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Myanmar

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1. TRENDS

1.1 M&A Market

The Myanmar M&A market has slowed considerably in the past 12 months, in response first to the effect of the COVID-19 pandemic, and subsequently to a state of emergency declared on 1 February 2021 under Order No 1/2021 of the Office of the President of Myanmar (Pro Tem) (“State of Emergency Order”).

The State of Emergency Order was issued in response to alleged fraud regarding voter lists in the 2020 general elections and the former government’s decision not to postpone opening Myanmar’s parliament. It has a term of one year and applies across the country, and effects the transfer, pursuant to Article 418(a) of Myanmar’s Constitution, of all of the legislative, executive and judicial powers of Myanmar’s government to the Commander-in-Chief (CIC) of Myanmar’s armed forces.

The State of Emergency Order has been met with widespread protests across the country, and a civil disobedience movement (CDM) involving strikes by public and private sector employees (particularly in the banking sector).

The State of Emergency Order has also been met with targeted sanctions on Myanmar’s military leaders by major western jurisdictions. In particular, US President Biden issued a new Executive Order 14014 titled “Blocking Property with Respect to the Situation in Burma” on 11 February 2021, providing (as at 12 April 2021) for the sanctioning of 12 current and former military leaders (including the CIC, who was already a sanctioned individual), the CIC’s two adult children (Khin Thiri Thet Mon and Aung Pyae Sone), five companies affiliated with the Myanmar armed forces (including the major military-affiliated conglomerates Myanma Economic Holdings Public Company Limited and Myanmar

Economic Corporation), six companies affiliated with the CIC’s children (A&M Mahar Company Limited, Everfit Company Limited, Seventh Sense Company Limited, Sky One Construction Company Limited, the Yangon Gallery and the Yangon Restaurant), two military units (including the 33rd Light Infantry Division, which was already a sanctioned entity) and the Myanmar government-owned Myanmar Gems Enterprise. The USA has also announced a freeze of USD1 billion in Myanmar government assets held in the USA and has implemented a ban on the export of sensitive defence equipment to Myanmar’s armed forces.

Restrictions on the entry into, and movement within, Myanmar (including restrictions on gatherings and curfews) due to COVID-19 which were implemented prior to the State of Emergency Order also remain in force, further hampering business activity.

In response to these events, planned new investments and expansions of existing projects have stalled, as businesses pause to evaluate the effect of the State of Emergency Order on their operations.

The events of 1 February 2021 have significantly increased the reputational and operational risks of doing business in Myanmar at the present time.

1.2 Key Trends

The Myanmar government implemented a number of important reforms in 2020, although the opportunities from these are unlikely to be fully realised due to the impact of the State of Emergency Order.

The Central Bank of Myanmar (CBM) issued the first two subsidiary licences to the Myanmar subsidiaries of South Korea’s KB Kookmin Bank and Industrial Bank of Korea in Decem-

ber 2020, permitting them to engage in onshore retail banking (as well as providing the wholesale banking services to foreign-owned companies and Myanmar banks, currently permitted to be provided by the licensed branch offices of foreign banks in Myanmar). Further subsidiary licences were issued in January 2021 to Mega International Commercial Bank Co., Ltd., Korea Development Bank, Cathay United Bank Co., Ltd. and Siam Commercial Bank.

This followed the CBM's announcement on 7 November 2019 that it would permit more than 35% foreign investment in local banks on a case-by-case basis and hold a new round of foreign bank licensing, in which foreign banks could apply for both branch and subsidiary licences.

The liberalisation of the insurance sector in 2019 and the liberalisation of the banking sector from 2019 were expected to have a particularly wide-ranging impact on Myanmar's economy, improving financial service product offerings and allowing Myanmar citizens and businesses to better insure against risk and access finance. As noted in **1.1 M&A Market**, as a result of the State of Emergency Order and the CDM, there are significant challenges for the operation of the banking sector in 2020.

There was also a greater focus on infrastructure projects in 2020, as the government made renewing Myanmar's ageing infrastructure a priority ahead of the elections in November 2020, in particular its transport and energy infrastructure. On 18 May 2020, the Myanmar government issued (and shortly afterwards completed) a tender for major solar power projects as part of its COVID-19 Economic Relief Plan. The Myanmar government also continued to support the development of the LNG-to-power project, including granting development rights to a new 1,250MW project in Thilawa, Yangon.

1.3 Key Industries

Statistics from Myanmar's companies registrar, the Directorate of Investment and Company Administration (DICA), show that as of 1 January 2021, foreign investment had been particularly strong recently in the power, manufacturing and real estate sectors, and that historically it has also been strong in oil and gas and transport and communications.

The impact of the COVID-19 pandemic had been felt particularly strongly in the hotel and tourism sector, which was affected by limits on travel to and within Myanmar, and the manufacturing sector, which was affected by measures aimed at social distancing and stay at home orders. The State of Emergency Order and the resulting disruption has further affected these sectors.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

Acquisitions in Myanmar may be undertaken by way of the acquisition of shares in, or a transfer of the business or assets of, the target. In terms of share acquisitions in listed companies, foreign share trading is now possible for companies listed on the Yangon Stock Exchange (YSX); see further **2.3 Restrictions on Foreign Investments**.

However, unsolicited, hostile transactions are in practice not possible in Myanmar. In relation to listed companies, there are currently no takeover regulations in this jurisdiction and there is no history of unsolicited transactions involving YSX-listed companies.

The Myanmar Companies Law (Law No 29/2017) (MCL) also provides for schemes of arrangement. Schemes approved by 75% of shareholders (or creditors) are binding on all shareholders

(or creditors) and the MCL provides for a court, either by the order sanctioning such scheme or a subsequent order, to make provision 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, so the courts have not yet developed their practice regarding such schemes.

2.2 Primary Regulators

The primary regulators for M&A activity in Myanmar are:

- the DICA, which administers the MCL;
- the Myanmar Investment Commission (MIC), established under the Myanmar Investment Law (Law No 40/2016) (MIL);
- the Securities and Exchange Commission of Myanmar (SECM), which administers the Securities and Exchange Law (Law No 20/2013) (SEL), and the YSX which was established pursuant to the SEL in 2015; and
- the Competition Commission, established on 31 October 2018 under Notification No 106/2018 of the Myanmar Government to enforce Myanmar's Competition Law (Law No 9/2015).

2.3 Restrictions on Foreign Investments Foreign Investment Regulation

The MIL, which came into effect on 30 March 2017, combined the previous local and foreign investment laws into one law and provides for a streamlined investment approval process.

Foreign investment restrictions

The MIC issued Notification No 15/2017 titled List of Restricted Investment Activities in relation to Section 42 of the MIL ("Negative List") on 10 April 2017, setting out the types of investments that are restricted to foreign investment, require approval of a Myanmar government ministry or may only be made through a joint venture with a Myanmar company; under the MIR, a Myan-

mar company is required to have at least a 20% shareholding in such a joint venture.

The Negative List was intended to be a comprehensive list of all such restrictions. However, while the MIC has updated the Negative List from time to time – for example, on 9 April 2018, it updated the criteria for approvals from the Ministry of Electricity and Energy (MOEE) for energy sector projects – as Myanmar's laws evolve, the Negative List will become dated, and legal advice should be obtained on the specific restrictions applicable to any proposed transaction at the time of investment.

Permissions to avoid foreign investment restrictions on land ownership

Foreign investors will require a land rights authorisation from the MIC under the MIL to have the right to enter into a long-term lease of land (in view of the restrictions under the 1987 Transfer of Immoveable Property Restriction Law (TIPRL) noted below, which may in practice limit leases of land over one year and transfers of immoveable property to companies considered Myanmar companies without such an endorsement).

Approvals applicable for Myanmar projects

Generally, a permit will be required under the MIL from the MIC for both foreign and local investments that are strategically important, capital intensive, have a large potential impact on the environment or local community, use state-owned land and other designated investments.

The MIC issued the Myanmar Investment Rules (Notification No 35/2017) (MIR) on 30 March 2017 setting out the process of obtaining approval under the MIL.

MIC approval will also be required for the direct (and potentially, indirect) acquisition of a majority of shares or controlling interest in a company with an MIC permit or endorsement. While the

MIC has advised in the past that indirect transfers of shares in companies with MIC permits or endorsements do not need to be notified to it, a prudent approach would be to confirm this with the MIC on a case-by-case basis, as indirect interests are within the scope of the approval requirement under the MIL.

Foreign Ownership Restrictions in Relation to Property

The TIPRL prohibits the transfer of immoveable property to, or its acquisition or lease for more than one year by, foreign citizens or “foreign-owned companies”, defined as companies that are not 50% or more owned or controlled by Myanmar citizens. However, notwithstanding this definition, in practice it is possible that Myanmar governmental authorities may restrict transfers or long-term leases by “foreign companies” as defined in the MCL, being companies with a foreign ownership above 35%.

Foreign Share Trading on the YSX

The YSX, established in 2015, is still developing as a stock exchange, and there are currently only six listed companies (with a seventh, Amata Holding Public Co., Ltd., approved for listing on 28 December 2020). The SECM and YSX have implemented a number of measures to encourage further listings and share trading.

In particular, foreigners were permitted to trade shares on the YSX from 20 March 2020, under Notification No 1/2019 issued by the SECM on 12 July 2019. The YSX issued the Framework for Trading by Foreign Investors on 6 September 2019 implementing the SECM’s notification by setting out the roles and responsibilities of listed companies, securities companies and the YSX in relation to foreigners trading shares on the YSX, and the SECM subsequently issued Instruction No 1/2020 on 6 March 2020 setting out the requirements for securities companies to open accounts for foreigners to trade shares.

Under Instruction No 1/2020, both resident and non-resident foreigners are entitled to trade shares on the YSX. Each listed entity is also permitted to set its own limit for the shareholding by foreigners and, under its Framework for Trading by Foreign Investors, the YSX would suspend purchase orders by foreigners which risked exceeding the upper limit for foreign shareholding, being within 5% of the upper limit set by the company.

2.4 Antitrust Regulations

Myanmar’s Competition Law entered into force on 24 February 2017. This law prohibits collaborations that have the purpose of “extremely raising market dominance” or lessening competition in a limited market, or which 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. However, the Competition Law is a relatively new law and it is not yet clear how its requirements will be applied in practice. The Competition Commission is yet to systematically enforce compliance with this law.

2.5 Labour Law Regulations

Employment is primarily regulated contractually in Myanmar, subject to the requirements of a number of labour laws regulating minimum standards in different aspects of employment, such as overtime and occupational health and safety, including the Employment and Skills Development Law (Law No 29/2013), Shops and Establishment Law (18/2016), 1951 Factories Act and Occupational Safety and Health Law (Law No 8/2019).

Myanmar has amended several of these laws, and there continues to be a push for further

amendment. Under the Employment and Skills Development Law, an employer is required to finalise a written employment contract within 30 days of commencement of employment. The employment contract is required to be filed with the local township office of the Ministry of Labour, Immigration and Population. The Ministry has for this purpose issued Notification No 140/2017 on 28 August 2017 prescribing a template employment contract for use of business in Myanmar.

2.6 National Security Review

There is no specific national security review of acquisitions in Myanmar, although the MIC must consider (together with other criteria) whether an investment proposal is compatible with the national security policies and objectives of the Myanmar government.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

The MCL was passed on 6 December 2017 and entered into force on 1 August 2018 and provides a modern corporate law framework – for example, improving companies’ ability to manage their capital structure and removing barriers to foreign investment, as well as strengthening corporate governance through introducing statutory directors’ duties.

The MCL reforms were accompanied by the introduction of an electronic companies registry (called MyCo), improving the process for corporate filings and transparency around the ownership and management of businesses in Myanmar. Under the MCL, any person may obtain an extract of the corporate information of a registered company from MyCo on payment

of the prescribed fees, set out in Notification No 57/2018 issued by the DICA on 9 July 2018.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover laws, and no changes are expected over the next 12 months, particularly given the situation resulting from the State of Emergency Order.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

Building a stake in a target prior to launching an acquisition offer, while possible under the MCL, is not customary in connection with acquisitions in Myanmar.

4.2 Material Shareholding Disclosure Threshold

Under Notification No 1/2016 of SECM, an extraordinary report would be required in connection with share acquisitions that result in a change in a public company’s parent company or major shareholder (defined as a shareholder with greater than 20% shareholding), or a transfer of its material undertaking.

The daily trades by foreign investors in listed companies would need to be reported to the YSX for the purposes of ensuring compliance with applicable restrictions on foreign shareholding (see further **2.3 Restrictions on Foreign Investments**).

4.3 Hurdles to Stakebuilding

There are no limits on the ability of a company to include rules in its corporate charter which impose hurdles on an acquirer increasing its stake in a target. However, in our experience, such hurdles would not be usual.

4.4 Dealings in Derivatives

There is currently no market for derivative instruments in Myanmar. It is expected that the regulatory framework for such instruments will develop over time as Myanmar's financial market develops.

4.5 Filing/Reporting Obligations

There is currently no market for derivative instruments in Myanmar.

4.6 Transparency

There is no requirement for shareholders to disclose the purpose of their acquisitions. There is no practice of hostile takeovers in Myanmar.

- 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 the following:

- sanctions risk – as noted in **1.1 M&A Market**, following the State of Emergency Order, sanctions have been imposed by a number of jurisdictions, including the USA and the UK, and as a result it will be important to review the ownership and management of potential targets to assess if there are any risks to the transaction under an applicable sanctions programme;
- the licences and approvals obtained by the target company for its business – in particular, as there are varying levels of understanding of, and compliance with, applicable licensing and approval requirements in Myanmar;
- interests in land – this can be challenging due 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 – in February 2020, the Financial Action Task Force returned Myanmar to its grey list of countries which pose a higher risk of money laundering and terrorism financing, only four years after removing Myanmar from the grey list.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

There is no obligation to disclose a deal other than where the material shareholding disclosure thresholds are triggered for public companies (see **4.2 Material Shareholding Disclosure Threshold**).

5.2 Market Practice on Timing

Disclosure of transactions is typically based on the commercial requirements of the parties involved and applicable legal requirements, including any need of a foreign investor to make disclosures such as under stock exchange rules.

5.3 Scope of Due Diligence

As in other jurisdictions, the scope of 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;

As a result of the COVID-19 pandemic and the State of Emergency Order, 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.

5.4 Standstills or Exclusivity

Standstill agreements are not usually demanded in Myanmar. However, buyer protections such as exclusivity are often negotiated between parties.

5.5 Definitive Agreements

Purchase terms are typically documented in definitive agreements. As in other jurisdictions, these typically take the form of a sale and purchase agreement for the applicable shares, business or assets, a shareholders' agreement (if applicable) and any other document required to effect the transfer of the shares, business or assets – for example, conveyances of land.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

The timeline to process an acquisition or sale is typically several months and depends on the nature and complexity of the transaction, relationship of the parties and the period required for due diligence.

Restrictions on movement within, and to, Myanmar, in response to COVID-19 have significantly impeded due diligence procedures and delayed acquisitions, particularly by foreign investors unable to travel to Myanmar.

The State of Emergency Order and resulting disruptions to governmental services may also impact on the time required for a transaction.

6.2 Mandatory Offer Threshold

There is no applicable mandatory offer threshold, reflecting that there are no takeover regulations in Myanmar.

6.3 Consideration

Consideration is most commonly in the form of cash. Where the consideration is financed through loans, such finance is generally obtained offshore, because Myanmar's banking sector is still developing.

However, where an M&A transaction is in the form of a joint venture between a foreign and local Myanmar partner, the Myanmar joint venture partner would typically make its contribution to the project company in kind by contributing assets (such as immovable property), and the foreign joint venture partner, in cash.

In terms of valuation certainty, obtaining accurate financial information on a target company in Myanmar is often challenging due to the poor accounting practices and record-keeping of companies in the country. However, while tools to mitigate this uncertainty (such as closing accounts) are available, in practice the purchase price is generally not adjusted, reflecting in part the difficulty of obtaining relevant financial information.

In addition, 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) (FEML). Prior approval from CBM is likely to be required in practice for loans, while equity fund transfers need only to be declared to CBM, under the FEML.

Obtaining approval from the CBM for loans is likely to be delayed as a result of the State of Emergency Order.

6.4 Common Conditions for a Takeover Offer

The terms of M&A offers are negotiated between the parties. However, schemes of arrangement are subject to court supervision (although in practice these are not used).

6.5 Minimum Acceptance Conditions

For schemes of arrangement, which are available as a matter of law (although practically not used in Myanmar), schemes approved by 75% of shareholders (or creditors) are binding on all shareholders (or creditors) and either by the order sanctioning such scheme or a subsequent order, a court can make provision for the transfer of a company's undertaking or its shares, pursuant to such scheme.

In addition, the approval of an offer to acquire the shares of a public company by 75% of shareholders within four months of such offer will give rise to a right on the part of the acquirer to compulsorily acquire the shares of dissenting shareholders upon notice within two months, subject to any objection proceedings.

6.6 Requirement to Obtain Financing

There are, in principle, no restrictions on including conditions (such as for obtaining finance) as part of business combinations. Schemes of arrangement could, in principle, be conditional, subject to the court's supervision.

6.7 Types of Deal Security Measures

Deal protection and cost coverage mechanisms typical to M&A (such as confidentiality or non-disclosure agreements, non-solicitation agreements and break-up fees or reverse break-up fees) are not prohibited in Myanmar and may be

used to protect deals from third-party bidders as in other jurisdictions.

No specific contractual considerations have developed in response to COVID-19, reflecting the slowing of new investments in sectors affected by the pandemic (and more recently by the State of Emergency Order). Given the changing situation and the potential for further downside risk, we would expect that acquirers and investors would seek to include material adverse change clauses as a condition to transactions.

There have been no regulatory changes that have impacted the length of interim periods, although disruptions to governmental services may impact on the ability to meet closing conditions for an investment.

6.8 Additional Governance Rights

A bidder that does not seek 100% ownership of a target may be able to negotiate governance rights such as board representation, as well as other typical protections which could be expected in a shareholders agreement such as reserved matters and pre-emptive rights.

6.9 Voting by Proxy

Under the MCL, individual shareholders may approve a proxy, and corporate shareholders may approve a corporate representative, to represent them at general meetings.

6.10 Squeeze-Out Mechanisms

As noted in **2.1 Acquiring a Company**, schemes of arrangement provide a means of squeezing out minority shareholders that have not agreed to an acquisition. In addition, the approval of an offer to acquire the shares of a public company by 75% of shareholders within four months of such offer will give rise to a right on the part of the acquirer to compulsorily acquire the shares of dissenting shareholders upon notice within

two months, subject to any objection proceedings.

6.11 Irrevocable Commitments

Irrevocable commitments of shareholders in relation to an acquisition are not used in Myanmar, which reflects the fact that there is not a developed public takeover market.

7. DISCLOSURE

7.1 Making a Bid Public

Other than the disclosure obligations applicable to public companies – described above in **4.2 Material Shareholding Disclosure Threshold** – there are no specific legal obligations to make a bid public.

7.2 Type of Disclosure Required

Companies may issue shares to individual investors from time to time, although a prospectus approved by the SECM would need to be prepared under the MCL and SEL in connection with an offer to the public.

7.3 Producing Financial Statements

Financial statements are not required to be disclosed as part of any legal disclosure requirement for bids in Myanmar.

Under the Myanmar Accountancy Council Law (Law No 31/2015), financial statements are required to be prepared in accordance with the Myanmar Financial Reporting Standards, which are based on IFRS.

7.4 Transaction Documents

On 1 December 2020, the Office of the President issued Notification No 118/2020, further implementing the Extractive Industries Transparency Initiative, adopted in 2014 by Myanmar, by requiring all contracts in the extractives sector to

be made publicly available from 1 January 2021. This requirement has not been enforced to date.

There are no broader requirements under Myanmar law for transaction documents to be disclosed.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

Directors owe statutory directors' duties to the company under the MCL, such as to act with due care and diligence and in good faith in the company's best interests. These duties would apply to a directors' conduct in the context of overseeing M&A activities. However, Section 166(e)(i) of the MCL provides that in exercising their duty to act in good faith and in the best interests of the company, a director may consider the likely long-term consequences of their decisions, including the impact on employees, business relationships with customers and suppliers, the environment and the company's reputation.

8.2 Special or Ad Hoc Committees

Special or ad hoc committees are not typically used for business combinations.

8.3 Business Judgement Rule

While the business judgment rule applies in Myanmar under Section 165(b) of the MCL, directors' duties and this rule were only introduced in Myanmar as part of the MCL reform, and its application has yet to be tested in the country's courts.

8.4 Independent Outside Advice

The nature of independent outside advice is subject to the discretion of the directors. Typically, the directors of a target company will retain independent legal advisers.

8.5 Conflicts of Interest

The MCL provides for statutory directors' duties, including the duty to act in good faith in the company's best interests. However, there has not been judicial scrutiny of these duties as yet. While obligations regarding conflicts of interest also applied to directors under Former MCA, this has not to date been the subject of judicial scrutiny in Myanmar.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

In practice, unsolicited, hostile transactions are not possible in Myanmar.

9.2 Directors' Use of Defensive Measures

In practice, unsolicited, hostile transactions are not possible in Myanmar.

9.3 Common Defensive Measures

In practice, unsolicited, hostile transactions are not possible in Myanmar.

9.4 Directors' Duties

In practice, unsolicited, hostile transactions are not possible in Myanmar.

9.5 Directors' Ability to "Just Say No"

In practice, unsolicited, hostile transactions are not possible in Myanmar.

10. LITIGATION

10.1 Frequency of Litigation

Litigation is not common in Myanmar, including in connection with M&A deals, reflecting that Myanmar's legal system – particularly in relation to sophisticated commercial disputes – is still developing its capacity.

10.2 Stage of Deal

The matter is not applicable in this jurisdiction.

10.3 "Broken-Deal" Disputes

We are not aware of any major precedents being established in 2020 regarding broken-deal disputes. It is possible that there may be commercial disputes relating to recently announced major transactions in relation to which an investor or acquirer may seek to delay or cancel as a result of the ongoing situation resulting from the State of Emergency Order.

11. ACTIVISM

11.1 Shareholder Activism

Following the declaration of the State of Emergency Order on 1 February 2021, there has been a strong focus on companies with ties to Myanmar's armed forces, both from within the Myanmar community and the Myanmar diaspora, as well as from the wider international community. Pressure has been brought to bear through publicity campaigns, boycotts of products within Myanmar by distributors and consumers and reports and open letters.

For example, in February 2021, the Singapore Stock Exchange asked Emerging Towns & Cities Singapore Ltd – which is developing the Golden City development in Yangon – to explain its links to the Myanmar military following a report by Justice for Myanmar, a rights group in Myanmar, claiming it had paid millions of dollars to the Myanmar armed forces.

11.2 Aims of Activists

The aim of activists is to pressure companies with business ties to Myanmar's armed forces to sever those ties, including by withdrawing from supply or purchase arrangements or investments. This is a recent phenomenon which is

a result of the State of Emergency Order, and which has not been impacted by the pandemic.

11.3 Interference with Completion

Primarily activists have targeted completed transactions to date. The primary goal of activists in Myanmar is to disrupt business dealings between third parties (including local and foreign investors) and the Myanmar armed forces and affiliated entities.

Myanmar Legal MHM is the Yangon office of Mori Hamada & Matsumoto, headquartered in Tokyo. It provides an international standard of service in Myanmar, practising Myanmar, Japanese and English law, with a focus on investments, mergers and acquisitions, and financing. Recent major transactions include advising AEON Mall Co., Ltd. on a joint venture with Shwe Taung Real Estate Company Limited to develop and operate shopping malls in Myanmar, and advising four of the six international insurers on their joint ventures with Myanmar insurers fol-

lowing the recent opening of the insurance sector to foreign investment. Since 2012, MHM has also been actively working to assist Myanmar in updating its laws and regulations and establishing new bodies, including developing the Thilawa Special Economic Zone. Through this work and its experience in handling transactions in Myanmar, the firm has developed a comprehensive understanding of how to efficiently and effectively navigate the political and economic landscape in the country.

AUTHORS



Kana Manabe is qualified in Japan and has over ten years' experience practising in Asia, with a strong focus on Myanmar. She is involved in a comprehensive study of the

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Win Naing is a leading corporate lawyer in Myanmar, with more than 20 years of experience in practice. He specialises in foreign direct investment, international

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Nirmalan Amirthanesan is an Australian lawyer who has been practising in Myanmar since joining MHM in 2016. Prior to this, he worked at the Australian Treasury and Australia's

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Myanmar Legal MHM

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Trends and Developments

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On 1 February 2021, a state of emergency was declared under Order No 1/2021 of the Office of the President of Myanmar (Pro Tem) (“State of Emergency Order”). The State of Emergency Order has a term of one year and applies across Myanmar, effecting the transfer under Article 418(a) of Myanmar’s Constitution of all of the legislative, executive and judicial powers of Myanmar’s government to the Commander-in-Chief (CIC) of Myanmar’s armed forces, Min Aung Hlaing.

Summarised below are some of the major implications of the State of Emergency Order to date for businesses operating in Myanmar. We note that it is likely that the operating environment in the country will remain challenging during the term of the State of Emergency Order and that the situation may continue to change rapidly. In response to these events, there has generally been a suspension of planned new investments and expansions of existing projects, as businesses pause to evaluate the effect of the State of Emergency Order on their operations. We expect investors will be waiting to see signs that the situation has stabilised prior to considering further investment into Myanmar.

Civil Disobedience Movement (CDM)

A significant proportion of Myanmar’s citizens have responded to the State of Emergency Order with a multi-faceted civil disobedience movement (CDM). The CDM involves, among others, street protests, mass strikes, boycotts of goods and services produced by or otherwise associated with the Myanmar armed forces, as well as seeking suspension of payment of government taxes – this in response to a request issued by

the Committee Representing Pyidaungsu Hluttaw, a committee which claims to represent the members of the Myanmar parliament who were elected to office but not sworn in following the November 2020 general elections as a result of the State of Emergency Order.

The strikes, initiated by health sector workers, have been widely adopted by both the private (in particular, banking) and public sectors. In some government ministries, local media estimate that well over 50% of employees are currently engaging in CDM activities, including not engaging in work. As a high-profile example, U Kyaw Moe Tun (Myanmar’s Ambassador to the United Nations) and Kyaw Zwar Minn (Myanmar’s former Ambassador to the UK), publicly announced their opposition to the State of Emergency Order – in U Kyaw Moe Tun’s case, in a speech to the United Nations General Assembly on 26 February 2021 calling for action against Myanmar’s armed forces.

Similarly, media reports indicate that most banks have had to close branches due to staff shortages, and are largely maintaining their businesses through ATMs and supporting online banking services. Estimates from local media and the Myanmar Container Trucking Association indicate that as many as 90% of Myanmar’s container vehicles are participating in the CDM, considerably slowing trade at ports.

The ongoing street protests in Yangon have further depleted staffing resources for companies. These operational issues pose significant challenges for businesses, which must navigate the imperative to maintain business operations and

comply with local legal requirements as enforced in Myanmar (such as paying taxes) while bearing in mind the expectations of its staff and the broader Myanmar community.

Internet and Power Shortages

In response to the protests, the Myanmar government had initially instructed internet network operators to turn off network connectivity on 6 February 2021. The disruptions in internet connectivity had a significant impact on business, in particular on banking operations. Currently internet connectivity is now permitted, although with regular disruptions, including more recently to mobile data services. It remains difficult to predict the timing of disruptions and businesses require flexibility to maintain operation. Telenor Myanmar Limited, a network service operator in Myanmar which had been publishing instructions from the Myanmar government directives regarding internet connectivity, announced on 14 February 2021 that it had been instructed to keep such directives confidential.

There was also a major nationwide power shortage reported on 5 March 2021 and businesses may need to prepare for further power shortages ahead as Myanmar enters the hotter months of the year.

Businesses operating in Myanmar will need to carefully monitor current events to make informed decisions to maintain their business operations. For example, if a contract in Myanmar cannot be performed due to the effects of the CDM or internet or power shortages, it will be important to consider whether a force majeure clause is applicable or, alternatively, if it is possible to avoid performance of the contract on the grounds of frustration under Section 56 of the Contract Act of Myanmar.

Security Situation

The security situation in Myanmar has become increasingly challenging since the State of Emergency Order, with ongoing demonstrations and protest activities being suppressed with reports of violence. On 16 March 2021, martial law was declared in certain townships in Yangon, which confers administrative and judicial authority in those areas to a regional commander of the armed forces. As part of the martial law order, military tribunals are empowered to try those in the area (including civilians) with breaches of certain laws, including in relation to exciting disaffection towards the Myanmar government.

As a result of the overall security situation, foreign embassies have issued alerts to their citizens, with the British Embassy recently advising its citizens to leave Myanmar by commercial means. The situation could be expected to result in a decrease in the expatriate labour force in Myanmar.

Sanctions Risk

A number of countries, such as the USA and the UK, have imposed sanctions in response to the State of Emergency Order, although so far these have been targeted to specific military and military-linked persons and entities. The targeted nature of these sanctions reflects a policy imperative of not generally restricting investment into Myanmar.

In particular, US President Biden issued a new Executive Order 14014, titled Blocking Property with Respect to the Situation in Burma, on 11 February 2021. As at 12 April 2021, 16 current and former military leaders (including the CIC, who was already a sanctioned individual), the CIC's two adult children (Khin Thiri Thet Mon and Aung Pyae Sone), five companies affiliated with the Myanmar armed forces (including the major military-affiliated conglomerates Myanma Economic Holdings Public Company

Limited (MEHPCL) and Myanmar Economic Corporation (MEC)), six companies affiliated with the CIC's children (A&M Mahar Company Limited, Everfit Company Limited, Seventh Sense Company Limited, Sky One Construction Company Limited, the Yangon Gallery and the Yangon Restaurant), two military units (including the 33rd Light Infantry Division, which was already a sanctioned entity) and the Myanmar government-owned Myanmar Gems Enterprise have been sanctioned. Under these sanctions, a broad asset freeze and restrictions on entry into the USA have been imposed on sanctioned individuals and entities.

The USA has also announced a freeze of USD1 billion in Myanmar government assets held in the USA. The US Department of Commerce has implemented a ban on the export of sensitive equipment subject to the US' Export Administration Regulations to Myanmar's armed forces. This includes – since a specific designation on 4 March 2021 by the Department of Commerce – exports of such equipment to Myanmar's Ministry of Home Affairs, Ministry of Defence, MEHPCL and MEC.

The EU, UK and Canada have also imposed targeted sanctions to date. The Council of the European Union passed two regulations and decisions on 22 March 2021, amending the existing framework for sanctions under Council Decision 2013/184/CFSP of 22 April 2013 and Council Regulation (EU) No 401/2013 of 2 May 2013, and providing for asset freezes and travel bans of:

- individuals from Myanmar's armed forces, police force or Border Guard Police (including those responsible for obstructing the provision of humanitarian assistance or independ-

ent investigations into alleged serious human rights violations);

- individuals and entities undermining democracy or the rule of law in Myanmar;
- entities owned or controlled by, or which generate revenue for, provide support to, or benefit, Myanmar's armed forces; and
- associated individuals and entities – as at 12 April 2021, 11 individuals have been designated (including the CIC).

In the case of the UK, these are pursuant to the new sanctions regime established following Brexit under the Sanctions and Anti-Money Laundering Act 2018, and the Burma (Sanctions) (EU Exit) Regulations 2019 established concurrently with Brexit to preserve certain existing sanctions, both comprising asset freezes and travel bans of sanctioned individuals. As at 12 April 2021, nine individuals, MEHPCL and MEC have been designated under these regimes in connection with the State of Emergency Order, including the CIC (being in addition to existing sanctions which had been in place for certain Myanmar military personnel under the Global Human Rights Sanctions Regulations (2020)).

Canada added nine individuals, including the CIC, to its list of sanctioned individuals under the Special Economic Measures (Burma) Regulations of 2007, which impose freezes on the Canadian assets of, and prohibits certain transactions with, sanctioned individuals (in addition to existing sanctions of military personnel and military-linked entities).

Further sanctions may be expected from these jurisdictions and potentially from other jurisdictions, such as Australia.

MYANMAR TRENDS AND DEVELOPMENTS

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Myanmar Legal MHM is the Yangon office of Mori Hamada & Matsumoto, headquartered in Tokyo. It provides an international standard of service in Myanmar, practising Myanmar, Japanese and English law, with a focus on investments, mergers and acquisitions, and financing. Recent major transactions include advising AEON Mall Co., Ltd. on a joint venture with Shwe Taung Real Estate Company Limited to develop and operate shopping malls in Myanmar, and advising four of the six international insurers on their joint ventures with Myanmar insurers fol-

lowing the recent opening of the insurance sector to foreign investment. Since 2012, MHM has also been actively working to assist Myanmar in updating its laws and regulations and establishing new bodies, including developing the Thilawa Special Economic Zone. Through this work and its experience in handling transactions in Myanmar, the firm has developed a comprehensive understanding of how to efficiently and effectively navigate the political and economic landscape in the country.

AUTHORS



Kana Manabe is qualified in Japan and has over ten years' experience practising in Asia, with a strong focus on Myanmar. She is involved in a comprehensive study of the

country's laws. She has been involved in numerous transactions in Myanmar, including advising Nippon Life Insurance Company and Mitsui Sumitomo Insurance Company Limited on their joint ventures following the opening of Myanmar's insurance sector to foreign investment, and the establishment of Toyota Myanmar Co., Ltd. in the Thilawa Special Economic Zone. She is a co-author of "The forefront of Myanmar legal affairs – theory and practice" (2016, Shoji-houmu).



Win Naing is a leading corporate lawyer in Myanmar, with more than 20 years of experience in practice. He specialises in foreign direct investment, international

business transactions, cross-border M&A and intellectual property laws, oil and gas, and property. He is highly ranked as a leading lawyer for general business law in Myanmar. He is an Advocate of the Supreme Court of the Republic of the Union of Myanmar.



Julian Barendse is an international corporate lawyer (qualified in Australia) with extensive cross-border experience across Asia. Since joining MHM in 2020, Julian has

been focused on assisting investors with their investments into Myanmar and the broader ASEAN region. His experience includes cross-border transactions in a number of sectors, including oil and gas, renewable energy, logistics and infrastructure, advising in jurisdictions across the region, including Japan, Indonesia, Thailand, Singapore, the Philippines, Australia and New Zealand.



Nirmalan Amirthanesan is an Australian lawyer who has been practising in Myanmar since joining MHM in 2016. Prior to this, he worked at the Australian Treasury and Australia's

competition regulator, the ACCC, advising on a range of regulatory matters, particularly Australia's foreign investment regulations and investment treaty negotiations, competition and consumer laws, and company tax.

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