The Mergers & Acquisitions Review

Eleventh Edition

Editor
Mark Zerdin

The Law Reviews

THE MERGERS & ACQUISITIONS REVIEW

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Chapter 38

MYANMAR

Krishna Ramachandra and Rory Lang[1]

I OVERVIEW OF M&A ACTIVITY

Myanmar's economic climate has been lifted by recent political developments. The National League for Democracy won nearly 80 per cent of contested seats in the Myanmar parliament during the general elections on 8 November 2015, and successfully transitioned into civilian-led power with Daw Aung San Suu Kyi as State Counsellor and U Htin Kyaw being sworn in as President in March 2016. In October 2016, former US President Barack Obama also issued the Burma-related executive order terminating the national emergency relating to Myanmar. The executive order in effect terminated the US sanctions policy against Myanmar.

According to the International Monetary Fund's recent World Economic Outlook, Myanmar is currently ranked as the world's fast-growing economy, with expected projected growth of 8.6 per cent.[2] Statistics recently released by the Directorate of Investment and Company Administration (Myanmar's company regulator) (DICA) show that, during the period between 1 April 2016 and 31 March 2017 (2016 financial year), foreign direct investment (FDI) in Myanmar reached US$6.649 billion. In the 2016 financial year, transportation and telecommunications were the highest-yielding FDI sectors, followed closely by the manufacturing industry, which reached a high of US$ 3.081 billion. Generally, Myanmar's other high-performing FDI sectors include oil and gas, power, manufacturing, real estate, mining, hotel and tourism, livestock and fisheries, agriculture, industrial estates, and construction. The top investor countries into Myanmar include China, Singapore, Thailand, Hong Kong, the United Kingdom, the Republic of Korea, Vietnam, Malaysia, the Netherlands, India, Japan and France.

Myanmar remains very attractive to foreign investors: it is one of the most natural resource-rich countries in Asia with plentiful supplies of oil and gas reserves (both on and offshore), various minerals, jade, precious stones and gems, forest products, and solar and hydropower project potential. While there has been very little exploration of Myanmar's natural resources due to a lack of developed exploration techniques and availability of

1 Krishna Ramachandra is managing director of and Rory Lang is a senior associate at Duane Morris & Selvam LLP.

2 World Economic Forum, Which are the World's Fastest Growing Economies? (18 April 2016). Available at www.weforum.org/agenda/2016/04/worlds-fastest-growing-economies (accessed 17 June 2016).

equipment, Myanmar's geographical location is central to key markets. In addition, the cost of local labour remains low, with the minimum wage set at approximately US$56 per month for a standard five-day working week.[3]

Reforms undertaken in Myanmar's financial sector further support the country's growth, as evident from the kyat-managed floated exchange rate system established in 2012, the creation of a Central Bank licensing mechanism for new foreign banks and the expansion of foreign branch networks. Development of special economic zones[4] (SEZs), such as the opening of Thilawa SEZ Zone A and approval of developments in Kyaukphyu and Dawei SEZs, similarly point to a promising financial sector.

Substantial progress has been made in recent years with the passing of relevant laws on investment.[5] The Financial Institutions Law 2016 (FIL) permits mergers between banks and allows foreign banks to acquire all or part of another bank established in Myanmar. However, this is subject to Central Bank of Myanmar (CBM) approval. Another recently enacted Arbitration Law 2016 (AL) gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and provides a reliable option for dispute resolution concerning M&A deals.

The Yangon Stock Exchange (YSX), which launched on 9 December 2015, made notable progress in Myanmar's capital markets sector, which began trading in March 2016. On 25 March 2016, First Myanmar Investment Co[6] was the first company listed on the YSX on 25 March 2016, followed by Myanmar Thilawa SEZ Holdings Public Ltd on 20 May 2016.

M&A activity into the country will continue to be delayed until the government allows foreign investors to buy shares in local companies, which includes local companies trading on the YSX. This will require the government to remove its existing policy of prohibiting foreigners from purchasing shares in local companies. We are hopeful that an updated version of the Myanmar Companies Act (NMCA) allowing foreigners to buy and sell shares in local Myanmar companies will pass this year.

i Infrastructure

Poor infrastructure, adverse weather conditions, substantial start-up costs and restrictions on trading pose various challenges to foreign investors doing business in the country. Ninety-four per cent of Myanmar companies experience power shortages due to a lack of electrical power, as Myanmar currently has less than 4,000MW of installed operating electrical power capacity.[7] Although the literacy rate is currently over 95 per cent, with the state emphasising free and compulsory primary education under the Private School Registration Act (2011), only 75 per cent of primary school pupils complete the final grade of primary education,[8]

3 A minimum wage was set in August 2015, nearly two-plus years after the enactment of the Minimum Wage Labour Law (March 2013). The minimum wage has been set at 3,600 kyats per day calculated at a rate of 450 kyats per hour.

4 Special Economic Zones Law (2013).

5 Foreign Investment Law (2012); Myanmar Citizens Investment Law (2013); Financial Institutions Law (2016).

6 Which was advised by Duane Morris & Selvam LLP.

7 World Bank Group, 'Myanmar Investment Climate Assessment: Sustaining Reforms in a Time of Transition', Report No. 93848-MM. January 2015.

8 UNESCO Institute for Statistics. Retrieved 16 June 2016 from data.uis.unesco.org.

leaving a shortage of sufficiently trained human capital. Nonetheless, improvements are under way in sectors such as telecommunications, with two telecom licences having been awarded to Ooredoo of Qatar and Telenor of Norway, along with a partnership of MPT with KDDI of Japan.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Myanmar's legal framework for M&A comprises company legislation such as the Myanmar Companies Act 1914 (MCA) and the Myanmar Special Companies Act 1950 (SCA). These work in conjunction with the Myanmar Investment Law 2016 (MIL) and Myanmar Investment Rules 2017, which repealed and replaced the Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013. Investors should pay particular to attention to the MCA and MIL, as these are the two most critical pieces of company legislation. These currently form the investment regulatory regime governing foreign and domestic investment in Myanmar. An updated version of the Myanmar Companies Act, the NMCA, is expected to replace the current centuries-old legislation.

The Myanmar Investment Commission (MIC) is the government-appointed body responsible for verifying and approving investment proposals, including the issuance of MIC permits (investment permits) to foreign investors. The MIC is basically the caretaker for dealing with most issues under the MIL, and regularly issues notifications about sector-specific developments. The MIC is composed of representatives and experts from government ministries, departments, governmental and non-governmental bodies.

A foreign investor has many options for structuring a business entity in Myanmar based on the kind of business activity to be carried out. The most common business structure used in Myanmar is a private company limited by shares (including both 100 per cent foreign-owned companies and joint venture companies), although other legal forms are permitted. Companies limited by shares include companies incorporated in Myanmar but with 100 per cent foreign ownership (shareholders can be both companies and individuals); and joint ventures incorporated in Myanmar between foreign-owned companies or individuals and Myanmar companies or individuals (including state-owned entities). Both 100 per cent foreign-owned companies and joint venture companies are governed by the MCA or the SCA, or by both, depending on whether the state is involved.

Foreign companies can establish their presence in Myanmar as a branch office (typically for oil and gas companies, airlines and foreign banks). A representative office is also permitted (typically for foreign banks not licensed to operate in Myanmar and insurance companies). Other less common options include establishing a not-for-profit organisation, a business association (such as a chamber of commerce), a company limited by guarantee (with or without share capital) or an unlimited company without share capital.

The above legal structures will require registration under the MCA through DICA, and in some cases with the MIC under the MIL. Registration under the MIL and the obtaining of a project-related MIC permit enables investors to enjoy tax incentives, long-term land lease options and other incentives. There are certain criteria to be met that are often higher in terms of required share capital and percentage of employment of local staff in skilled roles when compared with companies' registration under the MCA without an MIC permit. Industrial and manufacturing activities require registration under the MIL, while for companies engaged in service-related businesses, it is generally sufficient to register under the MCA only. Special rules apply to joint ventures with government entities, which must be formed under the SCA.

Given the government's existing policy of prohibiting foreigners from purchasing shares in local companies, an M&A transaction in Myanmar would be typically structured in one of the following ways. The foreign investor acquires shares in a foreign-owned Myanmar company held by an existing foreign shareholder; establishes a new joint venture with a Myanmar partner who provides capital contribution as assets that were agreed to be purchased (e.g., land); or establishes a company in Myanmar and purchases the relevant assets from the target.

At this stage, foreigners considering investment in Myanmar should only invest through a foreign-owned Myanmar incorporated company in which they are the shareholders, and have their directors duly registered at DICA in accordance with the MCA. Foreign Myanmar companies may be acquired by foreign purchasers.

Foreigners entering into nominee structures (holding the shares in a local Myanmar company in the name of a Myanmar citizen) will have little or no legal recourse in Myanmar. Such structures are on their face illegal, and unenforceable under Myanmar law. Under the Contract Act 1872 'illegality' may be pleaded, and the court will not recognise any foreign ownership rights to the shares. Such a structure will also create asset disposal issues. At this stage, this is not an option for foreign investors.

This position may change in late 2017 with the promulgation of the NMCA. While nominee structures will remain illegal and unenforceable in Myanmar, the NMCA will allow foreigners to own up to a total of 35 per cent of the shares in a local Myanmar company.[9] Consequently, share transfers in local companies to foreigners may be possible. The NMCA will also permit foreigners to buy and sell shares on the YSX. The NMCA was originally meant to be passed into law on 1 April 2017. However, its passage has been delayed. Given that the passage of the NMCA has been postponed until late 2017, the promulgation of the implementing rules will be deferred until at least 2018.

i MIL

The MIL was enacted in October 2016, and was supplemented in 2017 by subsidiary legislation known as Myanmar Investment Rules and Notifications 10, 11, 13, and 15. A foreign investor may obtain a non-mandatory investment permit (MIC permit) from the foreign investment regulator, the MIC. An MIC permit allows a foreign investor to benefit from certain investment incentives available under the MIL.

A foreign investor intending to invest on a small scale (having investment capital of less than US$5 million) who desires a long-term lease right for a period exceeding one year may apply for an endorsement from the MIC. If the investor's investment capital exceeds US$5 million, he or she must instead apply for an MIC permit, as he or she will be unlikely to be eligible for an endorsement.

Key incentives include the right to enter into a long-term lease, investment protection (which provides assurance that a company will not be nationalised and that the investments

9 For the first time, the MCL will allow foreign investors to own, buy and sell up to 35 per cent of the shares in a 'local' Myanmar company. The MCL will also allow foreign investors to buy and sell shares in Myanmar companies listed on the YSX. The MCL will also create additional duties for company directors. Such duties will be akin to statutory duties existing under the Australian Corporations Act 2001 (Cth).

will not be terminated), and the right to transfer foreign currencies such as net profit and income abroad. Certain tax incentives, such as tax holidays, are also available.[10] In addition, the MIL also sets the regime for share transfers whereby a foreign investor may, with the approval of the MIC, transfer shares to another foreign investor as well as to a Myanmar citizen.

Under the MIL and Notification No 15/2017, FDI by non-Myanmar residents is restricted as follows:

Activities only to be carried out by the Union Government of Myanmar:

a security and defence;
b arms and ammunition;
c national postage stamps;
d air traffic services;
e pilotage services;
f natural forest and forest area;
g radioactive metals;
h control of electrical power system; and
i inspection of electrical business.

Foreign investors are prohibited from direct foreign investment into companies carrying out the following businesses:

a publishing and distribution of periodicals in ethnic languages;
b freshwater fisheries;
c establishment of quarantine stations for the export and import of animals;
d pet care services;
e forest products;
f prospecting, exploration, and feasibility studies and production of minerals for small and medium-scale tour guide services;
g mini-markets; and
h convenience stores.

Among others, FDI in the following sectors can only be done through a joint venture with a Myanmar partner (individual, entity or state-owned entity):

a research activities related to fisheries;
b manufacturing and domestic distribution of all kinds of confectionery, including sweets, cocoa and chocolates;
c development, sale and lease of residential apartments and condominiums; and
d local tour services.

Governmental approval of the relevant ministry is required by foreign investors for FDI in the following sectors:

a publishing of periodical newspapers in foreign languages;
b cable TV;

10 Income tax holidays are available for a period of three, five or seven years depending on the MIC's discretion and which zone the project is located in. Zone 1 (less developed areas, excluding Yangon and Nay Pyi Taw), Zone 2 (moderately developed zone, excluding Yangon but including Nay Pyi Taw) or Zone 3 (developed zone, including Yangon and Mandalay). The income tax holiday is inclusive of the year in which the enterprise begins operations.

c laboratory services for animal disease diagnosis;
d aircraft repair and maintenance;
e wood-based industries;
f private hospital services; and
g urban development projects of 100 acres and above.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i MCA

The MCA is over 100 years old, and it is in desperate need of modernisation to bring it into line with international standards. Many parts of the MCA are irrelevant to modern-day business practices, such as the provisions relating to the company registration process, which require investors to file lengthy application dossiers.

The MCA underwent a process of revision involving DICA, the Ministry of National Planning and Economic Development, the Office of the Attorney General and the Union of Myanmar Federation of Chambers of Commerce, with the involvement of other multilateral agencies, expert legal advisers and the international business community. The NMCA is set to replace the MCA, and to provide improved disclosure and transparency laws. The NMCA will be based in part on corporate law regimes utilised by other common law jurisdictions such as Singapore, the United Kingdom and Australia.

Changes under the NMCA will likely provide for the improvement of company formation and management procedures, a revised corporate governance structure emphasising directors' duties, online company registration, financial reporting and audit requirements, protections for minority shareholders, regulation of related-party transactions and, notably, the removal of a distinction between foreign and domestic companies. For instance, an application for a permit to trade before incorporation will no longer be required. A public registry for companies is expected to be created that will include information on directors, shareholders, share capital, registered securities and all statutory filings. As part of the reform process, the business community and members of the public were invited to provide submissions. It is expected that the NMCA will make it easier for foreign investors to commence start-up operations in Myanmar.

ii FIL

The new FIL, which replaced the Financial Institutions of Myanmar Law 1990, was passed on 25 January 2016, containing more comprehensive regulations on risk management, Basel III compliance, anti-money laundering measures and prudential requirements for banks in Myanmar. It allows the CBM, as an integrated supervisor, to oversee banks, finance companies, and companies offering leasing, factoring and credit services.

The minimum capital requirement for local banks has been raised to 20 billion kyats, and to 92 billion kyats for branch offices or subsidiaries of foreign banks. There are currently a total of 13 foreign bank branch licences issued by the CBM allowing foreign banks to offer credit to foreign companies and local banking institutions in Myanmar. Nine foreign bank branches are in operation,[11] and four more have preliminary licences.[12] All banks must deposit 5 per cent of their customer deposits with the CBM in the form of cash as a reserve that cannot be invested in treasury bonds or any other interest-bearing instruments.

iii Securities and Exchange Law (SEL)

Enacted on 31 July 2013, the SEL was supplemented by the Securities and Exchange Rules issued on 27 July 2015. The Securities and Exchange Commission of Myanmar (SECM) offered provisional licences to operate to 10 securities companies[13] in October 2015. This was followed by the YSX's[14] official launch on 10 December 2015, and subsequently two company listings. There have also been further listings.[15]

For companies intending to list on the YSX, the criteria issued by the YSX on 14 August 2015 cover requirements on corporate existence, level of paid-up capital, shareholder composition and profit levels, as well as on corporate governance and management compliance, including corporate policies on auditing, tax, insider trading and reporting. The SECM may soon allow foreign investors access to the YSX, and local–foreign joint ventures may be able to list upon the expected enactment of the new MCA.[16]

The benefits of having a dynamic and modern securities exchange for both prospective investors and shareholders in terms of exit strategies, and its overall positive impact on the economy and M&A scene, make this an exciting development.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i US sanctions removal

The removal of US sanctions has significantly reduced previous barriers to US foreign investment in Myanmar, particularly in relation to M&A and banking transactions. For more information on the removal of the sanctions, see Section X, *infra*.

ii AL

Under the AL, which follows the UNCITRAL Model Law, domestic arbitrations are to be decided according to Myanmar law. Parties may further request the Myanmar courts

11 Australia and New Zealand Banking Group Limited; Bangkok Bank; Bank of Tokyo-Mitsubishi UFJ; Industrial and Commercial Bank of China; Malayan Banking Berhad; Mizuho Bank; Overseas-Chinese Banking Corporation; Sumitomo Mitsui Banking Corporation; and United Overseas Bank.

12 Amara Investment Securities; Aung Myint Mo Min Securities; AYA Trust Securities Company; CB Bank Securities; Expert Investment Securities; Global World Securities; KBZ Stirling Coleman Securities; KTZ Ruby Hill Securities; Myanmar Securities Exchange Centre; and Union Trust Securities.

13 Owned by Yangon Stock Exchange Joint Venture Co Ltd as a joint venture between Myanmar Economic Bank (51 per cent), Daiwa Institute of Research (30.25 per cent) and Japan Exchange Group (18.75 per cent) with a paid up capital of 32 billion kyats.

14 First Private Bank; Great Hor Kham; Myanmar Agribusiness Public Corporation; and Myanmar Citizens Bank.

15 Thiha (6 June 2016). Yangon Stock Exchange to Open to Foreign Investors. Retrieved 17 June 2016 from consult-myanmar.com/2016/06/06/yangon-stock-exchange-to-open-to-foreign-investors.

16 Ibid.

to determine any question of law arising out of arbitral proceedings. On the other hand, international arbitrations are to be decided according to the law agreed upon by the parties involved or as determined by the arbitral tribunal.

AL provisions encourage parties to first seek interim measures from an arbitral tribunal. Any subsequent court intervention in arbitral proceedings will be restricted to matters set out in the AL. While domestic awards may be set aside on grounds similar to Article 34 of the Model Law or appealed on a point of law, the procedure with regard to an international arbitration award made in Myanmar remains uncertain.

With the AL in force, greater legal security and stability is expected, which will be of benefit to investors. Foreign investors will likely also have recourse to protections under bilateral investment treaties or free trade agreements.[17] Despite the passage of the AL, however, additional steps still need to occur for the smooth enforcement of international arbitration awards, such as the Myanmar courts updating or introducing new rules and procedures, and training judges about the process of enforcing such awards.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

According to the International Monetary Fund's most recent World Economic Outlook, Myanmar is currently ranked as the world's fast-growing economy, with an expected growth project of 8.6 per cent in 2016.[18]

i Manufacturing sector

The growth rate of merchandise exports in Myanmar is expected to increase to 18.8 per cent in 2017, the highest growth rate among South-East Asian countries. The European Union's reinstatement of preferential access for Myanmar's exports and the US' suspension of its ban on imports from Myanmar, coupled with the country's appeal to investors as a low-cost manufacturing base given its low operating overheads and wage rates, point toward promising growth in Myanmar's manufacturing industry.

Garment manufacturing has been the largest recipient of FDI in Myanmar in previous years. Other recent projects include Nissan's plans to transfer production of the Sunny compact sedan to a new plant in the Bago region. This is expected to employ about 300 people and have an annual output capacity of 10,000 cars.[19]

ii Infrastructure sector

There have been several high-profile deals in the energy sector. Singapore-based Sembcorp Utilities[20] signed a power purchase agreement for a US$300 million gas-based plant project with the Myanmar Electric Power Enterprise (MEPE). This will involve the construction of a 230MW gas-fired power plant in Mawlamyaing, and a 225MW gas-fired power plant in

17 Myanmar Enacts New Arbitration Law. (5 January 2016). Retrieved 17 June 2016 from globalarbitrationnews.com/myanmar-enacts-new-arbitration-law-2016-03-11.

18 See footnote 2.

19 'Nissan says to start assembling cars in Myanmar this year' (17 February 2016). Retrieved 17 June 2016 from www.reuters.com/article/nissan-myanmar-idUSL3N15W2QH.

20 Advised by Duane Morris & Selvam LLP.

Myingyan.[21] In addition, China Three Gorges Corporation and MEPE will be developing a wind farm in Chaungtha, in the Ayeyarwady region.[22] These projects should provide some much-needed supply to address Myanmar's power deficiency, and improved grid reliability should facilitate the development of industrial zones.

iii Hospitality sector

In 2015, the travel and tourism sector in Myanmar saw a 6.8 per cent growth in direct contributions to the country's GDP, and the sector is expected to grow at about 8.4 per cent per annum in its direct contribution to GDP from 2015 to 2025.[23] In anticipation of the continued surge in visitor numbers, developers have moved to take advantage of the opportunity to address the scarcity of hotel accommodation in the country. Starwood Hotels & Resorts Worldwide Inc has signed on to build the Sheraton Yangon Hotel in the Tamwe Township. Future Group Co Ltd and Pyay Phyo Tun International Co Ltd have plans to develop a US$150 million sea view condominium and hotel in Myeik, Tanintharyi. In January 2016, Yoma Strategic Holdings Ltd announced the Landmark development project located at the heart of the downtown Yangon business district, which will convert the former headquarters of the Myanmar Railway Company into the Yangon Peninsula Hotel, complemented by luxury residences, hotel and commercial developments. This has been a complete success, with construction still underway.

The increased demand in this sector is likely to see M&A investment opportunities with local developers and management contracts involving a range of hospitality projects, including heritage redevelopments in the city centre, serviced apartments to cater to a growing influx of expatriates and business hotels in the country's growth hubs.

iv SEZs

The Special Economic Zone Law (SEZL), enacted on 23 January 2014 for the development of private sector-led SEZs in Myanmar, offers tax incentives and other benefits, such as leases of up to 75 years, to promote the entry of export-oriented enterprises in, *inter alia*, the manufacturing sector. Under the decentralised governing system, applications for investment permits within each SEZ will be approved by respective management committees that are separately overseen by a central working body. Foreign insurance companies and joint venture insurance companies are allowed to operate within the SEZs.

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21 Sembcorp, 'Sembcorp Signs Agreement to Develop the Largest Gas-Fired Independent Power Plant in Myanmar' (7 December 2015). Retrieved 6 July 2017 from www.sembcorp.com/en/media/media-releases/utilities/2015/december/sembcorp-signs-agreement-to-develop-the-largest-gas-fired-independent-power-plant-in-myanmar.

22 Gaung, J S (4 March 2016), 'China Three Gorges to set up Wind Farm', Retrieved 17 June 2016 from www.dealstreetasia.com/stories/myanmar-dealbook-a-wind-powered-project-to-kick-off-in-the-coastline-of-myanmars-delta-western-coastal-city-kyauk-phyu-to-complete-k40-million-waste-incineration-project-32928.

23 World Travel & Tourism Council. Travel and Tourism Economic Impact 2015: Myanmar. 2015. London, United Kingdom.

Thilawa SEZ, which is located 25km south of Yangon along the Yangon River, was the first SEZ in Myanmar, and was established in October 2013 by Myanmar-Japan Thilawa Development Ltd,[24] with Zone A being opened on 23 September 2015. In the next five years, 100 companies are expected to set up businesses in this area. [25]

In August 2015, Italian-Thai Development and Rojana Industrial Park signed an agreement with the government to resume the initial phase of the Dawei SEZ project. This will be located about 614km south of Yangon in the Tanintharyi region, and will involve building a port, power plants, a road to Thailand, an LNG terminal, a township, a telecom landline and an industrial estate. The Japanese government has also participated in developing the Dawei SEZ, and a Chinese state-affiliated company has plans to build an oil refinery near Dawei SEZ.[26]

The Kyaukphyu SEZ was approved in December 2015 by the Myanmar parliament and is situated about 400km northwest of Yangon in the Rakhine region. CITIC will hold an 85 per cent stake in it.[27] Development projects will include the building of a deep-sea port, an industrial park and residential estates.

To date, the Thilawa SEZ is the only SEZ to attract large-scale foreign investment.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As a cash-based society, Myanmar's finance sector has been largely under-developed due to its exclusion from the global banking system coupled with its ongoing struggle to recover from the 2003 banking crisis and subsequent heavy-handed regulation. Taking security as a foreign investor over immoveable property (in the form of land and buildings) involving a mortgage over land as well as 'land use rights' (as a large majority of land ownership is in the form of leasehold rights) is challenging. The basic rule is that foreign ownership of 'immoveable property' (defined under the Transfer of Immoveable Property Restriction Act (1987) to include 'land, benefits from the land, buildings and things constructed or situated on that land and things installed on those buildings') is significantly restricted. Accordingly, M&A financing is typically sourced offshore, as tight domestic and international restrictions limit sources of financing for the private sector.

i Central Bank Law 2013 (CBL)

The government initiated a reform of the financial sector and on 11 July 2013 when a new CBL came into force. This has given the CBM greater autonomy, and it is now an institution that acts as the licensing authority and regulator of all banks in Myanmar. The CBM can independently adjust interest rates as well as conduct currency and exchange operations. It also has statutory responsibility for developing Myanmar's capital markets sector.

24 Mitsubishi, Marubeni, Sumitomo, Japan International Cooperation Agency (49 per cent); government of Myanmar (10 per cent); local enterprises (41 per cent).

25 Including companies such as Acecook, Pokka Sapporo and Asahi Group Holdings.

26 Matzui, M (11 April 2016). 'Chinese Company to Build Oil Refinery near Dawei SEZ in Myanmar'. Retrieved 17 June 2016 from asia.nikkei.com/Politics-Economy/International-Relations/Chinese-company-to-build-oil-refinery-near-Dawei-SEZ-in-Myanmar.

27 Gaung, J S (30 December 2015). 'Myanmar Gives Go-ahead to Kyaukphyu SEZ, China's CITIC to Hold 85 per cent Stake'. Retrieved 17 June 2016 from www.dealstreetasia.com/stories/kyaukphyu-sez-to-be-handled-by-citic-with-85-pc-stake-25243.

The CBM has since issued a total of 13 foreign bank licences for operations in Myanmar's commercial banking sector. However, the scope of permitted operations is limited to banking for foreign corporations and foreign exchange services, including providing loans to foreign entities in both foreign and local currency. Foreign licensed banks are not allowed to participate in retail banking, but can partner with local banks to engage in trade finance and lend to local banks directly.

The CBM has alluded to the fact that current official interest rates for loans and deposits would not apply to loans by foreign banks to foreign entities, and that syndicated loans could take place between foreign banks and Myanmar entities in the future.

The Financial Institutions Law (passed on 25 January 2016) is the current legislative authority in Myanmar governing the entire banking and finance sector; this replaced the Financial Institutions of Myanmar Law (1990). To date, there have been no new implementing rules or regulations.

ii Capital market

Raising finance through Myanmar's capital market is now a viable reality for Myanmar companies and citizens with the opening of the YSX in December 2015. Regulated by the SECM, the YSX currently only allows local Myanmar citizens or companies to invest in companies listed on the YSX, although this is expected to change upon the future enactment of the NMCA. A key issue from a liquidity standpoint is expect to be a change in the NMCA allowing foreign investors to invest in Myanmar companies; until then, this remains a barrier to foreign investment in the Myanmar market. With the current regulations only allowing for local retail investors who largely lack capital and sufficient know-how of the operations of the capital market, the participation of institutional and foreign investors will be crucial to increasing liquidity and the continued success of the YSX. Training and capacity building will be needed for intermediary stakeholders, as there is currently a limited talent pool of skilled finance professionals in Myanmar. Over-the-counter markets will also be established by securities companies for public companies that may not be ready to list on the YSX.

iii Offshore and cross-border financing

While most developed and developing jurisdictions have in place well-defined mechanisms and legal procedures regarding the provision of financing with the corresponding onshore security of the borrower (in the form of land mortgages, charges on assets or the taking of other types of collateral), this process remains very much in its infancy in Myanmar. That said, several non-recourse offshore finance projects occurred in 2015 in Myanmar, primarily within the telecom sector and involving foreign-owned telecom tower companies that are working with telecom licence-holders Ooredoo and Telenor. Structuring these financing deals involved complex challenges, given the absence of defined procedures in permitting offshore private and multilateral financiers in not only taking onshore security from Myanmar borrowers but also perfecting said security. Whether financial closure was obtained remains to be seen, as we believe, in most cases, conditions precedent were either waived or shifted to conditions subsequent in order to permit a partial drawdown of the loan facilities by the Myanmar borrowers.

To this end, these deals have highlighted the current issues surrounding project financing in Myanmar, essentially pushing the issue into the spotlight, with the international business community requesting both policy and legal reform, such as the enactment of a

Secured Transactions Law to address the issue of security over the assets and property of a Myanmar borrower, as well as the perfection and registration of such security in the name of the lender or lenders.

VII EMPLOYMENT LAW

Myanmar labour laws do not specifically deal with transfers of employment in an M&A situation. Where employees are to be transferred to a new entity, this can be done via a contractual arrangement, and investors should take measures to ensure that any formalities or requirements in the contract are observed and complied with. Where an employee does not consent to a change in employer, or to enter into any transfer arrangement, the employee's existing employment will have to be terminated and termination severance will be payable. Termination standard practice calculations are based on the employment period as follows:

a from the completion of six months to less than one year, a severance payment in an amount of half of one month's salary;

b from the completion of one year to less than two years, severance payment in an amount of one month's salary;

c from the completion of two years to less than three years, severance payment in an amount of one-and-a-half month's salary;

d from the completion of three years to less than four years, severance payment in an amount of three months' salary;

e from the completion of four years to less than six years, severance payment in an amount of four months' salary;

f from the completion of six years to less than eight years, severance payment in an amount of five months' salary;

g from the completion of eight years to less than 10 years, severance payment in an amount of six months' salary; and

h from the completion of 10 years to less than 20 years, severance payment in an amount of eight months' salary.

Under the MIL, foreign investors are required to submit vocational training plans annually and commit to training their local employees to upgrade their skills. These employment provisions within the MIL affirm the government's support for local workers and recognise the importance of upgrading the Myanmar workforce to achieve sustainable economic growth.

Navigating the employment law framework is highly complicated for employers in Myanmar. Labour laws are still in a state of flux, and there is no single uniform piece of employment legislation in Myanmar; instead, a plethora of different laws exist regulating the employment sector with regard to issues such as work hours, holidays, leaves of absence, maternity, wages, and overtime and severance pay.[28] The Ministry of Labour also issues

28 Social Security Law 2012; Minimum Wage Labour Law (March 2013); Immigration Act 1947; Employment and Skill Development Law 2013; Employment and Training Act (1950); Factories Act 1951; Foreign Investment Law 2012; Payment of Wages Act 1936; Shops and Establishments Act 2016; Leave and Holidays Act 1951; and Workman's Compensation Act 1923.

regulations and guidelines on the legal rights and duties of employers and employees, model employment contracts and fair labour practices, with a view to establishing and maintaining industrial harmony.

VIII TAX LAW

The taxable period of a company (income year) in Myanmar coincides with its financial year, from 1 April to 31 March. Income tax returns must be filed within three months of the end of the income year. Capital gains tax returns must be filed and the corresponding payment made within one month of the date of disposal of the capital assets, defined as the date of the execution of the deed of disposal or the date of delivery of the capital assets, whichever is earlier.

Under the Income Tax Law (ITL), double tax agreements[29] (DTAs) entered into by the government with any foreign state on income tax will be followed notwithstanding any terms contrary in the ITL. However, this first requires approval of the Director General of the Internal Revenue Department in Nay Pyi Taw.

i Corporate income tax

Corporate income tax is levied at a rate of 25 per cent on total income, not including capital gains (except the transfer of shares in an oil and gas company, where rates ranging from 40 to 50 per cent will apply on gains). It is applicable to both resident and non-resident companies in Myanmar. A resident company is defined as one formed under the MCA or any other existing law of Myanmar, including companies under the MIL. Resident companies are taxed on a worldwide basis; hence, income deriving from sources outside of Myanmar is also taxable. Non-resident companies are those that are not formed under the MCA or any other existing Myanmar law. Taxable income includes trade or business income and rental income from moveable or immoveable property.

ii Capital gains tax

Capital gains tax of 10 per cent, applicable to both resident and non-resident companies, is payable on any gains realised from the sale, exchange or transfer of one or more capital assets, including shares in a company. Higher rates of between 40 and 50 per cent apply on gains from the transfer of shares in an oil and gas companies.

iii Withholding tax

Myanmar has a one-tier corporate tax system where dividends, branch profits and shares of profits of an association of persons (i.e., partnerships, joint ventures, companies) that have been taxed are exempt; therefore, no withholding tax is deductible.

29 DTAs have been concluded with India, Indonesia, Malaysia, Singapore, the Republic of Korea, Thailand, the United Kingdom, Vietnam, Laos and Bangladesh.

Withholding tax on interest payments only applies to payments made by non-residents or foreigners at a rate of 15 per cent. The payment of royalties for the use of licences, trademarks or patents is subject to a withholding tax rate of 15 per cent for residents and 10 per cent for non-residents.[30]

iv Commercial tax

Commercial tax is generally a 5 per cent turnover tax on goods and services produced or rendered within Myanmar based on sales proceeds, and is dependent on the nature of goods and services. All services are subject to 5 per cent commercial tax, except 26 types of services that are specifically exempted from commercial tax (e.g., home rental, life insurance, banking services). It is only applicable to specific commercial transactions listed in the Commercial Tax Law, including imported goods based on the landed cost, which is the sum of the cost, insurance, freight value and customs duties.

v Special goods tax

The Union Tax Law 2016 took effect on 1 April 2016, with key developments including the reintroduction of the Special Goods Tax Law. This imposes tax rates ranging from 5 to 120 per cent on listed special goods including cigarettes, tobacco leaves, cheroots, cigars, pipe tobacco, alcoholic beverages, gemstones, teak, petroleum, jet fuel and natural gas.

IX COMPETITION LAW

Myanmar's Competition Law (CL), which was enacted on 24 February 2015, came into force on 24 February 2017 under Notification 69/2015 issued by the President's office on 12 December 2015. The CL is far-reaching, and provides for the creation of a Competition Commission with investigative and adjudicative powers. It classifies violations into four categories to regulate competition, market monopolies, anticompetitive acts and merger control. Civil and criminal penalties will be imposed, and include the conviction of senior managers. The CL will likely have significant impact once enforced, and businesses would be well advised to seek necessary assistance.

X SANCTIONS

The US government pledged a commitment to removing all the remaining financial and trade sanctions against Myanmar, representing a milestone in Myanmar's journey to further integrate into the global economy. This announcement was made by former US President Barack Obama on 14 September 2016 after a meeting with Myanmar State Counsellor Daw Aung San Suu Kyi, the *de facto* leader of Myanmar.

The US sanctions were imposed by the International Emergency Economic Powers Act, which authorised President Obama to declare a 'national emergency' and to impose economic and trade sanctions in response to the 'unusual and extraordinary' threat to, *inter alia*, US security, its economy and foreign policy. As a part of enforcement efforts, the US

30 For residents, deductions as above shall be set off against tax due on final assessment. For non-residents, the above withholding tax from payments to non-resident companies is a final tax (Ministry of Finance and Revenue Notification No. 41/2010 of 10 March 2010).

Department of the Treasury's Office of Foreign Assets Control (OFAC) published a list of individuals, groups and companies owned by or controlled by Myanmar citizens that US citizens were prohibited to deal with: the Specially Designated Nationals List (SDNs List). The US sanctions against Myanmar were put in place by OFAC from 1997, but largely eased in 2012. The initial sanctions easing in 2012 was followed by relief, effective in early 2016, which removed several state-owned enterprises and banks from the SDN List.

As a result of the removal of all the sanctions, the prohibition to trade or deal with the Myanmar individuals and entities on the SDNs List no longer exists; however, sanctions against them under other programmes, such as that regarding North Korea and counternarcotics, will remain in the List. This landmark move will effectively facilitate US investment to enter one of the last frontier markets left in Asia.

On 7 October 2016, President Barack Obama issued an executive order terminating the national emergency relating to Myanmar (the Burma-related executive orders). This has had the effect that:

a all individuals and entities listed on the SDN List for Myanmar-related reasons have been removed from the SDN List;

b the requirement for US citizens and companies to report annually to the US State Department outlining information regarding policies and procedures with respect to human rights, workers' rights, environmental stewardship, land acquisitions, arrangements with security service providers and payments to Myanmar government entities has been suspended;

c all OFAC-administered restrictions relating to banking and financial transactions within Myanmar have been removed;

d the Responsible Investment Reporting Requirements have been removed (that is, US citizens will no longer need to report any agreement with the Myanmar Oil and Gas Enterprise or any investment that exceeds US$5 million); and

e the ban on the importation into the US of Myanmar-originated jadeite and rubies has been revoked.

The suspension is contingent on Myanmar's progress in addressing money laundering, corruption and narcotics-related activities. FinCEN will remove the prohibition entirely when Myanmar has made sufficient progress on this front.

In reality, the lifting of US sanctions has not significantly increased US foreign investment into Myanmar in the past nine months. However, while it is still very early days, we remain optimistic.

XI OUTLOOK

As Myanmar's reform process gains momentum after more than a year of transition to a civilian-led government and the removal of US sanctions, many changes are taking place. In 2016, Daw Aung San Suu Kyi announced a crackdown on unpaid taxes, and revisited Myanmar's Anti-Corruption law with a set of guidelines lowering limits on gifts accepted by civil servants. The Anti-Corruption Law (AC Law), passed by parliament in August 2013, seeks to 'eradicate bribery as a national cause'.

The AC Law sets out a framework for a presidential commission to investigate cases of bribery and to consider the assets of public officials on its own initiative. While primarily targeted at bribe-taking by those in the public sector, the net can be cast to catch those in the private sector. There is a ban on the receipt of gifts from organisations or individuals seeking gains, whether of a business or other nature, from civil servants. Gifts subject to the new limit include 'money, gold, silver, air tickets, hotel stays, free meals, golf club membership fees'. The new guidelines state that they aim to distinguish 'gifts offered as a means of social courtesy […] from ones given with the intention of bribery'. The guidelines offer specificity to many aspects outlined in the AC Law, and will be a development welcomed by those seeking to invest and do business in Myanmar.

In a new move to streamline government activity, a reorganisation of the union ministries was commenced in March 2016, reducing the overall number of ministries from 36 to 21. In a further development, on 24 March 2016, the Union Parliament approved the appointment of 18 key ministers to form the new government. Some of these ministers have oversight of more than one major ministry.

The merger of the Ministry of Finance and the Ministry of National Planning has created synergies to facilitate investment. The integration of the ministries related to transportation and communications also benefits major projects, a number of which are still in progress. Finally, the merger of the Ministry of Electric Power and the Ministry of Energy has helped to streamline the process for the development of new power projects. Consolidating the ministries has promoted an easing of administrative processes concerning foreign investment, and will hopefully continue to be a significant benefit to current and future projects. We remain optimistic.

Lawyers and investors alike are still eagerly awaiting the passing of key new legislation (which was meant to be enacted in late 2015). These include the NMCA and implementing Rules, the Condominium Law (Rules) and the Mining Law Amendment Act (Rules). Myanmar is still in desperate need of a Secured Transactions Law and an improved Intellectual Property Law to help stimulate foreign investment.

Myanmar is moving towards a more open economy and democratic society, although these transitions will neither be seamless, nor occur overnight. As the country readies itself for increased foreign investment, it will remain a challenging frontier market for investors. Nevertheless, from multinational corporations to private equity firms, companies still seem to be drawn to one of the world's last economic frontiers. If prospective investors are able to identify and mitigate risks through focused risk assessments, comprehensive due diligence and appropriate compliance measures, there are opportunities available.

Appendix 1

ABOUT THE AUTHORS

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Krishna Ramachandra is managing director of Selvam & Partners in Yangon and of Duane Morris & Selvam LLP in Singapore. As head of its corporate finance, investment and private client practice groups, his expertise includes M&A and capital markets, investment funds and private equity, and technology, media and telecommunications law.

He has almost two decades of experience in advising issuers, funds, investment banks, listed and private companies, and high-net-worth individuals in Asia, Europe and the US on equity and debt securities issuances, compliance and regulatory matters. He also possesses extensive experience providing counsel to local Myanmar business leaders on issues involving a cross-border element in Myanmar's key industry sectors. His valued legal advice has earned him numerous accolades by respected industry authorities including *Asialaw Leading Lawyers*, *Chambers and Partners*, *Asia Pacific Legal 500* and *IFLR1000*. *Legal 500* has noted that Krishna's 'intellectual stamina and acute appreciation of commercial realities make him a formidable adviser – his ability to come up with creative, workable solutions is second-to-none'.

Krishna graduated from Christ's College, Cambridge University with an LLM in corporate finance on a Freshfields Bruckhaus Deringer scholarship in 1996. He articled and qualified with Freshfields in London prior to relocating to Singapore with Clifford Chance in 2003 and subsequently joined Selvam LLC in 2006. In 2011, Duane Morris and Selvam LLC entered into the first US–Singapore joint law venture to form Duane Morris & Selvam LLP.

Krishna is an advocate and solicitor of the Supreme Court of Singapore, and a solicitor of England and Wales. He previously sat on the Singapore Law Society's Corporate Practice Committee for Mergers & Acquisitions and Insolvency, Corporate Commercial Matters and Listing Matters. He is invited to speak regularly on M&A, corporate governance, listings and fundraising matters at conferences globally.

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Rory J Lang is an international corporate lawyer and senior associate at Duane Morris & Selvam LLP's Myanmar office in Yangon. He practises in all areas of dispute resolution, banking and finance, capital markets, corporate, cross-border transactions, commercial, mergers and acquisitions, real estate, employment and energy, and resources law. He has significant experience in all forms of foreign direct investments and cross-border transactions. Rory provides ongoing legal assistance in relation to corporate structuring for investment; commercial contracts with local and international corporations and individuals; labour law; local regional compliance requirements; and real estate guidance for developers and hospitality providers.

Rory has more than eight years of experience in Australia and South-East Asia, including nearly three years on-the-ground experience in Myanmar, Laos, and Singapore. He speaks regularly on market entry, M&A, employment law, energy, resources and property matters at conferences throughout the ASEAN region.

Rory holds a BA, LLB from the University of Notre Dame Australia, a graduate diploma in legal practice from the Australian National University, a graduate diploma in commercial and resources law, and an LLM in mining and energy law from the University of Western Australia.

Rory is admitted to practise as a lawyer of the Supreme Court of Western Australia, and as a solicitor of the federal courts and High Court of Australia. He is also a registered foreign lawyer in Singapore.

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