

Jurisdiction: Myanmar
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Myanmar has laws of general application and sector-specific laws that apply to mergers and acquisitions. An investor must examine these laws carefully before deciding to make an investment in Myanmar.

Laws of general application include the recently enacted Myanmar Companies Law (The Pyidaungsu Hluttaw Law No. 29/2017) and the Myanmar Investment Law (The Pyidaungsu Hluttaw Law No. 40/2016). The Myanmar Companies Law, together with the Myanmar Companies Regulations (Ministry of Planning and Finance (“MOPF”) Notification No. 66/2018), governs the establishment, governance, and dissolution of companies and other corporate entities in Myanmar. It provides for the rights and obligations of shareholders, members, and officers (including directors) of a company in Myanmar. On the other hand, the Myanmar Investment Law, together with the Myanmar Investment Rules (MOPF Notification No. 35/2017), provides the rules and regulations governing investments by citizen and foreign investors within Myanmar. In particular, the Myanmar Investment Law establishes the conditions and regulations applicable in respect of investments in Myanmar and provides certain guarantees, protections and benefits afforded to investors in relation to these investments.

As regards mergers and acquisition transactions involving listed companies in Myanmar, the Securities Exchange Law (The Pyidaungsu Hluttaw Law No. 20/2013) and the Securities Exchange Rules (Ministry of Finance

Notification No. 1806/2015) may also be relevant. In this respect, although the Securities Exchange Law and Rules do not yet provide guidelines in respect of the takeover of a public or listed company, the Ministry of Finance and the Securities and Exchange Commission of Myanmar (“SECM”) are nevertheless authorized to issue implementing regulations in this regard.

An investor should also take into account the State-owned Economic Enterprises Law (The State Law and Order Restoration Council Law No. 9/1989) and the Myanmar Competition Law (The Pyidaungsu Hluttaw Law No. 9/2015) which may, among others, restrict or prohibit investments in certain industries or prescribe the manner or provide certain guidelines upon which an investment in Myanmar should be made. These two laws will be discussed in more detail below.

Key sector-specific laws include: (1) the Financial Institutions Law (The Pyidaungsu Hluttaw Law No. 20/2016) governing banks and other non-bank financial institutions (including related mergers and acquisitions); and (2) the Telecommunications Law (The Pyidaungsu Hluttaw Law No. 31/2013) and the Competition Rules for the Telecommunications Sector issued by the Ministry of Transportation and Communications regulating the information and communications technology sector.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The key government regulators and agencies in respect of mergers and acquisitions in Myanmar include the following:

- Central Bank of Myanmar (“CBM”), which among others, regulates the inflow and outflow of foreign exchange into and out of Myanmar.
- Directorate of Investment and Company Administration (“DICA”) which is primarily tasked to implement and enforce the Myanmar Companies Law and serves as the register and primary regulator of companies and other corporate entities in Myanmar;
- Myanmar Investment Commission (“MIC”) which is tasked to implement and enforce the Myanmar Investment Law. Investments (and any accompanying incentives) made pursuant to the Myanmar Investment Law are subject to the approval of the MIC; and
- SECM, which is tasked to implement the Myanmar Securities Exchange Law and Rules and generally regulates the securities market in Myanmar.

Moreover, merger and acquisition transactions in certain industries may be captured by the regulatory authority of Myanmar’s sector regulators such as the Ministry of Commerce, Ministry of Transportation and Communications, and Ministry of Electricity and Energy.

Notably, the Myanmar Competition Law provides for the establishment of the Myanmar Competition Commission tasked to implement the said law and adjudicate complaints related to its purported violations. Such a Competition Commission, however, has not been established yet as of the time of writing.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

While Myanmar law does not appear to prohibit such bids, it also currently does not yet provide guidelines in respect of the takeover of a publicly listed company. Notably, in relation to the transfer of shares in a public company (transferor) to another (transferee), the Myanmar Companies Law grants the transferee the power to acquire the shares of the transferor held by

any dissenting shareholder of the transferor in cases where such transfer has been approved by shareholders of the transferor holding no less than three-fourths in value of the shares being transferred.

That said, hostile takeovers are uncommon, if not non-existent in Myanmar due in part to the former government policy that prohibited foreign investors from acquiring shares in citizen-owned Myanmar companies and the infancy status of its securities market. Pending rules and regulations concerning the takeover of listed companies, and in the absence of any major shift in government policy, we do not expect Myanmar’s limited experience on hostile takeovers to change in the short term.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The Myanmar Companies Law may require certain corporate approvals before a company may enter into a merger and acquisition transaction. It also provides certain requirements and procedures in relation to the offer and issuance of shares by public companies, as well as the transfer of shares by such public companies. The Myanmar Competition Law and Rules further regulate economic activities that may affect competition in Myanmar, including merger and acquisition transactions. In this respect, the Myanmar Competition Law generally prohibits agreements with the object and effect of restraining competition in the market subject only to very limited exemptions. As mentioned above, however, the Myanmar Competition Commission has yet to be formed and, accordingly, the Myanmar Competition Law has yet to be implemented fully.

Moreover, merger and acquisition transactions involving foreign investments may be prohibited or restricted by applicable Myanmar laws, rules and regulations covering the activity intended to be undertaken in relation to the



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Partnership, has more than 25 years of corporate legal practice in South East Asia.

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foreign investment. The State-Owned Economic Enterprises Law and the Myanmar Investment Law are particularly relevant in this respect. Briefly, the State-Owned Economic Enterprises Law provides that the Myanmar government has the sole right to carry out economic enterprises identified as state-owned economic enterprises. These activities include, among others, the exploration, extraction, and sale of petroleum and natural gas and electricity generation services. That being said, the Myanmar government, in the interest of the State, may allow joint ventures between the Myanmar government and any other person or economic organization to carry out any restricted activity subject to applicable (unspecified) conditions.

In addition to the foregoing, the Myanmar Investment Commission likewise issued a list of restricted investment activities under

Notification No. 15/2017 pursuant to the provisions of the Myanmar Investment Law and Rules. Under Notification No. 15/2017, investment activities are classified as follows: (1) activities that may only be carried out by the Myanmar government; (2) activities that are not allowed to be carried out by foreign investors; (3) activities that may only be carried out in the form of a joint venture with citizens and citizen-owned entities; and (4) activities that may only be carried out upon approval of the relevant authorities. The Myanmar Investment Law also provides that the Myanmar Investment Commission is authorized to seek the approval of the Union Parliament for investment activities which may have a significant impact on security, economic conditions, the environment, and national interests of the Union and its citizens.

Finally, even in the absence of any written law or regulation restricting foreign investment in a particular sector, it bears noting that there are internal policies adopted from time to time by the Myanmar authorities and sector regulators that could prohibit or restrict investment by foreigners.

5. What documentation is required to implement these transactions?

The documentation includes the usual transaction documents agreed and executed by the parties which, depending on the structure of the transaction agreed upon, may include a share purchase agreement, shareholders' agreement, joint venture agreement, or an asset purchase agreement. Side agreements between the parties and relevant financing documents (as will be discussed below) may likewise be included in the documentation.

Moreover, in transactions captured by certain sector regulators, additional requirements may be necessary especially if notification to or approval by the relevant regulator is required. For instance, in respect of a share transfer involving a company with a permit or endorsement from the MIC, prior approval of the MIC may be required under certain circumstances. The transaction documents may then include documents that the MIC (or any other sector regulator) may require the relevant parties to execute and/or submit.

6. What government charges or fees apply to these transactions?

The documentation for a merger and acquisition transaction may be subject to stamp duties and registration fees. In this regard, the Myanmar Stamp Act (India Act II, 1899) imposes stamp duties for instruments listed in Schedule 1 thereof (e.g., agreements, affidavits, deeds, bills of lading, etc.) that are either (1) executed in Myanmar; or (2) executed outside of Myanmar but relates to any property situated, or to any

matter or thing done or to be done in and is received in Myanmar.

Stamp duties must be paid before or at the time of execution of an instrument if executed within Myanmar. If the instrument is executed outside of Myanmar, it should be stamped within three months from the date when it is brought into Myanmar. Depending on the instrument involved as determined by the stamp duty officer, stamp duties may range from a negligible 300 Myanmar Kyats (approx. 0.20 United States Dollars) to a certain percentage of the consideration for the transaction (e.g., 2%). The consequences of not stamping in the manner provided by law include confiscation or impoundment of the instrument, inadmissibility of the instrument as evidence in court (except in particular cases when ten times the amount of the proper duty is paid as penalty), and prosecution.

The Registration Act (Act 16 of 1908), currently in effect, and the New Registration Law (The Pyidaungsu Hluttaw Law No. 9/2018), which will take effect once the relevant implementing notification is issued, provides that it is mandatory for certain instruments to be registered with the Registrar of Deeds and Assurances. Such instruments that are required to be registered mandatorily include those gifting immovable property and those which purport to create, declare, assign, limit or extinguish any rights, title or interest in immovable property. Under the Registration Act and New Registration Law, an unregistered instrument will not affect any immovable property and may not be received as evidence of any transaction affecting such property subject only to limited exceptions. This means that instruments purporting to create any rights, title or interest in and to a land are generally not effective unless they are registered. Registration fees in this regard would have to be paid.

7. Do shareholders have consent or approval rights in connection with a deal?

This would depend on the structure of the deal and how the deal would affect the rights of a company's shareholders. For instance, the Myanmar Companies Law requires shareholder approval in instances where, among others, the company intends to vary shareholder rights, issue preference shares, alter its constitution, alter or reduce its capital, and dispose its main undertaking. If the deal results in these instances, then shareholder approval for each such instance would be required.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Yes – the Myanmar Companies Law specifically lists and sets out the duties of company directors. In this regard, company directors have the duty to, among others, act with care and diligence, act in good faith and in the company's best interests, not to improperly use their position and information, and comply with the law and the constitution. In view of this, should the directors fail to fulfil their duties and act in pursuit of the company's best interests, shareholders may have the cause of action to file either a case for oppressive conduct of affairs against the relevant officers of the company or a derivative suit and bring or intervene in proceedings involving the company.

That being said, it bears noting that the foregoing duties of directors and remedies afforded to shareholders are new developments in Myanmar. It thus remains to be seen how effective these duties and remedies would be in protecting or enforcing shareholder rights in Myanmar.

9. In what circumstances are break-up fees payable by the target company?

We are unaware of any specific provision of law requiring the target company to pay break-up

fees in case an intended deal does not materialize. Break-up fees are contractual in nature and parties should be free to contractually agree in this regard. We note though that such agreement on break-up fees (whether it is the acquirer or the target company that pays) is uncommon in Myanmar and there does not appear to be any ostensible general commercial practice in this regard.

10. Can conditions be attached to an offer in connection with a deal?

Yes – conditions may be attached to an offer in connection with a deal. This is contractual in nature and is generally allowed provided that the stipulated conditions do not contravene any law or public policy. Having said that, it should be noted that publicly listed companies may be required to disclose and seek approval of and otherwise comply with the regulating conditions of the SECM in relation to a deal.

Common conditions imposed by foreign companies in transactions with Myanmar companies include those related to immovable property (e.g., acquisition or rectification of certain properties or property rights) and security (e.g., charge of shares, pledge of movable properties). The structure of the local company may also change or its constitution may be revised pursuant to a deal. Under which circumstance, shareholder approval would have to be obtained pursuant to the Myanmar Companies Law.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Financing is a relatively new development in Myanmar and, accordingly, the rules and regulations governing financial arrangements and related policies and practices have not yet crystallized. Having said that, it should be noted that financing documents including applicable security arrangements are typically executed separately from the main transaction

documents, although these transaction documents may have references to such financing documents (and the financing documents may similarly refer to the main transaction documents).

In respect of the foregoing, do note that CBM approval would have to be obtained in the case of offshore financing. The CBM also currently imposes a maximum debt to equity ratio of 3:1 or 4:1 in this respect. Moreover, if such financing is secured by immovable property in Myanmar, investors should note that an onshore security trustee (usually a local bank or financial institution) may be required under Myanmar law and there may thus be additional financing documents in this regard. Companies that have an MIC permit or MIC endorsement are likewise required to notify the MIC prior to executing or entering into any such security arrangement involving immovable property in Myanmar.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

There are instances when minority shareholders may be squeezed out of a company. As mentioned, in relation to the transfer of shares in a public company (transferor) to another (transferee), the Myanmar Companies Law grants the transferee the power to acquire the shares of the transferor held by any dissenting shareholder of the transferor in cases where such transfer has been approved by shareholders of the transferor holding no less than three-fourths in value of the shares being transferred.

The aforesaid notwithstanding, do note that the legality of any shareholder squeeze would depend in part on the relevant industry the company is in and the sector-regulator involved. As mentioned, there are industries where foreign investment can only be made either in partnership with the Myanmar government or through a joint venture with a local Myanmar company. The MIC may also impose minimum citizen ownership requirements in respect of

investments made under an MIC permit or MIC endorsement. Under these circumstances, the equity interest of a local Myanmar company in the relevant venture may not be squeezed out to go below the thresholds set under the law or by the MIC or the relevant sector regulator.

13. What is the waiting or notification period that must be observed before completing a business combination?

None at this point – the Myanmar Competition Law and Myanmar Competition Rules have yet to provide the procedure for merger notification and/or review in Myanmar.

14. Are there any industry-specific rules that apply to the company being acquired?

Yes, as mentioned above sector-specific laws include the Financial Institutions Law governing banks and other non-bank financial institutions (including related mergers and acquisitions) and the Telecommunications Law and the Competition Rules for the Telecommunications Sector issued by the Ministry of Transportation and Communications regulating the information and communications technology sector.

15. Are cross-border transactions subject to certain special legal requirements?

A cross-border transaction may be subject to the foreign ownership restrictions and prohibitions discussed above if it involves the acquisition of shares or formation of a joint venture company with a Myanmar partner to engage in a restricted economic activity in Myanmar.

Moreover, the flow of funds into and out of Myanmar is likewise subject to the relevant CBM regulations. As mentioned above, offshore loans (including shareholder loans) are subject to CBM approval. On the other hand, the repatriation or transfer of funds offshore may be subject to CBM approval depending on whether the relevant transaction is classified as



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a capital transaction (for which CBM approval is required) or an ordinary transaction (for which CBM approval is not required) under the relevant CBM regulations.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

It bears noting that Myanmar does not have a singular labour code or framework governing all employment related matters. Instead, Myanmar's labour laws are scattered among various laws passed by the legislature and the policies and practices of the Ministry of Labour, Immigration and Population. None of these laws

and regulations, however, specifically deal with employment matters arising from a merger and/or acquisition transaction. We are likewise unaware of any existing policy or practice by the relevant authorities in this regard. Accordingly, as we understand it, employment arrangements following a merger or acquisition are generally contractual in nature where any transfer of employment would have to be agreed upon by the employee and the new employer.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Admittedly, Myanmar's legal and regulatory framework is still developing following almost six decades of isolation. That being said, there are at least three key developments are seen to substantially impact merger and acquisition transactions in Myanmar: (1) the implementation of the Myanmar Companies law; (2) the implementation of the Myanmar Competition Law; and (3) the passage of intellectual property laws.

First, the Myanmar Companies Law finally took effect last 1 August 2018 reforming and liberalizing Myanmar's general corporate regulatory framework. Among the most significant reforms introduced by the Myanmar Companies Law is in relation to the definition of a foreign company. Previously a company is considered as a foreign company if its share capital is not entirely owned or controlled by Myanmar citizens, i.e., even if only one share is held by a foreigner, the company will be considered a foreign company and the accompanying restrictions and prohibitions would apply to it. In contrast, the Myanmar Companies Law allows a 35% foreign equity participation in Myanmar companies, and treats such foreign invested companies as Myanmar companies. While it remains to be seen how this particular provision of the Myanmar Companies Law will be implemented, and whether it would be applied across all industries and sectors, the 35% foreign equity threshold in Myanmar companies theoretically opens the door for foreign investors to engage in economic activities previously reserved only to Myanmar companies (e.g., banking, insurance and road transportation).

Second, while the Myanmar Competition Law is already in effect, it has not been fully implemented yet. Indeed, and as mentioned, the Myanmar Competition Commission has not been established yet as of the time of writing. In this respect, the establishment

of the Myanmar Competition Commission and its full implementation of the Myanmar Competition Law will surely impact merger and acquisition transactions in Myanmar especially if, upon full implementation, mandatory merger notifications are established and thresholds for any such notification are prescribed by the said Commission. Investors will then have to carefully take these into account in structuring their investments in Myanmar.

Finally, the passage of intellectual property laws will most certainly give a much-needed boost to merger and acquisition transactions in Myanmar. Myanmar currently has an antiquated, colonial-era and, needless to state, inadequate regime applicable to intellectual property and this nurtures a genuine concern for infringement among potential investors. The passage of intellectual property laws recognizing intellectual property rights and providing a procedure for registration or protection of such rights, and the proper enforcement of these rights would thus allay investor concerns.

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