

PANORAMIC

PRIVATE M&A

Myanmar



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Private M&A

Contributing Editors

Will Pearce and Louis L Goldberg

Davis Polk & Wardwell LLP

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Contents

Private M&A

STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

- Structure
- Legal regulation
- Legal title
- Multiple sellers
- Exclusion of assets or liabilities
- Consents
- Regulatory filings

ADVISERS, NEGOTIATION AND DOCUMENTATION

- Appointed advisers
- Duty of good faith
- Documentation

DUE DILIGENCE AND DISCLOSURE

- Scope of due diligence
- Liability for statements
- Publicly available information
- Impact of deemed or actual knowledge

PRICING, CONSIDERATION AND FINANCING

- Determining pricing
- Form of consideration
- Earn-outs, deposits and escrows
- Financing
- Limitations on financing structure

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

- Closing conditions
- Pre-closing covenants
- Termination rights

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

- Scope of representations, warranties and indemnities
- Limitations on liability
- Transaction insurance
- Post-closing covenants

TAX

Transfer taxes
Corporate and other taxes

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees
Notification and consultation of employees
Transfer of pensions and benefits

UPDATE AND TRENDS

Key developments

Contributors

Myanmar

Myanmar Legal MHM Limited

MYANMAR LEGAL MHM

Takeshi Mukawa

takeshi.mukawa@mhm-global.com

Julian Barendse

julian.barendse@mhm-global.com

Thit Thit Aung

thitthit.aung@mhm-global.com

Nirmalan Amirthanesan

nirmalan.amirthanesan@mhm-global.com

STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Private acquisitions in Myanmar are typically undertaken by way of an acquisition of shares in the target or a transfer of business or assets.

As with other jurisdictions, the process typically includes the following steps:

- preliminary documentation, such as a term sheet or memorandum of understanding;
- a due diligence process (including legal, financial and tax due diligence);
- negotiation and execution of transaction documents (such as a share purchase agreement, asset or business acquisition agreement);
- closing of the transaction through the satisfaction of conditions precedent (such as obtaining required regulatory approvals); and
- regulatory filings.

The time to complete acquisitions and disposals varies depending on the necessary governmental approvals and the sector of the target company or business. In some sectors, the need to obtain governmental approvals and liaise with applicable authorities has the potential to cause significant delays to a transaction.

Structure of transaction

Share acquisition

A significant corporate reform was undertaken through the 2017 enactment of the [Myanmar Companies Law \(Law No. 29/2017\)](#) (MCL), which entered into force on 1 August 2018. The MCL replaced the [1914 Myanmar Companies Act](#) (the Former MCA) and provides a framework for foreign investment by way of share acquisition.

Companies are classified under the MCL (as was the case under the Former MCA) as either a 'Myanmar company' or a 'foreign company'. The classification of a company as a Myanmar company or a foreign company is important because foreign companies are subject to various legal and practical restrictions that restrict foreign investment, although reforms such as the [Myanmar Investment Law \(Law No. 40/2016\)](#) (MIL) have significantly expanded the scope for foreign investment.

Under the MCL, unlike the Former MCA, companies are permitted to have foreign ownership of up to 35 per cent while still being classified as a Myanmar company. It is also possible to have foreign ownership exceeding 35 per cent under the MCL; however, in this case, the company will be classified under the MCL as a foreign company and will be subject to additional restrictions on investments (under the MIL), as well as restrictions on rights to transfer and hold land as compared with a Myanmar company.

Business (asset) transfers

As is common in other jurisdictions, a transfer of business or assets is undertaken by way of execution of a business or asset sale agreement, which would provide for the transfer of the applicable assets to the acquirer.

Schemes of arrangement

Schemes of arrangement are also possible under the MCL and permit the acquisition of a company subject to court supervision where 75 per cent of the shareholders' vote has been obtained. However, this is not a common method for undertaking acquisition transactions. While schemes of arrangement may theoretically also have been possible under the Former MCA, there is no precedent in Myanmar, and the courts have not yet developed a practice regarding such schemes.

Due diligence

Due diligence for acquisitions continues to be challenging in Myanmar, as a result of factors including poor record-keeping and compliance by Myanmar companies, lack of familiarity with due diligence processes and sensitivity to disclosing company information. Prospective acquirers are advised to engage early with potential target companies to explain the purpose and nature of due diligence procedures and build the relationships required to ensure an appropriate quality of disclosure.

Regulatory approvals

The main regulatory approval for an acquisition in Myanmar is likely to be under the MIL. The time required for approval from the Myanmar Investment Commission (MIC) for the transfer of shares or a business, where the target has a permit or endorsement issued by the MIC, depends on the timing of the meeting of the MIC after the application is made and whether the MIC considers that further information (or a meeting) is required to inform its decision. As a result, it is not possible to predict the timing of the MIC's decision.

Law stated - 2 August 2024

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Key Myanmar laws applicable to acquisitions and disposals

Myanmar rapidly updated its laws relating to private M&A transactions as it opened up to foreign investment. The development and implementation of Myanmar's laws have been impacted by Myanmar's economic and political circumstances in recent years. In general, Myanmar's legal system also lacks clear precedents to confirm the current legal position. The answers given to these questions must be understood in this context.

The main laws governing acquisitions and disposals of privately owned companies, businesses or assets are:

- the MIL;
- the MCL;
- the [Transfer of Immovable Property Restriction Law 1987](#) (TIRPL);
- the Competition Law (Law No. 9/2015) (the Competition Law); and
- the [Foreign Exchange Management Law \(Law No. 12/2012\)](#) (FEML).

MIL

The MIL, which came into effect on 30 March 2017, simplified the investment regime in Myanmar and provides a more comprehensive and supportive framework for foreign and local investment in Myanmar. It combines the previous local and foreign investment laws into one law and provides for a streamlined investment approval process.

The MIC issued the [Myanmar Investment Rules \(Notification No. 35/2017\)](#) (MIR) on 30 March 2017, which set out the process for obtaining an MIC permit or MIC endorsement, as required.

MCL

The MCL replaced the Former MCA and provides a modern corporate law framework. For example, it improves companies' ability to manage their capital structure and removes some barriers to foreign investment.

In particular, it broadened the definition of a Myanmar company to include companies with foreign investment of up to 35 per cent, and abolished the requirement for foreign companies to obtain a Form of Permit (a required permit to trade, which, in practice, was only very rarely given for foreign companies intending to engage in trading activities).

Under the Former MCA, companies with any foreign shareholding were classified as foreign companies. The practice of the Directorate of Investment and Company Administration (DICA) under the Former MCA was to require a Myanmar company to change its registration when it changed from a Myanmar company to a foreign company as a result of a foreign company obtaining an interest in it (and vice versa). DICA would not permit such changes to its registration, effectively prohibiting foreign investment in Myanmar companies.

TIRPL

The TIRPL provides for restrictions on the transfer of land to, or its acquisition or lease for more than one year by, a foreign-owned company. The definition of 'foreign-owned companies' under the TIRPL refers to companies that are not 50 per cent or more owned or controlled by Myanmar citizens.

Despite this definition, the government previously applied a narrower definition (by reference to the Former MCA), which effectively prohibited such transfer, acquisition or lease by a foreign company.

As a result of the MCL, it is expected that even if a narrow application continues to be given by applicable land authorities, Myanmar companies with up to 35 per cent foreign ownership will be permitted to acquire an interest in land.

Competition Law

The Competition Law entered into force on 24 February 2017. It prohibits business combinations that:

- have the purpose of 'extremely raising market dominance';
- have the purpose of lessening competition in a limited market; or
- would result in a market share above the prescribed amount.

Business combinations prohibited under the Competition Law may be exempt in certain circumstances, including if the acquired business is at risk of insolvency or if it will promote exports, technology transfer or productivity. The Competition Law is a relatively new law, and it is not clear how its requirements will be applied in practice. Notifications issued by the Myanmar Ministry of Commerce (MOC) under the Competition Law to date largely address procedural matters (such as Notification No. 50/2017 of the MOC dated 9 October 2017).

The Competition Commission was established under the Competition Law on 31 October 2018 (under Notification No. 106/2018 of the Union Government), but it has yet to systematically enforce compliance with the Competition Law.

FEML

The FEML provides the regulatory framework for foreign currency exchange in Myanmar. Under the FEML, only banks that are authorised by the Central Bank of Myanmar (CBM) to engage in foreign banking may undertake foreign exchange transactions.

In 2022, the CBM issued a number of significant measures under the FEML that restrict the use and availability of foreign currency in Myanmar, which may impact M&A activity. In particular, the CBM issued Notification No. 12/2022 and Directive No. 4/2022 (each dated 3 April 2022) as well as Directive No. 5/2022 and Directive No. 6/2022 (each dated 5 April 2022), requiring that:

- Myanmar residents (other than Myanmar government entities and those provided an express exemption by the CBM) deposit earnings, capital income, borrowings and unilateral transfers denominated in a foreign currency in an account at a Myanmar bank and convert those amounts to kyats at the CBM reference rate within one

business day (with the reference rate being 2,100 kyats per US dollar since 5 August 2022);

- foreign currency amounts already held by such Myanmar residents be converted to kyats at the above-mentioned reference rate of the CBM; and
- all foreign currency remittances from Myanmar (including loan repayments) obtain the prior approval of the Foreign Exchange Supervisory Committee (FESC), which was formed under Order No. 28/2022 of the State Administration Council of Myanmar on 4 April 2022.

The CBM has continued to amend these requirements since April 2022. On 6 December 2023, the CBM published a letter it had issued to authorised dealer banks in Myanmar advising that it would not set the exchange rate for the online trading of foreign currencies and that banks were free to undertake foreign exchange transactions at the market rate. Previously, on 30 December 2022, the CBM notified Myanmar banks that the FESC had determined that ¹ for companies with foreign ownership greater than 35 per cent – it would not be necessary for banks to compulsorily convert foreign currency-denominated amounts held by them into kyats. Instead, such currency may be used for their own use or converted to kyats at banks (although offshore remittance remains subject to FESC approval).

Governing law for Myanmar M&A transactions

Under Myanmar law, parties are free, in principle, to choose the governing law of an agreement. However, in practice, state-owned enterprises and Myanmar government agencies will rarely agree to a choice of foreign governing law, and Myanmar private parties also generally prefer Myanmar law to be applied to transaction agreements.

For agreements that are subject to scrutiny under the MIL (eg, as part of an application for a permit or endorsement), the MIC will generally require that Myanmar law govern the agreement.

Law stated - 2 August 2024

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The MCL provides that shares are movable property, for which it is possible to obtain full legal title in Myanmar. Under the MCL, the possession of a share certificate in respect of a share provides prima facie evidence of ownership. The ownership and transfers of a company's shares should be recorded in its register of members to ensure it is effective.

For an acquisition by way of transfer of assets or business, the ownership rights to the applicable assets being transferred will be undertaken through execution and delivery under an asset transfer agreement. The type of legal title held by asset owners in Myanmar varies

between asset categories. For example, land is categorised into various forms of title with the two main categories of land being 'freehold land', which is rarely found in Myanmar, and 'grant land', which is leasehold land owned by the state and leased on a long-term basis (eg, terms of 10, 30 or 60 years) to private parties. In addition, there are a number of other categories of land owned by the state over which a land use right is granted to private parties for a particular purpose, such as agricultural land, grazing land, and vacant, fallow and virgin land.

It is possible for title to shares, businesses or assets to transfer automatically by operation of law, such as upon the death of the titleholder.

Legally, there is a difference between legal and beneficial title in Myanmar – however, trusts are rarely used in practice.

Law stated - 2 August 2024

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

It may be possible for a shareholder to require that other shareholders transfer their shares to a common acquirer through a 'drag-along' mechanism if provided for in the company constitution or a shareholders' agreement.

Another potential legal mechanism for undertaking an acquisition of all shares in a company without the agreement of all shareholders would be by way of a scheme of arrangement under the MCL. Schemes approved by 75 per cent of shareholders (or creditors) are binding on all shareholders (or creditors), and the MCL provides for a court, either by an order sanctioning such scheme or a subsequent order, to provide for the transfer of a company's undertaking or its shares, pursuant to such scheme. However, there is no precedent in Myanmar for schemes of arrangement, and Myanmar's courts have not yet developed a practice regarding such schemes.

Law stated - 2 August 2024

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

There are no specific restrictions under Myanmar law regarding the exclusion of assets or liabilities from transactions by the parties. This is generally a matter of agreement between the parties in structuring the transaction.

Law stated - 2 August 2024

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Overall investment framework

The main regulatory approval for an acquisition in Myanmar is likely to be under the MIL. Generally, a permit will be required from the MIC under the MIL for investments that:

- are strategically important;
- are capital intensive;
- have a large potential impact on the environment or local community; or
- use state-owned land; and
- are designated by the government.

Even if a permit is not required, foreign investors will require an endorsement from the MIC under the MIL to have the right to enter into a long-term lease of land or to obtain certain tax incentives.

If a target company has an MIC permit or endorsement under the MIL, approval of the MIC will also be required for the direct (and potentially indirect) acquisition of a majority of shares or controlling interest in the company. The MIC has advised that it does not need to be notified of indirect transfers of shares in companies with MIC permits or endorsements that occur because of a transfer of shares in an entity located offshore, but a prudent approach would be to seek a view from the MIC on a case by case basis (as indirect interests are within the scope of the approval requirement under the MIL).

There also continue to be practical restrictions on investing in Myanmar. For example, in many sensitive sectors, investment is possible only through a concession from, or a joint venture with, the government, reflecting the continuing role of the government and government agencies in Myanmar's economy.

Further details on foreign investment restrictions

On 10 April 2017, the MIC issued [Notification No. 15/2017](#) (List of Restricted Investment Activities), which was made in relation to section 42 of the MIL (the MIL Notification). It sets out the types of investments:

- in which foreign investment is not permitted;
- that require approval of a Myanmar government ministry; or
- that may only be made through a joint venture with a Myanmar company (under the MIR, a Myanmar company is required to have at least a 20 per cent shareholding in such a joint venture).

While the MIL Notification was intended to be a comprehensive list of all such restrictions, we are not aware of any updates since April 2018 (when the criteria for approvals from the Ministry of Electricity and Energy for energy sector projects was updated). Investors are advised to obtain advice on the particular approvals applicable at the time of their investment.

Under the MIL Notification, up to 100 per cent foreign investment is permitted in, for example, the establishment and operation of offices or commercial buildings. Foreign investors can also invest through a joint venture with a local partner in a number of sectors, including the development, sale and lease of residential apartments and condominiums.

Timing for MIC consideration

The MIR sets out the process for obtaining an MIC permit or MIC endorsement as required.

The current timelines for MIC consideration of an approval depend on the timing of the meeting of the MIC after the application is made and whether the MIC considers that further information (or a meeting) is required to inform its decision. As a result, the timelines for approval, in reality, are unlikely to align with the stipulated timelines under the MIL: the MIL gives the MIC 15 business days to undertake an initial assessment regarding whether the application is complete, 60 business days (for a permit) or 30 business days (for an endorsement) to undertake a substantive assessment of the application and grant the permit or endorsement, along with a further 10 business days to issue the approval. It is, therefore, important to manage the timeline for obtaining MIC approval (based on the circumstances at the time) and engage with the MIC to minimise the time taken for this approval.

Law stated - 2 August 2024

Consents

Are any other third-party consents commonly required?

Third-party consents may be required from shareholders under a shareholders' agreements or constitution for the transfer of shares (eg, if first-refusal rights are granted to shareholders) and from counterparties for the transfer of contracts.

Importantly, land used for the business of a company in Myanmar is commonly held in the name of one of the shareholders or directors of the company. The consent of such landowner to transfer the land under an acquisition transaction should be obtained.

Law stated - 2 August 2024

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

We set out below a summary of key regulatory filings.

MCL

Under the MCL, notification of transfer must be filed with DICA within 21 days after a transfer of shares in a company incorporated in Myanmar. Other associated filings with DICA may also be required, for example, for a change in its business name or directors.

MIL

Under the MIL, a notice must be filed with the MIC for any transfers of shares in, or the business of, a company with a MIC permit or endorsement. The prior approval of the MIC will be required for any transfer of shares in, or the business of, a company that has an MIC permit or endorsement, if it will result in an entity that is not an affiliate of the transferor acquiring majority ownership or control of the shares, or more than 50 per cent of the assets of the business.

While the MIC has advised that it does not need to be notified of indirect transfers of shares in companies with MIC permits or endorsements that occur because of a transfer of shares in an entity located offshore, a prudent approach would be to seek a view from MIC on a matter-by-matter basis.

In addition, if the transaction involves the incorporation of a new company to acquire the business or assets, the new entity requires an MIC permit to undertake certain large investments, or (even if a permit is not required) an MIC endorsement to obtain the right to enter into a long-term lease of land or certain tax incentives.

Registration of Instruments Law (Law No. 9/2018)

Certain acquisitions of property may also be registrable under the [Registration of Instruments Law](#). Instruments that, among other things, create or assign rights to immovable property valued above 100,000 kyats, and leases of immovable property for a term of more than one year or that fix an annual rent, must be registered unless they relate to a land grant from the government. A failure to register such instruments will affect their validity.

1899 Myanmar Stamp Act

Under the [Myanmar Stamp Act 1899](#), the amount of stamp duty payable depends on the document. For share transfers, stamp duty of 0.1 per cent of the value of the transfer price applies. For joint venture agreements, stamp duty of 150,000 kyats will generally apply.

Law stated - 2 August 2024

ADVISERS, NEGOTIATION AND DOCUMENTATION

| Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

A buyer or seller will generally appoint accountants to advise on the financial and tax aspects of a transaction and undertake financial due diligence of a target company. Professional advisers generally have standard terms of engagement.

Law stated - 2 August 2024

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

It is generally understood that Myanmar law does not impose a duty to negotiate in good faith, but this is often included as a contractual obligation in term sheets and other preliminary agreements for Myanmar transactions.

In terms of other duties, under the Myanmar Companies Law (MCL), as in other jurisdictions, directors are subject to a number of duties, including when negotiating a transaction, such as the duty to act in good faith and in the best interests of the company in relation to such negotiations.

Law stated - 2 August 2024

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

As in other jurisdictions, typically buyers and sellers will enter into:

- a sale and purchase agreement for the applicable shares, business or assets;
- if applicable, a shareholders' agreement; and
- any other document required to effect the transfer of the shares, the business or assets (eg, conveyances of land).

Law stated - 2 August 2024

Documentation

Are there formalities for executing documents? Are digital signatures enforceable?

There are generally no specific formalities required to execute documents in Myanmar. Under the MCL, where documents are executed by a company either by affixing its common seal

or by the signature of two directors (or if the company has only one director, that director) or a director and company secretary, a statutory presumption arises that the documents have been duly executed. The MCL does not, however, limit the ways in which a company may execute a document, and common practice in Myanmar is for a company to execute documents by the signature of its managing director.

The [Electronic Transactions Law \(Law No. 5/2004\)](#) provides that contracts may be executed electronically.

Law stated - 2 August 2024

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

In Myanmar, sellers do not typically produce due diligence reports for acquirers. Consequently, an acquirer should undertake due diligence (including legal due diligence) as part of undertaking a transaction.

As in other jurisdictions, the scope of legal due diligence will depend on the risk appetite of the acquirer. A typical legal due diligence would cover:

- the corporate information of the company;
- compliance with Myanmar law;
- verification of its licences and assets (including intellectual property);
- review of material contracts;
- labour and environmental compliance; and
- outstanding financial obligations and securities granted by the company.

In Myanmar, it is particularly important to undertake thorough due diligence of:

- **sanctions risk:** sanctions have been imposed by a number of jurisdictions, including the United States, the European Union, the United Kingdom, Australia and Canada. Therefore, it will be important to review the ownership and management of potential targets (as well as the ownership of any applicable land) to assess if there are any risks to a potential transaction under an applicable sanctions programme;
- **human rights due diligence:** businesses intending to operate in Myanmar are advised to undertake a human rights due diligence review prior to making their investment (and while undertaking their business in Myanmar) to ensure that their operations in Myanmar will be conducted in an ethical and appropriate manner, consistent with internationally recognised human rights;
- **the licences and approvals obtained by the target company for its business:** in particular, there are varying levels of understanding of, and compliance with, applicable licensing and approval requirements in Myanmar;

- interests in land: this can be challenging owing to the poor quality of official documentation regarding land title (Myanmar lacks a comprehensive land titles registry) and the prevalence of informal arrangements for land use in Myanmar (eg, companies often operate on land belonging to a third person, such as a major shareholder); and
- corruption, money laundering and terrorism financing: at the Plenary Meeting of the Financial Action Task Force (FATF) held in Paris on 21 October 2022, FATF added Myanmar to the list of jurisdictions that are subject to a Call for Action (known generally as its black list).

To the extent that a target does not have information easily available in electronic format (which can often occur in Myanmar), there may be delays in obtaining relevant information. Generally, due diligence for acquisitions continues to be challenging in Myanmar, including as a result of poor record-keeping and compliance by Myanmar companies, lack of familiarity with due diligence processes and sensitivity to disclosing company information. Prospective acquirers are advised to engage early with potential target companies to explain the purpose and nature of due diligence procedures and build the relationships required to ensure an appropriate quality of disclosure.

Law stated - 2 August 2024

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Under the [Contract Act 1872](#), if a contract is entered into by coercion, fraud or misrepresentation, at the option of the person whose consent was so affected, the contract may be voidable, or the person may be entitled to insist on the performance of the contract and the provision of a remedy to put the party in the place that party would have been in if the misrepresentation had been true.

The Contract Act's protections regarding misleading statements cannot be excluded by contract.

Law stated - 2 August 2024

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Under the Myanmar Companies Law (MCL), private companies registered in Myanmar are required to maintain registers, among other things, of shareholders at their registered office or principal place of business and make them available to shareholders. However, few companies currently comply with this requirement and, in general, limited information is publicly available about unlisted companies registered in Myanmar.

Under the MCL, any person may obtain an extract of the corporate information of a registered company from the electronic register of the Directorate of Investment and Company Administration (DICA), called MyCo, on payment of the prescribed fee. DICA published [Notification No. 57/2018](#) on 9 July 2018, setting out its filing fees, including 20,000 kyats for requesting current and historical extracts of the corporate information of a company. However, at present, such extracts cannot be obtained by third parties and must be requested from DICA by the company itself.

Apart from the companies' registry under the MCL, under the [Trademark Law \(Law No. 3/2019\)](#), it is possible to search trademarks (or pending trademarks) for free through the [website](#) of the Intellectual Property Department of the Ministry of Commerce. Besides company and trademark searches, Myanmar does not generally maintain computerised records of ownership of other property or security taken on such property.

Law stated - 2 August 2024

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Under the Contract Act, a contract resulting from misrepresentation (including silent misrepresentation) or fraud will not be voidable if the party, whose consent to the contract was caused by the misrepresentation or fraud, had the means of discovering the truth with ordinary diligence.

Law stated - 2 August 2024

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Obtaining accurate financial information on a target company in Myanmar is often challenging owing to the poor accounting practices and record-keeping of companies in Myanmar.

While there is no restriction in Myanmar on the use of closing accounts or locked-box structures, in practice, the purchase price is generally not adjusted, reflecting in part the difficulty of obtaining relevant financial information.

Law stated - 2 August 2024

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Where a private M&A transaction is in the form of a joint venture between a foreign investor and a local Myanmar partner, shares in the project company are commonly offered as consideration for the transfer to the project company of the business or assets of the Myanmar joint venture partner. The foreign joint venture partner would typically make its contribution to the project company in cash.

There is no overriding obligation to pay multiple sellers the same consideration under Myanmar law.

Law stated - 2 August 2024

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

It is not common to use earn-outs, deposits or escrows in a private M&A transaction.

Law stated - 2 August 2024

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

Acquisitions are generally financed through available cash resources or acquisition loans. In the case of loan financing, for acquisitions by foreign investors, such finance was generally obtained offshore.

In terms of financing Myanmar investments, it is generally understood that, in practice, all transfers of funds into or from Myanmar are governed by the Foreign Exchange Management Law (Law No. 12/2012). Prior approval from the Central Bank of Myanmar (CBM) is likely to be required in practice for loans, while equity fund transfers need only be declared to CBM.

Acquisition loans are likely to become more difficult to source for Myanmar transactions owing to factors such as the sanctions imposed by a number of jurisdictions (in particular the United States), the blacklisting of Myanmar by the Financial Action Task Force and foreign exchange measures implemented by the CBM. These measures include, for example, CBM Letter No. FE-1/744 (Ka) requesting that Myanmar banks ask their customers to suspend repayments of offshore loans. Such measures, together with other recent measures restricting foreign exchange in Myanmar, are likely to raise concerns for foreign financial institutions.

Assurance is generally provided where an acquisition is financed through loans by including closing conditions in the sale and purchase agreement, requiring the purchaser to secure such loans on terms that are satisfactory to both parties.

Law stated - 2 August 2024

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

Restrictions under the Myanmar Companies Law (MCL) apply in relation to a public company, or a private company that is a subsidiary of a public company, providing financial assistance with respect to the acquisition of its shares (sections 128 to 130). A procedure is provided under the MCL for board and shareholder approval to authorise financial assistance. Private companies (other than subsidiaries of public companies) are outside the scope of those restrictions.

Law stated - 2 August 2024

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Transactions are generally subject to closing conditions, which typically include the following:

- execution of all ancillary agreements (including any loan agreements);
- attainment of corporate approvals;
- attainment of all licences, permits and approvals (including under the Myanmar Investment Law (Law No. 40/2016));
- representations and warranties of the parties remain true and accurate; and
- non-occurrence of any material adverse events or force majeure.

Law stated - 2 August 2024

Closing conditions

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Generally, all parties will be expected to exert reasonable efforts to secure the satisfaction of any closing conditions.

Given the scope for delay in satisfying closing conditions (particularly regulatory approvals) in Myanmar through no fault on the part of either party, the typical approach to closing conditions is to include a long-stop date for closing.

Law stated - 2 August 2024

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Typically, parties will include pre-closing covenants to preserve the value of the target business or assets. Common covenants include general obligations to keep the business intact and operate it in the ordinary course of business in accordance with the past practice of the seller. The parties may also include obligations to consult or obtain approval from the acquirer for certain corporate actions that may affect the profitability of the target business or assets.

The remedy for a breach of the covenants is generally a claim for damages.

Law stated - 2 August 2024

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Generally, termination will be available after execution of a sale and purchase agreement only for a failure to satisfy a closing condition, or to meet a long-stop date.

Law stated - 2 August 2024

Termination rights

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are not typical in Myanmar.

Under the Contract Act 1872, where a break-up fee or reverse break-up fee applies to breach of contract, it will be enforceable only to the extent it is determined by the court to be reasonable (eg, the court may decide to award only a part of the amount).

Law stated - 2 August 2024

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

As in other jurisdictions, the parties will typically negotiate representations, warranties and indemnities in sale and purchase agreements.

Typical warranties of both parties will include their corporate capacity and authority to execute the transaction agreements. A seller will typically additionally provide warranties relating to:

- title and authority to transfer the transferred business or assets;
- accuracy of corporate and financial records;
- disclosure of litigation risks;
- material contracts;
- solvency of the target and seller;
- compliance with Myanmar law;
- the maintenance of required licences and permits;
- labour and environmental compliance;
- intellectual property rights; and
- insurance.

It would also be prudent to seek representations and warranties in relation to whether any persons involved in the management and ownership of the target and sellers (and the ownership of any related property) are subject to any international sanctions.

Indemnity clauses are subject to negotiation and may be broad, covering any loss caused by a breach of the sale and purchase agreement, including warranties, or limited to specific breaches.

The main distinction between indemnities and warranties is that indemnities are specifically defined in the Contract Act 1872. The Contract Act defines indemnities as contracts to transfer to the promisor any loss to a promisee caused by the promisor or a third party. Under the Contract Act, a promisee is entitled to recover all losses from a promisor under an indemnity clause.

The Contract Act does not specifically deal with warranties; however, the [Sale of Goods Act 1930](#) implies certain warranties in contracts for the sale and purchase of goods.

Under the Contract Act, if a contract is the result of coercion, fraud or misrepresentation, at the option of the person whose consent was not obtained, the contract may be voidable, or such person may be entitled to insist on the performance of the contract and the provision of a remedy to put the party in the place that the party would have been in had the misrepresentation been true.

Law stated - 2 August 2024

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

Sellers customarily limit liability by negotiating the scope of individual representations and warranties and excluding warranties other than those set out in the agreement. A typical

limitation that may also be found in sale and purchase agreements is to limit the liability of the seller for breach of warranties to a maximum of the purchase price.

Law stated - 2 August 2024

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and indemnity insurance is not available in Myanmar.

Law stated - 2 August 2024

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Parties may include, for example, non-compete and confidentiality obligations as post-closing covenants.

Under the Contract Act, a person who purchases the goodwill of a business may impose reasonable restrictions regarding the conduct of a similar business within specified local limits; otherwise, non-compete clauses are generally prohibited.

Law stated - 2 August 2024

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Stamp duty will generally be payable for transfers of shares in a company, a business or assets. Under the Myanmar Stamp Act 1899, the amount of stamp duty payable depends on the document. For share transfers, stamp duty of 0.1 per cent of the value of the transfer price applies. For joint venture agreements, stamp duty of 150,000 kyats will apply.

The parties may agree on who bears the stamp duty. In the absence of such agreement, the Stamp Act sets out certain default rules, for example, that for certain instruments (eg, for the transfer of shares), the person drawing, making or executing the instrument will bear the stamp duty.

Law stated - 2 August 2024

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

In addition to stamp duty, capital gains tax is payable on any capital income. The capital gains tax rate is 10 per cent in most sectors or about 40 per cent for oil and gas assets.

Withholding taxes also apply for certain categories of corporate income, although these generally do not apply to Myanmar-resident companies under Notification No. 47/2018 of the Ministry of Planning and Finance. Where applicable, residents can offset withholding taxes against their final fiscal year-end tax liability, while non-residents cannot. Under Notification No. 47/2018, the withholding amounts since 1 July 2018 are:

Category	Residents	Non-residents
Interest payments	0 per cent	15 per cent
Royalty payments	10 per cent	15 per cent
Payments by government and government instrumentalities under contracts for goods and services	2 per cent	2.5 per cent
Payment by the private sector under contracts for goods and services	0 per cent	2.5 per cent

The withholding rates can be reduced if a person not resident in Myanmar is a resident of a country that is party to a double tax treaty with Myanmar. Myanmar has double tax treaties with Bangladesh, India, Indonesia, South Korea, Laos, Malaysia, Singapore, Thailand, the United Kingdom and Vietnam, and it is in the process of finalising treaties with other jurisdictions (those with Bangladesh and Indonesia are not yet ratified)

Under the double tax treaty with Singapore, the amount withheld on interest payments will be reduced to 8 per cent if the payment is to a bank or financial institution, or 10 per cent if it is to any other person, and the amount withheld on royalty payments will be reduced to 10 per cent for patents, designs or models.

Law stated - 2 August 2024

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

The acquisition of shares in a target company would not affect its legal status as the employer, and its employees would continue to be its employees. Employees would not automatically be transferred to an acquiring company in the context of the acquisition of a business or assets. Consequently, the transfer of employment contracts to the acquiring entity (with the consent of applicable employees) would be required.

Law stated - 2 August 2024

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There is no legal obligation to notify or consult with employees or employee representatives in connection with a private M&A transaction.

Law stated - 2 August 2024

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In a share acquisition, as the employer would remain the applicable target company, the accrued benefits of employees (including prior service and leave entitlements) are not affected. In relation to the acquisition of a business or assets, the parties may negotiate recognition by the acquirer of such accrued benefits.

No retirement savings contribution scheme exists in Myanmar for private sector employees.

Law stated - 2 August 2024

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Recent listing on the Yangon Stock Exchange (YSX)

In 2023, Myanmar Agro Exchange Public Co, Ltd (MAEX) became the eighth company to list on the YSX. MAEX's primary business is the construction and operation of the Danyingone Wholesale Market located in Yangon, which specialises in the distribution of fruits, vegetables, agri-commodities, flowers and fish. The listing of MAEX demonstrates the continued strength and resilience of Myanmar's businesses, particularly those with a domestic focus.

The YSX began operations on 9 December 2015, and the practice and regulations around listings in Myanmar are still developing. The listing of established companies such as MAEX will help the YSX to develop further as a stock exchange.

Myanmar Legal MHM acted as legal adviser to MAEX on its listing.

Implementation of IP Laws

Myanmar implemented a long-awaited IP reform in 2019 with the passing of the Industrial Design Law (Law No. 2/2019) and the Trade Mark Law (Law No. 3/2019) on 30 January 2019, the Patent Law (Law No. 7/2019) on 11 March 2019 and the Copyright Law (Law No. 15/2019) on 24 May 2019. However, the entry into force of these laws had been subject to a further notification. The State Administration Council (SAC) undertook the necessary steps to implement these laws in 2024 and 2023.

Through SAC Notification No. 106/2024 (dated 1 June 2024), the SAC determined that the Patent Law would be enforced as of 31 May 2024. In conjunction with this notification, enforcement regulations were published on 5 June 2024.

Previously, on 10 March 2023, the SAC announced (under Notification No. 82/2023) that the Trade Mark Law would enter force on 1 April 2023, and on 18 October 2023, the SAC issued Notification Nos. 217/2023 and 218/2023 announcing that the Industrial Design Law and Copyright Law would enter into force on 31 October 2023. The Ministry of Commerce also issued the Rules for the Registration of Marks (set out in Notification No. 17/2023 dated 31 March 2023), the Industrial Design Rules (set out in Notification No. 67/2023 dated 29 September 2023) and the Rules for Registration of Literary and Artistic Works and Related Rights Matters (set out in Notification No. 70/2023 dated 23 October 2023), providing the detailed rules for the registration of trade marks, industrial designs and copyright.

The implementation of these laws is a significant development for the protection of IP rights in Myanmar. Previously, there was limited protection for IP apart from trade marks, which could be protected by registering a declaration of ownership of the trade mark under the Registration of Instruments Law (Law No. 9/2018), under which the registration of certain documents is provided for.

Filings for registrations of trade marks already in use or registered under the Registration of Instruments Law (Law No. 9/2018) have been accepted under the Trade Mark Law since 1 October 2020 under Order No. 63/2020 of the Ministry of Commerce dated 28 August 2020. Trade marks for which such filings have been made will be registered under the Trade Mark Law with effect from the date it takes effect.

Implementation of Myanmar's Insolvency Law

Myanmar's [Insolvency Law \(Law No. 1/2020\)](#) (IL) generally entered into force on 25 March 2020 under Order No. 50/2020 issued by the Office of the President of Myanmar and introduced an international standard insolvency framework to Myanmar.

However, the registration of insolvency practitioners by the professional body of insolvency practitioners, the Myanmar Insolvency Practitioners' Regulatory Council (the IP Council), and the Directorate of Investment and Company Administration, which is required to implement the IL, has remained pending despite the entry into force of the IL. This has limited the operation of the IL. On 27 June 2023, the IP Council released four notifications to further implement the IL, by forming the Insolvency Practitioner Certification Committee, Disciplinary Committee and Executive Committee, as well as publishing the IP Council's logo.

On 31 January 2024, the Supreme Court of Myanmar notified that (under Notification No. 130/2024) that the IP Council had determined that to be eligible to be issued an insolvency practitioner certificate, candidates must have a minimum of 10 years' experience as a certified public accountant or 10 years' experience as an advocate.

As at 17 July 2024, no insolvency practitioner certificates have been issued by the IP Council. The implementation of the IL requires that there are certified insolvency practitioners who can be appointed to companies under the IL, such as the appointment of rehabilitation managers (for the purposes of new rehabilitation proceedings under the IL) and liquidators (to undertake the liquidation of companies under the IL).

The formation of these committees may signify a preparedness on the part of the IP Council to register insolvency practitioners and implement the IL, which will be of significant interest to businesses in Myanmar. The availability and implementation of rehabilitation proceedings would, in particular, provide a new means of restructuring companies in financial difficulty (including through compromise of debts and injection of new equity capital).

Law stated - 2 August 2024