

# MYANMAR

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## **LAW AND PRACTICE:**

**p.3**

*Contributed by Kelvin Chia Yangon Ltd.*

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.



# Law and Practice

Contributed by Kelvin Chia Yangon Ltd.

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**Kelvin Chia Yangon Ltd.** is an international commercial law firm that has been in active operation in Myanmar since 1995 and has close to 50 experienced lawyers, paralegals and business researchers based in Yangon and Mandalay. KCY is a subsidiary of Kelvin Chia Partnership (KCP) in Singa-

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## 1. General

### 1.1 Main Sources of Law

Myanmar does not have a singular piece of legislation or framework governing real estate: rights and obligations pertaining to real property (including the transfer, sale or disposition thereof) are scattered in the provisions of various laws.

These laws include but are not limited to the following:

- the Myanmar Constitution (2008), which provides that the state is the ultimate owner of all lands and natural resources in Myanmar;
- the Transfer of Property Act (1882) (TPA), which regulates the transfer of property (including immovable property) in Myanmar and defines what constitutes transfer of property, the kind of properties that may be transferred, and the necessary conditions in order for such transfer of property to be valid and enforceable. More particularly, the TPA sets out the rules in relation to the transfer, sale, mortgage and lease, gift or exchange of immovable properties;
- the Land Acquisition Act (1894), which provides a mechanism for the state and companies to acquire land compulsorily when necessary for a public purpose;
- the Lower Burma Town and Village Lands Act (1889), which governs the rights and obligations of a landholder in Lower Burma as defined therein (which includes the Yangon Region) and how a landholder may obtain or lose such rights and obligations;
- the Upper Burma Land and Revenue Regulation (1889), which governs the rights and obligations of a landholder in Upper Burma as defined therein (which includes the Mandalay Region), particularly with respect to the payment of land revenue;
- the Transfer of Immovable Property Restriction Act (1987) (TIPRA), which provides a general prohibition on the transfer of immovable property to a foreigner or foreign-owned company (including by way of purchase, gift, mortgage, exchange or transfer). It also limits the term of leases of immovable property to foreigners or foreign companies, subject only to the exceptions therein as approved by the relevant authority. For this purpose, immovable property is defined under the TIPRA as “land and benefits arising out of land, buildings and things built or imbedded in the earth and other things attached to the building”;
- the Farmland Law (2012), which establishes a system for the designation and registration of farmlands, and provides a procedure for the relevant authorities to issue

- land use certificates, which create rights and obligations for the use and disposition of such farmlands;
- the Vacant, Fallow and Virgin Lands Management Law (2012), which regulates the use by Myanmar citizens, Myanmar state organs and joint venture investors of land that was previously tenanted but has since been abandoned (vacant and fallow land) or land that has never been tenanted (virgin land);
  - the Special Economic Zones Law (2012) (SEZ Law), which regulates the use of land located in areas designated as special economic zones. Notably, the law allows a foreign investor in an economic zone to lease or use land for a period of up to 50 years, renewable for another period of up to 25 years;
  - the Myanmar Investment Law (2016) (as amended), which enshrines Myanmar's foreign investment framework, including land use rights that may be secured by foreign investors. In particular, the law provides that a foreign investor may enter into long-term land leases of up to 50 years if it obtains either a permit or an endorsement from the Myanmar Investment Commission (MIC); and
  - the Condominium Law (2016), which defines a 'condominium' and allows foreigners to purchase and own up to 40% of the units therein.

## 1.2 Main Market Trends and Deals

The highly anticipated Myanmar Companies Law (2017), which repealed and superseded the century-old Old Companies Act (1914), finally came into effect in August 2018 and significantly liberalised the definition of a 'foreign company' under Myanmar law. Previously, a 'foreign company' was defined as a company that is not wholly-owned by Myanmar citizens; a company was considered foreign under Myanmar law if just one share was owned by a person who is not a Myanmar citizen. This changed under the Myanmar Companies Law, which now allows companies to have up to 35% foreign equity without being considered foreign.

That being said, even a company with 35% or less foreign ownership may not be permitted to own or acquire rights of ownership in certain categories of land, such as farmland. The land could also be vested in or be under the administrative control of a particular Ministry, which may, notwithstanding any provisions of the Myanmar Companies Law, disallow ownership of the land by any company with any foreign interest. In short, positions may not always align, and it is best to review the title in the land and do basic due diligence before acquiring the land. In calculating the 35% interest, it is understood that direct and indirect ownership will be taken into account.

## 1.3 Proposals for Reform

Expectations were high when the Myanmar Companies Law – which redefined what constitutes a foreign company – was enacted, but these expectations have been tempered in the

short period since the law has been implemented. Presently, several government ministries (including the Yangon City Development Committee) still subscribe to the position that a company with foreign ownership – no matter how small – is prohibited from owning rights over land. This may change over time as different state and region governments and Ministries align their policies with the Myanmar Companies Law.

## 2. Sale and Purchase

### 2.1 Categories of Property Rights

With the very limited exception of freehold land, all land in Myanmar is owned by the state. Nevertheless, rights over land may be acquired by individuals and companies through grants, leases or licences issued by the relevant authorities (eg, Yangon City Development Committee (YCDC), Department of Urban and Housing Development) or other Ministries. Some of these rights may be assigned, transferred or disposed by the holder thereof, while others require the approval of the issuing or other relevant authority prior to any such assignment, transfer or disposition, and others may not be assigned, transferred or otherwise disposed.

In this regard, property rights on land that may be acquired by individuals and companies can be categorised as follows:

- **Collectively Owned Land** – this is a type of land registered and used in accordance with the provisions of the Condominium Law belonging to all co-owners (unit owners) of a condominium where such condominium and other collectively owned property is located.
- **Farmland** – this is a type of land owned by the state but where the rights to possess and cultivate the same are granted to a Myanmar natural person. In this regard, farmlands are generally reserved for the cultivation of agriculture and/or breeding livestock, unless any other use has been permitted by the relevant authorities (eg, the Central Administrative Body of the Farmland and its regional and state counterparts). Notably, the right to use farmland also carries with it the right to sell, mortgage, lease, exchange or gift such a right to use, whether wholly or partially.
- **Freehold Land** – granted during the colonial era, this is the only type of land in Myanmar where full ownership rights are vested on a Myanmar citizen. As such, freehold land may be used for any lawful purpose and leased, sold or otherwise transferred to a Myanmar citizen without restriction, and may only be expropriated by the government if public interest requires it, subject to the payment of compensation and in accordance with the Land Acquisition Act.
- **Forest Land** – this type of land is governed by the Forest Law (1992), which requires the granting of permission for extracting timber, firewood or other economic uses of

forest land. Under the Forest Law, forest dwellers can be forcibly evicted from the areas despite long-term traditional residence therein.

- **Grant Land** – this type of land is owned by the state but leasehold rights to possess and use the land for a lawful purpose are granted to a Myanmar citizen on a long-term basis. Such rights may be enjoyed by the grantee or his successor in interest for a period ranging from ten to 90 years, extendible subject to the approval of the relevant authority. Rights over grant land may be leased or otherwise transferred, subject to the conditions specified in the land grant.
- **Leased Land** – this is a type of land owned by the state but which a lease allowing the right to possess and use the land for a specified purpose has been granted by the government to an individual or company. Land use authorisations conferred on a foreign invested company under the Myanmar Investment Law fall under this category. Typically, the conditions for the use and, if permitted, sublease, assignment, transfer or disposition of the land/land rights are stated in the lease.
- **Licensed Land** – this is a type of land owned by the state but where certain limited rights and obligations as specified in a written licence have been granted by local land authorities to a Myanmar citizen. These limited rights granted under this type of land may only be assigned or transferred with the approval of the aforesaid local land authorities.
- **Permit Land** – this is a type of land owned by the state where limited use and possession rights for a temporary period of one year have been granted to a Myanmar citizen (generally civil servants). Rights in this type of land may not be sold or otherwise transferred but may subsequently be converted to Grant Land, subject to stated conditions (generally completion of construction) having been met.
- **Religious Land** – this includes land declared as such by the Ministry of Home Affairs, pursuant to a proponent’s application. If approved, the land will be converted to religious land and ownership of it will be transferred to the Ministry of Religious Affairs and Culture. In turn, the Ministry of Religious Affairs and Culture will grant the beneficial use of the land to an applicant, who shall hold it in trust for the religious purpose for which the land was converted. The trustee is typically nominated by members of the religious community utilising the land. Once the land is converted to religious land, it retains its classification and cannot be altered without the consent of the government.
- **Vacant, Fallow and Virgin Land** – vacant and fallow lands are lands previously cultivated by tenants but that have since been abandoned by such tenants. Virgin lands are those that have not been previously cultivated or tenanted. Such lands form a part of the government land bank and may be allocated to Myanmar citizens, state-owned economic organisations, and foreign joint venture inves-

tors (subject to compliance with the Myanmar Investment Law) for agriculture, livestock, poultry farming, aquaculture or any other use permitted and approved by the Central Committee for the Management of Vacant, Fallow and Virgin Lands.

## 2.2 Laws Applicable to Transfer of Title

The TPA governs the transfer of real property in Myanmar in the absence of any other special law governing the particular land. The TPA defines ‘transfer of property’ as an “act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons.” The TPA provides, among others, who may transfer, what may be transferred, and the consequences of such transfer.

The TIPRA, on the other hand, contains restrictions on transfers or dealings with land in favour of foreigners.

The Condominium Law governs the transfer of units in developments that have been successfully registered as a condominium, and the transfer of the underlying land into collective ownership of the subsidiary proprietors of the units.

Depending on the type or classification of real property involved, the provisions of the Farmland Law, the Vacant, Fallow and Virgin Lands Management Law, the SEZ Law, the Myanmar Investment Law, and the Condominium Law may also apply with respect to the conditions and approvals necessary for any such transfer.

The Deed Registration Law (2018) and the Stamp Act (1899) also apply in respect of the relevant formalities to be observed for transfers.

## 2.3 Effecting Lawful and Proper Transfer of Title

Land rights in Myanmar are generally conveyed through a written deed duly executed by the parties, stamped by the Myanmar Stamp Office, and registered with the Registration Office. Title insurance is unavailable in Myanmar.

## 2.4 Real Estate Due Diligence

Given the lack of a publicly accessible central land recordal or registration database in Myanmar, the land grant, land lease and/or other land rights certificate, land map and land history/record for a particular plot of land maintained and issued by the relevant authorities are usually examined and relied upon in connection with any investigation into title.

The land grant, land lease and/or other land rights certificates typically provide information on the land, including its particulars; the landholder; the land grantee; the duration of the grant, lease or use; any payment of fee/charges payable for the grant lease or use; and conditions for the renewal of the grant lease or right to use. They also set out the relevant

covenants, obligations and terms and conditions to be complied with by the land grantee or tenant.

## 2.5 Typical Representations and Warranties

Typical representations and warranties in real property contracts generally involve those that concern the capacity of a seller and the status of the subject real property.

In particular, in relation to the capacity of the seller, the representations and warranties would normally include those that pertain to the status of the seller (eg, whether it is an entity in good standing based on Myanmar laws), its legal capacity to possess, use and transfer real property, and the authority of the individual signing or executing the relevant conveyance deed or agreement.

As regards the real property itself, relevant representations and warranties include those relating to the integrity of the title, pending disputes and litigation, encumbrances, classification and permitted uses of the land, and payment of land revenue and other taxes and fees chargeable on real property. These representations and warranties are important, given the absence of a publicly accessible central land recordal or registration database in Myanmar.

Depending on the type of land involved and the particulars of the buyer and seller, a complaint for violation of contractual representations and warranties involving real property may be lodged with the Land Investigation Commission or the Rule of Law and Stabilisation Committee, Land Utilisation Management Committees at a district and township levels and, pursuant to the Specific Relief Act (1877) and the Code of Civil Procedure (1909), the relevant courts. That said, it is unclear exactly how contractual provisions relating to representations and warranties on real property may be enforced by Myanmar courts, due to the lack of jurisprudential guidance on the matter. In this respect, where the parties to a contract have reduced their agreement in writing, courts are likely to treat such written contract as a conclusive statement of the intentions of the parties, and thus apply its provisions.

## 2.6 Important Areas of Law for Investors

With the exception of condominiums, foreigners (ie, non-Myanmar citizens) are prohibited from purchasing and owning real property in Myanmar. At most, a foreign individual or entity may only obtain land use rights as discussed above by agreement either with a grantee of such rights or with the government of Myanmar. Moreover, the TIPRA prohibits foreigners from acquiring immovable property or interests in immoveable property except pursuant to short-term leases for a term not exceeding one year, subject to the following exceptions:

- the SEZ Law allows a foreign investor in an economic zone to lease or use land for a period of up to 50 years, renewable for another period of up to 25 years;
- the Myanmar Investment Law provides that a foreign investor may enter into long-term land leases of up to 50 years if it obtains either a permit or an endorsement from the MIC (an “MIC Permit” or “MIC Endorsement”). This period may be extended twice for a period of ten years each;
- the MIC may confer overarching land rights authorisation on a developer so that the developer may extend long-term leases to foreign investors, which do not then have to separately obtain an MIC Permit or MIC Endorsement; and
- the TIPRA provides that the relevant ministry may allow exemptions from the provisions of said act to:
  - (a) a foreign government for the use of its diplomatic mission accredited to Myanmar;
  - (b) United Nations’ organisations; or
  - (c) any other organisations of individuals.

## 2.7 Soil Pollution or Environmental Contamination

There is no existing ruling or clear precedent regarding the liability of an innocent buyer relating to soil pollution or environmental contamination in Myanmar. That being said, it is believed that a transferee of real property rights should not be made responsible for soil pollution or environmental contamination if it was not caused or contributed to by said transferee.

## 2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

Given the lack of a publicly accessible central land recordal or registration database in Myanmar, the land grant, land lease and/or other land use certificate, land map and land history/record for a particular plot of land maintained and issued by the relevant authorities are usually examined and relied upon in connection with any investigation into title. However, in the process of applying for an MIC Permit or an MIC Endorsement, the MIC would seek recommendations from the relevant authorities and the region governments, which would then usually raise objections if the area in question has been designated for particular zoning or planning purposes, inconsistent with the purpose contemplated by the project. General investigations may also be conducted at the relevant departments of the state or region governments or relevant authorities that have administrative jurisdiction over the land as to the existence of any restrictions relating to the use of the land, considering zoning or planning objectives.

It is possible to enter into specific development agreements with the relevant authorities for the development of land in Myanmar, through either private-public partnerships, joint venture agreements or other forms of concessions.

## 2.9 Condemnation, Expropriation or Compulsory Purchase

The taking or expropriation of land by the government for a public purpose is permitted under the Land Acquisition Act.

The procedure for taking or expropriating land begins with a declaration of intended acquisition being published in the Gazette, stating the district or other territorial division in which the land is situated, the purpose for which it is needed, its approximate area, and, if a plan has been made of the land, the place where such plan may be inspected. This declaration is conclusive evidence that the land is needed for a public purpose and, after making such a declaration, the state is allowed to take possession of the land through a specially appointed collector, who also determines the level of compensation for those claiming to have rights and interests to the land taken or expropriated.

The Land Acquisition Act also provides for a mechanism whereby any person interested in such taken or expropriated land who has not accepted the award of the collector may, by written application to the collector, require the matter to be referred by the collector to the determination of the courts. This applies whether the objection of such interested person refers to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

## 2.10 Taxes Applicable to a Transaction

The prevailing stamp duty as set out below should be paid:

- sale or transfer of immovable property by conveyance: 2% on the amount or value;
- rental of immovable property for a term of less than one year but not more than three years by bond: 0.5% of the amount or value of the average annual rent reserved; and
- rental of immovable property for three years or more: 2% of the amount or value of the average annual rent reserved.

The Stamp Act further provides that a 2% additional stamp duty shall be applied for the transfer of properties located within the Naypyitaw Development territory, the City of Yangon Development territory, and the City of Mandalay Development territory.

In addition, income arising from the sale of capital assets such as land is typically subject to a 10% capital gains tax imposable on either local or foreign currency. Unless otherwise agreed upon, capital gains taxes are generally borne by the seller, while stamp taxes are generally shouldered by the buyer.

Rental income arising from long-term leases is chargeable as income in the hands of the lessor. A company that is a

lessor has to account for such rental as part of its income for purposes of computing corporate income tax. A natural person who receives rental income is subject to a tax rate of 10% on his or her receipts.

In a share transfer or share deal in respect of a property-owning company, capital gains tax is imposed on the gains arising from the sale of shares. Stamp duty is imposed at the rate of 0.1% on the value of the shares.

## 2.11 Legal Restrictions on Foreign Investors

Foreigners are generally precluded from acquiring real property in Myanmar, subject to the same exceptions as set out in **2.6 Important Areas of Law for Investors**. As discussed above, the TIPRA generally prohibits foreigners from acquiring real estate or interests in real estate, other than pursuant to short-term leases for a term not exceeding one year.

## 3. Real Estate Finance

### 3.1 Financing Acquisitions of Commercial Real Estate

To reiterate, foreigners are not allowed to purchase and own land in Myanmar. However, use and possessory rights over land may be obtained by a foreign investor through long-term leases either from the government or from a landholder or grantee who is allowed to sublease a particular plot of land. It is common for the rent in such long-term leases to be paid upfront by the lessor.

In this respect, to finance the aforesaid rent and the development of the real property, an entity may use its onshore funds, obtain shareholder loans, call for more capital, or publicly offer its shares. Such entity may also obtain a loan onshore – through local or foreign banks licensed by the Myanmar Central Bank – or offshore. It is possible for mortgages to be created over such long-term leases for raising finance with licensed financial institutions in Myanmar.

Depending on the chosen financing structure, approvals from the relevant authorities (eg, the Directorate of Investment and Company Administration (DICA), MIC and Myanmar Central Bank) may be required.

### 3.2 Typical Security Created by Commercial Investors

The following may be used as security in Myanmar financing transactions.

#### Mortgages

Mortgages are recognised in Myanmar. The TPA defines a mortgage as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an exist-

ing or future debt, or the performance of an engagement that may give rise to a pecuniary liability. In this regard, the most common forms of mortgages utilised in Myanmar are as follows:

- Simple mortgage – this is where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money.
- English mortgage – this is where the mortgagor binds himself to repay on a certain date, and to transfer the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment.
- Mortgage by deposit of title-deeds – this mortgage is created upon the deposit by the mortgagor of title-deeds to the creditor or his agent with mutual intention to create a security. No written instrument is required and it is the act of deposit of the title-deeds with the intention to create a security for a loan that constitutes the mortgage.

It should be noted, however, that an onshore security trustee (typically a local bank) is required before real property may secure an offshore loan. Moreover, companies operating under the auspices of the MIC (whether through an MIC permit or an endorsement) are required to notify the MIC before any mortgage of the relevant land to any person during the permitted investment period.

### **Pledges**

A pledge as security for payment of a debt or performance of a promise is recognised in Myanmar. Under Myanmar law, the goods pledged may be retained not only for payment of the debt or performance of the promise, but also for the interest of such debt, and reimbursement of all necessary expenses incurred by the lender in respect of the possession or the preservation of the goods pledged.

In practice, shares in the onshore borrowing company are sometimes pledged to the foreign lender, although there is a question whether a pledge may be created over shares through a deposit of share certificates, since share certificates are not strictly documents of title. Share charges are becoming more common as such. Some lenders also require share charges in the offshore special purpose vehicle holding the shares of the onshore borrowing company. Hence, in case of default by the onshore borrower, the lender may enforce either onshore in Myanmar or offshore against the special purpose vehicle. Any such charge or other security over shares should be registered with the Companies Registration Office.

### **3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders**

An onshore security trustee (typically a local bank) is required before real property may be used to secure an offshore loan. Moreover, companies operating under the auspices of the MIC (whether through an MIC permit or endorsement) are required to notify the MIC before any mortgage of the relevant land to any person during the permitted investment period.

### **3.4 Taxes or Fees Relating to the Granting and Enforcement of Security**

The Stamp Act provides that all instruments chargeable with duty and executed by any person in Myanmar shall be stamped before or at the time of execution of said instrument. It also provides that, if an instrument is not duly stamped, the stamp duty and revenue officer shall require the payment of the proper duty payable or the amount required to make up the same, together with a penalty of MMK500 or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof (whether such amount exceeds or falls short of MMK500). In addition to these monetary penalties, the other consequences of not stamping and/or insufficiently stamping an instrument may include the confiscation/impoundment of the instrument, prosecution, and inadmissibility of the instrument as evidence in court.

The Deed Registration Law (2018) provides that it is mandatory for certain instruments to be registered with the Registrar of Deeds and Assurances. Such instruments include:

- instruments of gifts of immovable property;
- non-testamentary instruments that purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, in immovable property;
- non-testamentary instruments that acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;
- leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent; and
- non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingents, to or in immovable property.

Under the Registration Law, an unregistered instrument will not affect any immovable property or be received as evidence of any transaction affecting such property. This means that, generally, instruments purporting to create any rights, title

or interest in and to a land will not be effective unless they are registered.

Charges created by companies are also registrable under the Myanmar Companies Law, and hence mortgages over land created by a company may also have to be registered thereunder, with nominal registration fees payable.

### **3.5 Legal Requirements Before an Entity Can Give Valid Security**

Approval from certain relevant authorities may be required before an entity can give valid security, depending on the chosen financing structure. These authorities may include the DICA, Central Bank of Myanmar, MIC, certain government ministries, and local authorities, among others. Moreover, as previously mentioned, an onshore security trustee (typically a local bank) is required before real property may secure an offshore loan.

### **3.6 Formalities When a Borrower is in Default**

Depending on the type of land involved and the particulars of the buyer and seller, a complaint may be lodged with the Land Investigation Commission or the Rule of Law and Stabilisation Committee, Land Utilisation Management Committees at the district and township levels and, pursuant to the Specific Relief Act (1877) and the Code of Civil Procedure (1909), the relevant courts. That said, it is unclear as to exactly how security over real property may be enforced by Myanmar courts due to the lack of jurisprudential guidance on the matter. In this respect, where the parties to a contract have reduced their agreement in writing, courts are likely to treat such a written contract as a conclusive statement of the intentions of the parties and thus apply its provisions.

Registration under the Registration Law and the Myanmar Companies Law, as applicable, in accordance with the timing provided under their respective provisions, is critical for the validity and enforceability of any security over land.

### **3.7 Subordinating Existing Debt to Newly Created Debt**

Under the Insolvency Act (1920), the courts have full power to decide all questions that may arise in the case of insolvency, whether they are questions of title or priority, or of any nature whatsoever, and whether they involve matters of law or fact. In this respect, the courts may apply the common law principles of common sense, justice, equity and good conscience. However, it is unlikely for any properly created and registered security to become subordinated to a newly created debt except for debts in favour of certain persons who are given special preference under the Myanmar Companies Law. Such creditors include Myanmar tax and revenue authorities in respect of taxes, cesses and rates due, and employees, in respect of salaries and payments due within two months prior to winding up.

### **3.8 Lenders' Liability Under Environmental Laws**

There appear to be no existing rulings or clear precedents regarding a lender's liability for environmental contamination of land. Without any such express rules or precedents, the lender should not be liable for pollution of the real property, provided that it did not cause or contribute to such pollution.

### **3.9 Effects of Borrower Becoming Insolvent**

The Insolvency Act governs the rules relating to insolvency proceedings in Myanmar. Generally, any transfer of interest made in good faith and for valuable consideration shall not be affected by insolvency proceedings. For this purpose, a transfer of interest includes any transfer of interest in property and the creation of any charge upon property. In this regard, the Insolvency Act provides that any transfer of property not made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall be voidable and may be annulled by the courts if the transferor is adjudged insolvent on a petition for insolvency presented within two years after the date of the transfer.

The Insolvency Act also provides that every transfer of property, payment, obligation incurred and judicial proceeding taken or suffered by an insolvent person in favour of another creditor, with a view of giving that creditor preference over the other creditors, shall be deemed fraudulent and void if such person is adjudged as insolvent. Regardless of this, nothing in the Insolvency Act shall invalidate the following:

- any payment by the insolvent to any of his creditors;
- any payment or delivery to the insolvent;
- any transfer by the insolvent for valuable consideration; and
- any contract or dealing by or with the insolvent for valuable consideration.

Finally, a secured creditor petitioning for the adjudication of a debtor as insolvent has the option of either stating his willingness to relinquish the relevant security for the benefit of the creditors in the petition, or giving an estimate of the value of such security. In the latter case, the creditor may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

### **3.10 Consequences of LIBOR Index Expiry**

The effect of the expiry of LIBOR should be examined on a case-by-case basis. To mitigate potential risks, parties to a contract may seek to agree on a transitional clause or a replacement rate. Moreover, given that Myanmar's financial market is still in its infancy, it is unlikely the Myanmar government will enact legislation suggesting a replacement rate to be adopted by contracting parties.

## 4. Planning and Zoning

### 4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

The Myanmar National Building Code provides that all major land use developments that include new construction, extension, retrofitting, increase of floor area, and changes in usage of buildings/land must conform with zoning classifications. In this respect, the laws discussed above concerning the various classifications of land in Myanmar and their respective permissible conditions effectively apply as zoning laws as well. In addition, specific notifications and issuances of local authorities relating to the zoning of urban areas may also apply.

For instance, the YCDC has drafted a Yangon Zoning Plan, which is intended to provide a comprehensive height control and zoning plan for the Yangon Region.

### 4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The Myanmar National Building Code applies to both new builds and refurbishments. It has seven sections pertaining to:

- planning, environment, administration and legislation;
- architecture and urban design;
- structural design;
- soil and foundation;
- building services;
- building materials; and
- construction practices and safety.

It should be noted that the provisions of the Myanmar National Building Code do not prevent the installation of any material or prohibit any design or method of construction not specifically prescribed by it, provided that any such alternative has been approved. In this respect, an alternative material, design or method of construction should generally be approved where the relevant building authority finds that the proposed design is satisfactory and complies with the intent of the provisions of the Myanmar National Building Code, and that the material, method or work offered is, for the purposes intended, at least the equivalent of that prescribed in the aforesaid Code in quality, strength, effectiveness, fire resistance, durability and safety.

### 4.3 Regulatory Authorities

The applicable laws and restrictions, and the regulating authority, would generally depend on the classification of the land. Moreover, depending on the location of the parcel of land, issuances of the relevant local authorities may also apply (eg, YCDC for the Yangon Region, Thilawa Management Committee for the Thilawa Special Economic Zone).

### 4.4 Obtaining Entitlements to Develop a New Project

The Myanmar National Building Code provides that all major land use developments that include new construction, extensions, retrofitting, increase of floor area, and changes in usage of buildings/land require a planning permit to be issued by the Development Planning and Building Authority. However, such a Development Planning and Building Authority has not yet been established and it has so far been Myanmar's Ministry of Construction that issues such planning permits. For the Yangon Region, such building permits may be issued by the YCDC.

### 4.5 Right of Appeal Against an Authority's Decision

In general, an appeal against an administrative authority's decision in Myanmar is made by:

- first, addressing the deficiencies of the application as stated by the authority and refile the application; and
- second, if the application is still denied after such refile, appealing to the next higher ranking official within the same authority.

For instance, insofar as the Myanmar National Building Code is concerned, an applicant for a planning or building permit has the right to revise his or her application and/or reapply based on the reasons for denial given by the relevant authority. Similarly, at the DICA, an appeal against a denial by a frontline officer may be done by appealing to the officer that is next higher in rank.

Theoretically, the Supreme Court of Myanmar has the power to issue writs based on common law tradition (eg, certiorari, prohibition, mandamus) against administrative bodies based on the Supreme Court's powers under the Myanmar Constitution and the Union Judiciary Law. However, this is untested and it is unclear how a decision of the Supreme Court against an administrative body and in favour of an investor (whether local or foreign) will be enforced.

### 4.6 Agreements with Local or Governmental Authorities

Depending on the project structure, developers could enter into private-public partnership agreements, joint ventures, concession agreements and lease agreements with the relevant authorities.

### 4.7 Enforcement of Restrictions on Development and Designated Use

Construction or work for which a permit is required shall be subject to inspection by the relevant building authority, and such construction or work shall remain accessible and exposed for inspection purposes until approved. Approval as a result of an inspection shall not be construed to be approval of a violation of the provisions of all relevant laws or of

other issuances or ordinances in Myanmar. It may also be necessary to obtain a building completion certificate issued by the regional authority that has administrative jurisdiction in the location of a particular development.

## 5. Investment Vehicles

### 5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Foreigners who wish to invest and conduct business in Myanmar may rely on the investment framework enshrined in the Myanmar Companies Law (2017) (Companies Law) and the Myanmar Investment Law (2016) (MIL), and its implementing rules (MIL Rules) and notifications. Outside of such mainframe investment laws, specific investment activities may also be subject to special laws, regulations and/or relevant government policies.

In order to conduct business activities in Myanmar, a foreign investor must establish either a private limited company or a branch office with the Companies Registration Office (CRO) of the DICA under the Ministry of Planning and Finance. There is no separate concept of a representative office in Myanmar (except in the banking and insurance sectors), and foreign companies that wish to establish a representative office typically register non-revenue-generating branch offices with business activities that are limited to representative-office type activities (such as marketing, liaison services and market research services).

A private limited company established by foreigners in Myanmar may be wholly foreign-owned or constituted as a joint venture. The Companies Law defines a foreign company as “a company incorporated in [Myanmar] in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent.” Nevertheless, it should be stressed that the definition of a foreign company under the Companies Law should not by itself be interpreted to mean that foreigners will automatically be allowed to invest in a particular sector in Myanmar (such as real property) up to the prescribed 35% threshold – this will further depend on laws and policies covering each specific sector/activity. Given that the Companies Law only came into effect in August 2018, it is still unclear how this will be enforced in the real property sector.

### 5.2 Main Features of the Constitution of Each Type of Entity

A company constitution functions as the standard constitutive document for companies incorporated in Myanmar. A company is not required to state its object or purpose in the constitution. In this respect, a company has full legal capacity to carry on any business or activity, do any act, or enter into any transaction within and outside Myanmar, as

long as it is lawful and all necessary permits and licences are obtained.

### 5.3 Minimum Capital Requirement

There is no minimum capital requirement for companies incorporated in Myanmar under the Companies Law.

For a company applying for an MIC Permit or MIC Endorsement, the minimum amount of capital that has to be committed towards a project for purposes of securing an MIC Permit would have to be proposed by an investor in its application for an MIC Permit, and needs to be commensurate with the project in question and subject to the review and assessment of the MIC.

For purposes of being considered for any Tax Incentives under the MIL in connection with any capital expansion plans, which would include for instance tax incentives allowing a right to import materials and equipment during the construction period, the MIC requires a minimum commitment in terms of capital in the amount of USD300,000. The MIC has a right to specify the timing for such injection.

Finally, before any company can bring shareholders’ loans from offshore into Myanmar, there has to be a paid up capital of at least USD500,000. This is a requirement of the Central Bank of Myanmar.

### 5.4 Applicable Governance Requirements

Myanmar does not have a separate code of corporate governance for business organisations. As such, the provisions of the Companies Law relating to corporate governance generally apply. The Companies Law similarly has provisions governing the management, administration and governance of business organisations; it provides that a company shall have a name and registered office, and outlines the procedure for meetings of a company’s board of directors. Notably, the Companies Law exempts small companies from complying with certain corporate governance requirements. For this purpose, a small company is defined as a company other than a public company or subsidiary of a public company that satisfies the following conditions:

- it and its subsidiaries have no more than 30 employees (or such other number as may be prescribed under the Companies Law); and
- it and its subsidiaries had annual revenue in the prior financial year of less than MMK50 million in aggregate (or such other amount as may be prescribed pursuant to the Companies Law).

### 5.5 Annual Entity Maintenance and Accounting Compliance

The costs relating to the maintenance and accounting compliance of a Myanmar company depend on the type of enti-

ty involved and the number of transactions in which it is engaged.

For instance, compliance costs will certainly be lower if an entity is a normal company registered with the DICA. Such costs will substantially increase if the company is either a public company, a listed company, a company in a Special Economic Zone, or a company with an MIC level investment.

## 6. Commercial Leases

### 6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Commercial leases are recognised in Myanmar. However, as mentioned, the TIPRA prohibits foreigners from leasing immovable property for a term exceeding one year subject to the following exceptions:

- the SEZ Law allows a foreign investor in an economic zone to lease or use land for a period of up to 50 years, renewable for another period of up to 25 years;
- the Myanmar Investment Law provides that a foreign investor may enter into long-term land leases of up to 50 years if it obtains either a permit or an endorsement from the MIC. This period may be extended twice for a period of ten years each;
- the MIC may confer overarching land rights authorisation on a developer so that said developer may extend long-term leases to foreign investors, which do not then have to separately obtain an MIC Permit or MIC Endorsement; and
- the TIPRA provides that the relevant ministry may allow exemptions from the provisions of the said act to:
  - (a) a foreign government for the use of its diplomatic mission accredited to Myanmar;
  - (b) United Nations' organisations; or
  - (c) any other organisations of individuals.

### 6.2 Types of Commercial Leases

Parties to a lease agreement are free to negotiate and agree on the terms. In this respect, commercial lease agreements may range from a base or net lease (where rent is charged by the landlord solely for use of the space and other costs are shouldered or paid for by the tenant) to a gross or full-service lease (where rent covers not only the use of the space but also utilities, janitorial services and insurance, among other costs).

### 6.3 Regulation of Rents or Lease Terms

Rent is generally negotiable among the parties. While the Urban Rent Control Act (1960) provides that the President of Myanmar or his duly appointed inspector has the right to determine the standard rent in urban areas, this particular provision of the act is currently not enforced. Moreover, the

Myanmar government previously expressed an intention to impose rent controls to curb rental prices, but has not done so as of the time of writing.

### 6.4 Typical Terms of a Lease

The TIPRA prohibits foreigners from leasing immovable property for a term exceeding one year, unless the exceptions discussed in **2.6 Important Areas of Law for Investors** apply (eg, if the foreign investor has obtained an MIC Permit or MIC Endorsement). Hence, lease contracts involving foreign companies without an MIC Permit or MIC Endorsement typically have one-year terms, with an option to renew annually. Similarly, rent is also generally paid annually although, due to several economic and political factors, foreign investors can now negotiate bi-annual or even quarterly payments with local lessors.

The maintenance and repair of real estate are typically stipulated and agreed upon by the parties in the contract.

### 6.5 Rent Variation

Generally, the rental fee payable remains the same throughout the duration of the lease (especially for annual leases). However, it should be noted that lease payments may be paid upfront (at the beginning of the lease period) if the lease is annual or for a longer period. Moreover, if the lease is longer than one year (eg, 25 years), the lease agreement may reflect incremental increases in lease payments over time.

### 6.6 Determination of New Rent

Changes or increases in rent are determined by agreement of the parties, unless a lease agreement or contract otherwise provides a mechanism for such an increase (eg, a provision in the lease agreement stating that rent shall increase by 10% annually).

### 6.7 Payment of VAT

There is no VAT in Myanmar. However, a 5% commercial tax is payable on rental payments, typically shouldered by a tenant.

### 6.8 Costs Payable by Tenant at Start of Lease

Any costs other than rent at the start of a lease will depend on the contractual arrangement between the parties – eg, whether the lease is a net lease, gross lease or a mixture of both. Typically, in addition to the amount of rent due, a security deposit is payable at the beginning of the lease as well as stamp duty so that the landlord may stamp the lease.

### 6.9 Payment of Maintenance and Repair

The maintenance and repair of common areas are generally paid for by the developer, who will impose maintenance fees on its tenants. If the real property involved is a condominium, a condominium association will be constituted and be responsible for the management, maintenance and repair of such collectively owned premises.

**6.10 Payment of Utilities and Telecommunications**

This would generally depend on the contractual arrangements between the developer and its tenants.

**6.11 Insuring the Real Estate that is Subject to the Lease**

The insurance sector in Myanmar is relatively underdeveloped, and it is not common for a lease contract to contain provisions relating to insurance. In the case of a large-scale development, the developers would typically be the party responsible for insuring the building against fire and other usual risks.

**6.12 Restrictions on Use of Real Estate**

The landlord may impose contractual restrictions and/or conditions on the tenant relating to the use of real property. Moreover, the classification of the subject property and its location are also relevant in determining the permissible uses of said property and the restrictions applicable thereto.

**6.13 Tenant's Ability to Alter and Improve Real Estate**

The contractual arrangements between the parties will stipulate whether a tenant may alter or improve the real estate. The parties may agree on the conditions, if any, for implementing such alteration or improvements, provided that they do not violate the applicable laws.

**6.14 Specific Regulations**

Specific laws and regulations may apply to certain types of real estate (eg, the SEZ Law, the Condominium Law). The relevant ministries, such as the Ministry of Hotel and Tourism, may also have notifications and issuances governing properties within their jurisdiction. These laws, notifications and issuances affect the real property and construction sectors in that they may prescribe certain usage and/or construction requirements to entities within the scope of their regulatory authorities.

**6.15 Effect of Tenant's Insolvency**

The insolvency of a tenant should generally not affect the right of a landholder to receive rental payments, but it is not uncommon for lease agreements in larger-scale developments to provide that the tenant's insolvency constitutes a breach of the lease agreement and would allow the landlord to re-enter into possession.

**6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations**

As previously mentioned, lease payments are often paid upfront by a tenant to cover an entire lease term. Moreover, security deposits intended to cover any damage to the property caused by the tenant are quite common in Myanmar.

**6.17 Right to Occupy After Termination or Expiration of a Lease**

Unless the relevant lease agreement or contract provides otherwise (eg, through automatic renewal clauses), a tenant generally does not have the right to occupy a piece of real estate after the expiry or termination of the lease. To ensure that the tenant leaves the property on the date originally agreed upon, a landlord may send notices reminding the tenant to vacate at least 30 days prior to the expiry or termination of the lease. The landlord may also initiate eviction proceedings against the tenant.

**6.18 Right to Terminate Lease**

Generally, parties may terminate the contract upon mutual agreement. Unilateral termination rights are usually not granted, except in favour of the landlord in relation to non-payment of rent and other material breaches of the lease agreements by the tenant.

**6.19 Forced Eviction**

The TPA notably recognises that the lessor may institute a suit of ejectment against the lessee for non-payment of rent. In this regard, Myanmar's Code of Civil Procedure also provides the remedy of the delivery of property, which may apply to both movable and immovable property.

A decree of delivery of immovable property compels the party against whom it was adjudged to vacate and deliver possession of immovable property to another. While this remedy is theoretically available to any party, whether public or private, it is understood that it has generally been used against persons occupying state-owned or administered land.

**6.20 Termination by Third Party**

Lease agreements executed pursuant to the provisions of the Myanmar Investment Law and the Special Economic Zone Law may be terminated by the MIC and the Special Economic Zone Management Committee if it is found that a tenant has violated the conditions of the relevant investment permit. Except for land acquisitions made under the Land Acquisition Act, which specifically provides a procedure to determine the appropriate compensation, we are only aware of circumstances where termination is effected with cause, and therefore the issue of compensation does not arise.

**7. Construction****7.1 Common Structures Used to Price Construction Projects**

When looking at how to price a construction project, there appears to be a preference towards lump sum fixed pricing, subject only to variations based on certain stipulated conditions in a construction contract. That said, there are

also parties that adopt other pricing methodologies for their construction projects, such as dynamic pricing.

## 7.2 Assigning Responsibility for the Design and Construction of a Project

There is a recent trend for big-ticket projects in Myanmar to follow the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) suite of standard construction contract templates (eg, the Conditions of Contract for Construction, Conditions of Contract for Plant and Design-Build, Conditions of Contract for EPC Turnkey Projects, and the Short Form of Contract).

## 7.3 Management of Construction Risk

A mixture of indemnities, warranties, limitations on liability and waivers may be used to manage construction risks. The usual contractual clauses are generally enforceable, and are not subject to any legal limitations.

## 7.4 Management of Schedule-related Risk

Depending on the reason for a delay (whether it is caused by a contractor or by some other third party – eg, authorities), liquidated damages may be imposed against a designer/contractor.

## 7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Forms of security are not uncommon, such as letters of credit, parent guarantees, performance bonds, escrow accounts and third-party sureties.

## 7.6 Liens or Encumbrances in the Event of Non-payment

There does not appear to be any provision of law prohibiting contractors and/or designers from agreeing to lien or otherwise encumber a property in the event of non-payment. Hence, it appears that a lien or encumbrance on property is acceptable, provided that it is contractually agreed upon.

In this regard, it should be noted that the Myanmar Contract Act analogously provides that bankers, tactors, wharfingers, advocates of the High Court, and policy brokers may, in the absence of a contract to the contrary, retain any goods bailed to them as a security for a general balance of account, but

no other persons have a right to retain goods bailed to them as a security for such balance, unless there is an express contract to that effect. Moreover, the TPA likewise provides that, where immovable property of one person is by an act of parties or operation of law made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, in which case the rules governing simple mortgage shall apply.

## 7.7 Requirements Before Use or Inhabitation

Before a project may be inhabited or used for its intended purpose, a building completion certificate is required to be issued by the relevant authority (eg, the YCDC for projects located at the Yangon Region).

# 8. Tax

## 8.1 VAT

There is no VAT in Myanmar. The equivalent tax, called commercial tax, does not typically apply to the sale of real property, as real property is not captured by the definition of a good or service under the Commercial Tax Law [1990]. However, a 5% commercial tax is levied on the lease of real property.

## 8.2 Mitigation of Tax Liability

There are structuring options and methods to mitigate the transfer, recordation, stamp or other tax liability on the acquisitions of large real estate portfolios. These options may be assessed on a case-by-case basis and would depend on, among others, the transaction structure.

## 8.3 Municipal Taxes

The Yangon City Development Law provides for property taxes due on real property situated in Yangon. Other municipal entities may also do the same.

## 8.4 Income Tax Withholding for Foreign Investors

Income arising from the sale of capital assets such as land is typically subject to a 10% capital gains tax imposable in either local or foreign currency and on both foreigners and local sellers. Unless otherwise agreed upon, capital gains taxes are generally borne by the seller.

Rental income arising from long-term leases is chargeable as income in the hands of the lessor. A company that is a lessor has to account for such rental income as part of its income for purposes of computing corporate income tax. A natural person who receives rental income is subject to a tax rate of 10% on his or her receipts.

In a share transfer or share deal, capital gains tax is imposed on the gains arising from the sale of shares. Stamp duty is imposed at the rate of 0.1% on the value of the shares.

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Foreign investors who receive rental income in Myanmar would generally have established an entity in Myanmar to conduct business, which, as a local Myanmar entity, would not suffer any withholding in respect of any rental income to which it is entitled.

### **8.5 Tax Benefits**

Tax benefits arising from owning fixed assets such as buildings, plants and machinery may include depreciation allowance, which may be extended by the MIC under the MIL.

### **8.6 Key Provisions in the Federal Tax Reform Legislation**

Myanmar companies do not typically have real property investments in the US and are thus unlikely to be affected by the recently adopted federal tax reform legislation. That said, it is understood that the lower income tax rates and tax relief provisions of the legislation may benefit Myanmar companies that intend to invest in commercial real estate in the United States.

