may then be issued for sale by brokers licensed by the SEC. The public offering must be closed within 90 days of the issuance of SEC approval, although with SEC approval it can be extended by 30 days. A share offering must not exceed 10 times the company's registered capital.

Currently, securities may be bought, sold and transferred at the LSX only in Lao Kip. However the SEC appears to be leaving open the possibility for such transfers to occur in other currencies in the future. The par value of shares bought, sold or transferred must not exceed 100,000 Lao Kip (approximately US$12.50), while the par value of debentures or bonds must not exceed 1,000,000 Lao Kip (approximately US$125). Both individual and juristic persons can trade securities on the LSX. Foreign investors are entitled to purchase securities, although for some companies the following restriction may apply: individual investors do not hold more than 10 percent of the total shares of a single listed company, and that a group of investors together do not hold more than 49 percent of the total shares of a single listed company. The SEC has stated that as long as there are no industry restrictions (eg. media industry), listed companies may allow any percentage of foreign ownership.

Other laws

The Government recognises the importance of foreign investment into the Lao PDR. As such, it continues to work towards the continued evolution of the Lao legal system.

Investments by foreigners including foreign owned companies are governed by the 2009 *Investment Law* which recently superseded the *Foreign Investment and Domestic Investment Laws*. The harmonisation of the *Foreign and Domestic Investment Laws* represents a significant change from the previous investment regime which provided different incentives to domestic and foreign investors. The 2009 *Investment Law* will apply to both foreign and domestic investors. The law outlines the sectors that are open to investment, the forms of investment available, the incentives available to investors, the rights and duties of investors, and the investment licensing process. The Government has stated the law will reduce the length of time the share transfer process will take.

Shares are considered to be a movable property and are transferable in the manner provided by the AoA of the company and subject to applicable laws. Any creation of a security interest on such shares is regulated by the provisions of the 2005 *Secured Transactions Law.* The following types of security are permitted in the Lao PDR: (i) security agreements covering immovable assets including land use rights, leases, and fixtures and movable assets; (ii) pledges of movable assets, documents, shares, contractual rights, receivables, bank accounts, intellectual property rights, licenses, and future assets or gains from projects or activities certain to occur in the future; (iii) mortgages of movable assets; and (iv) guarantees personal or company.

Conclusion

The current economic growth of the Lao PDR may be attributable to the structural market economic reforms and the continued evolution of a market economy. Such reforms include focusing on corporatisation and privatisation of public enterprises; enforcement of the tax system; commercial liberalisation and openness to foreign investment. These reforms have resulted in improved development indicators and, accordingly, in 2010 the annual GDP growth rate was 7.8 percent (as reported by World Bank). Despite being a small market, the Lao PDR's geographic proximity to larger markets in Thailand, Vietnam and China offers significant opportunities for the country's future development.

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An emerging market

Changes in Myanmar's decades-old legislation have seen foreign company involvement, mostly in the mining, power and energy fields, increase dramatically in recent years. James Finch, Soe Phone Myint, and Saw Yu Win, of *DFDL Mekong*, explain some of the laws a potential investor will encounter in this challenging legal environment.

State of the market

There has been little activity in Myanmar with respect to mergers and acquisitions, except in connection with private equity transactions. The reason for this is that there is no dedicated securities law in Myanmar. Also, despite the formation in 1996 of a joint venture known as the Myanmar Securities Exchange Centre Co. Ltd. (MSEC), between the Myanma Economic Bank, a state-owned financial institution, and Daiwa Institute Research Ltd. of Japan, there is no active stock market in Myanmar.

Law related to merger and acquisition

The *Myanmar Companies Act of 1913* (MC Act) is the law that regulates mergers and acquisitions under Myanmar law. Relevant provisions of the MC Act and other Myanmar law and practice related to mergers and acquisitions are discussed below.

Acquisitions

Acquisition of shares in a company is the most common way company interests are transferred in Myanmar. This is done through instruments of transfer of shares in most industries or transfer of participation interests under deeds of assignment in oil and gas sector. There are comprehensive provisions in the MC Act that must be followed in connection with share acquisitions, including transfer of shares, notifying and filing requirements as a result of change of shareholders, directors and officers, and change of name of company. Some of the most important points are as follows.

"The term 'merger' is not specifically used or defined in the MC Act. The term as used in the MC Act is re-construction or amalgamation, which would include what is commonly thought of as a merger"

James Finch

By James Finch, Soe Phone Myint, and Saw Yu Win, ***DFDL Mekong***

Under the MC Act, shares are considered movable property and transferable in the manner provided by the articles of association of the company. A share certificate must be stamped by the company and affixed with a 3-kyat revenue stamp. The transfer of shares is not lawful unless the proper instrument of transfer of shares is stamped and executed by the transferor and transferee. The proper stamp duty for the transfer of shares under the Myanmar Stamp Act is 2½ percent of the value of the share and must be paid to the Internal Revenue Department. Copies of executed instruments reflecting the transfer of shares, duly stamped, together with required documents such as board of directors' resolutions concerning share transfer must be submitted to the Companies Registration Office (CRO) within 21 days from the date of such transfer.

Following submission to the CRO, transfers of shares need to be approved by the relevant authorities. In the case of companies operating with approval under the *Myanmar Foreign Investment Law* of 1988 (MFIL), this approval must come from the Myanmar Investment Commission, which, in turn must receive the approval of the Myanmar Trade and Investment Supervision Committee (TISC) and the cabinet. Transfers of shares of companies not operating under the MFIL must come from the TISC and cabinet.

Regarding notification of changes of directors and officers, a company must file a form containing the particulars of any such changes with the CRO within 14 days of such appointments or changes.

As for notification of change of the name of a company, a special resolution of shareholders is required for this, and it must be filed with the CRO within 15 days from the date it is passed.

Soe Phone Myint

"As a matter of present government policy, Myanmar-owned shares in Myanmar companies may not be transferred to foreigners"

Mergers

The term "merger" is not specifically used or defined in the MC Act. The term as used in the MC Act is re-construction or amalgamation, which would include what is commonly thought of as a merger. The most important provisions of the MC Act with respect to re-construction or amalgamation are as follows:

In case of a conventional merger in which the whole or part of the undertaking or property is transferred from one company to another, a Myanmar court can provide as follows in an order to the parties:

(a) for the transfer to the transferee company of the whole or part of the undertaking or property or liabilities of the transferor company;

(b) for allotting or appropriating by transferee company of shares, debentures, policies or other interests in that company to persons to whom, under documentation, they are to be allotted or appropriated;

(c) for continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) for dissolution, without winding up, of any transferor company;

(e) for provision to be made for any persons who dissent from the compromise or arrangement (see below);

(f) for such other incidental, consequential or supplemental matters as are necessary to secure that the merger shall be fully and effectively carried out.

An order for transfer, when made as set forth above, will be conclusive and if so directed by order of the court and the relevant documentation, freed from any charge or claim. A certified copy of the court's order must be filed by the company in relation to which the order is made, with the CRO within 14 days of the date the court issues its order. If this is not done, the company and its officers will be liable to fine.

With respect to mergers, the MC Act lays down a special procedure which is to be followed for the purpose of buying up the shares of dissenting shareholders. It contains the following stipulations:

- The documentation must involve a transfer of shares from one company to another, and this must have been approved by not less than three-quarters of the value of the holders of the shares affected within four months of the offer to buy up the shares of the dissenting shareholders. Within two months of the expiration of the four

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Saw Yu Win

months mentioned above, the transferee company may give notice to any dissenting shareholder of the transferor company that it desires to acquire the dissenting shareholder's shares.

- The dissenting shareholder concerned may, within one month of such notice, apply to the court with regard to acquisition of shares, and the court has the discretion to disallow the acquisition of the shares by the transferee company.
- If the dissenting shareholder does not apply to the court or if the court orders otherwise, the transferee company will be entitled and bound to acquire such shares, on the same terms under which the shares of approving shareholders were purchased.
- After notice has been given by the transferee company the procedure is as follows for the purchase of the shares by the transferee company. First, the court can order to the contrary if the dissenting shareholder has made an application to the court and the court agrees. If there is no such order from the court or application pending, the transferee company shall, on the expiration of one month from the date or on which the notice has been given, transmit a copy of the notice to the transferor company. If there is such an application pending, the notice cannot be sent until the application is decided upon by the court. Second, at the time of the notice the transferee company must pay or transfer to the transferor company the amount of or other consideration representing the price of the shares payable by the transferee company.
- After payment as set forth above, the transferor company must thereupon register the transferee company as the holder of those shares, pay the sums received into a separate bank account and hold the same in trust for the persons concerned who are entitled to the shares.

The MC Act also allows a company to alter the provisions of its memorandum of association—by special resolution—with respect to the objects of the company, as may be required to enable it to merge with any other company. Such alteration will not take effect until it is confirmed by the court, on petition. There are many other provisions related to memorandum and articles of association, its alteration, procedure on confirmation of the alteration, requirement of registration of alteration at the CRO.

Particular regulation of in-bound M&A

As a matter of present government policy, Myanmar-owned shares in Myanmar companies may not be transferred to foreigners. Though shares owned by foreigners may be transferred to other foreigners, the approvals mentioned above must be obtained.

In general, under the *Myanmar Income Tax Law of 1974*, income tax is levied on capital gains realised from the sale of capital assets such as shares at the rate of 10 percent in the case of resident foreigners or 40 percent in the case of non-resident foreigners. For the sale of capital assets, including participating interests, in the oil and gas sector, the Ministry of Finance and Revenue Notification No. 121/2006 requirement of tax on capital gains of 40 percent to 50 percent will be applicable.

As to labour issues, in general, the Myanmar labour law, practice and labour authorities require that an employee being terminated due to a merger or acquisition is entitled to receive a severance payment depending on the employee's term of service.

Each ministry in Myanmar has special requirements with respect to foreign investment and the use of resources under its jurisdiction, so the due diligence process in any merger or acquisition in Myanmar should involve an industry-specific check of the requirements necessary to acquire equity interests, especially in joint venture companies.

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