

Private M&A

2022

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Will Pearce and Louis L Goldberg

Davis Polk & Wardwell LLP

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

 **LEXOLOGY**
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Contents

| | |
|--|------------|
| Comparing UK and US private M&A transactions | 5 |
| Will Pearce and William Tong | |
| Davis Polk & Wardwell LLP | |
| The use of completion accounts in private M&A transactions | 10 |
| Tom Crossland and Fabian Sherwin | |
| Deloitte | |
| Foreign direct investment controls in cross-border acquisitions | 14 |
| Matthew Yeowart, Léonore De Mullewie and Sara Moshfegh | |
| Davis Polk & Wardwell LLP | |
| HR, incentives and retention issues in M&A transactions | 18 |
| Matthew Emms | |
| BDO LLP | |
| Data privacy and cybersecurity in global dealmaking | 24 |
| Matthew Bacal and Pritesh Shah | |
| Davis Polk & Wardwell LLP | |
| Riders on a storm: signs of a hardening M&A insurance market? | 32 |
| Piers Johansen and Dominic Rose | |
| Aon M&A and Transaction Solutions | |
| Australia | 35 |
| Michael Wallin and Andrew Jiang | |
| MinterEllison | |
| Austria | 43 |
| Christian Herbst and Maximilian Lang | |
| Schoenherr | |
| Belgium | 50 |
| Dries Hommez and Florent Volckaert | |
| Stibbe | |
| Canada | 60 |
| John M Mercury, James T McClary, Bryan C Haynes, Ian C Michael, Kristopher R Hanc and Drew C Broughton | |
| Bennett Jones LLP | |
| China | 68 |
| Jiangshan (Jackson) Tang Haiwen & Partners | |
| Howard Zhang Davis Polk & Wardwell LLP | |
| Denmark | 76 |
| Anders Ørjan Jensen and Charlotte Thorsen | |
| Gorrissen Federspiel | |
| Dominican Republic | 84 |
| Fabio J Guzmán Saladín and Pamela Benzán | |
| Guzmán Ariza | |
| Egypt | 89 |
| Mohamed Hashish and Rana Abdelaty | |
| Soliman, Hashish & Partners | |
| Finland | 95 |
| Fredrik Lassenius, Christoffer Waselius and Niko Markkanen | |
| Waselius & Wist | |
| France | 104 |
| Jacques Naquet-Radiguet | |
| Davis Polk & Wardwell LLP | |
| Georgia | 111 |
| Archil Giorgadze and Ana Kochiashvili | |
| MG Law Office | |
| Germany | 119 |
| Alexander Schwarz and Ralf Morshäuser | |
| Gleiss Lutz | |
| Greece | 129 |
| Catherine M Karatzas, Anna K Manda and Olga Vinieri | |
| Karatzas & Partners Law Firm | |
| Hong Kong | 137 |
| Yang Chu, Miranda So and Jason Xu | |
| Davis Polk & Wardwell LLP | |
| Indonesia | 147 |
| Yozua Makes | |
| Makes & Partners | |
| Israel | 154 |
| Sharon A Amir and Idan Lidor | |
| Naschitz Brandes Amir | |
| Italy | 162 |
| Francesco Florio and Paolo Antonio Mulas | |
| Legance – Avvocati Associati | |

| | | | |
|--|------------|--|------------|
| Latvia | 170 | South Korea | 271 |
| Gints Vilgerts and Jūlija Jerņeva VILGERTS | | Sky Yang, Mok Hong Kim, Hyunchul An and Joceline Park Bae, Kim & Lee LLC | |
| Luxembourg | 177 | Spain | 278 |
| Gérald Origer, Claire-Marie Darnand and Michaël Meylan Stibbe | | Guillermo del Río Uría Menéndez | |
| Malaysia | 185 | Sudan | 286 |
| Dato' Foong Chee Meng, Tan Chien Li, Khor Wei Min and Vivian Chew Li Voon Foong and Partners | | Mahmoud Bassiouny, Yassir Ali, Nadia Abdallah and Amgad Nagy Matouk Bassiouny | |
| Myanmar | 195 | Sweden | 292 |
| Takeshi Mukawa, Win Naing, Julian Barendse and Nirmalan Amirthanesan Myanmar Legal MHM Limited | | Peter Sundgren and Matthias Pannier Vinge | |
| Netherlands | 204 | Switzerland | 300 |
| Hans Witteveen and Jeroen Tjaden Stibbe | | Claude Lambert, Reto Heuberger and Andreas Müller Homburger | |
| New Zealand | 215 | Thailand | 309 |
| Erich Bachmann, Kate Telford and Julika Wahlmann-Smith Hesketh Henry | | Panuwat Chalongkuamdee, Natira Siripun, Chositar Daecharux and Thosaphol Thurongkinanonth SRPP Limited | |
| Norway | 222 | Turkey | 319 |
| Ole K Aabø-Evensen Aabø-Evensen & Co | | Noyan Turunç, Esin Çamlıbel and Kerem Turunç Turunç | |
| Philippines | 234 | United Arab Emirates | 327 |
| Lily K Gruba and Jorge Alfonso C Melo Zambrano Gruba Caganda & Advincula | | Malack El Masry and Charlotte Jackson Ibrahim & Partners | |
| Portugal | 241 | United Kingdom | 336 |
| Francisco Santos Costa Cuatrecasas | | Will Pearce, Simon Little and William Tong Davis Polk & Wardwell LLP | |
| Serbia | 250 | United States | 345 |
| Nenad Stankovic, Sara Pendjer and Mitar Simonovic Stankovic & Partners NSTLaw | | Cheryl Chan, Darren M Schweiger and Evan Rosen Davis Polk & Wardwell LLP | |
| Singapore | 260 | Zambia | 354 |
| Ong Sin Wei, Teo Hsiao-Huey, Soong Wen E and Daniel Chui WongPartnership LLP | | Joseph Jalasi, Mailesi Undi and Jonathan Chileshe Eric Silwamba, Jalasi & Linyama Legal Practitioners | |

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

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

Private acquisitions in Myanmar are typically undertaken by way of:

- acquisition of shares in the target; or
- acquisition by way of transfer of business or assets.

As with other jurisdictions, the process would typically include the following steps:

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

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

Structure of transaction

Share acquisition

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

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

Under the MCL, unlike the Former MCA, companies are permitted to have foreign ownership up to 35 per cent while still being classified as a Myanmar company. It is also possible to have foreign ownership

exceeding 35 per cent under the MCL; however, in this case, the company will be classified under the MCL as a foreign company and will be subject to additional restrictions on investments (under the MIL), as well as restrictions on rights to transfer and hold land as compared with a Myanmar company.

Business (asset) transfers

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

Schemes of arrangement

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

Due diligence

Due diligence for acquisitions continues to be challenging in Myanmar, 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.

Regulatory approvals

The main regulatory approval for an acquisition in Myanmar is likely to be under the MIL. Approvals by the Myanmar Investment Commission (MIC) for the transfer of shares or a business where the target has a permit or endorsement issued by MIC may typically take around two weeks to one month to process.

Legal regulation

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

Key Myanmar laws applicable to acquisitions and disposals

Myanmar has been rapidly updating its laws relating to private M&A transactions as it has opened up to foreign investment, and the legal environment for businesses more broadly is also changing rapidly. Many of these laws have been only recently implemented or have only recently begun to apply. In general, Myanmar's legal system lacks

clear precedents to confirm the current legal position. The answers given to these questions must be understood in this context.

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

- the MIL;
- the MCL;
- 1987 Transfer of Immovable Property Restriction Law (TIRPL); and
- the Competition Law (Law No. 9/2015) (the Competition Law).

MIL

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

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

MCL

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

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

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

TIRPL

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

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

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

Competition Law

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

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

Business combinations prohibited under the Competition Law may be exempt in certain circumstances, including if the acquired business is at risk of insolvency or if it will promote exports, technology transfer or productivity. The Competition Law is a relatively new law,

and it is not clear how its requirements will be applied in practice. Notifications issued by the Myanmar Ministry of Commerce (MOC) under the Competition Law to date largely address procedural matters (such as Notification No. 50/2017 of the MOC dated 9 October 2017). The Competition Commission was established under the Competition Law on 31 October 2018 (under Notification No. 106/2018 of the Union Government) but is yet to systematically enforce compliance with the Competition Law.

Governing law for Myanmar M&A transactions

Under Myanmar law, parties are free, in principle, to choose the governing law of an agreement. However, in practice, state-owned enterprises and Myanmar government agencies will rarely agree to a choice of foreign governing law, and Myanmar private parties also generally prefer Myanmar law to be applied to transaction agreements. For agreements that are subject to scrutiny under the MIL (eg, as part of an application for a permit or endorsement), the MIC will generally require that Myanmar law governs such agreements.

Legal title

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

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

For an acquisition by way of transfer of assets or business, the ownership rights to the applicable assets being transferred will be undertaken through execution and delivery under an asset transfer agreement. The type of legal title held by asset owners in Myanmar varies between asset categories. For example, land is categorised into various forms of title with the two main categories of land being 'freehold land', which is only rarely found in Myanmar, and 'grant land', which is leasehold land owned by the state and leased on a long-term (eg, terms of 10, 30 or 90 years) basis to private parties. In addition to these, there are a number of other categories of land owned by the state over which a land use right is granted to private parties for a particular purpose, such as agricultural land, grazing land and vacant, fallow and virgin land.

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

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

Multiple sellers

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

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

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

Exclusion of assets or liabilities

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

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

Consents

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

Overall investment framework

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

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

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

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

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

Further details on foreign investment restrictions

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

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

While the MIL Notification is intended to be a comprehensive list of all such restrictions, this is subject to the government keeping the MIL Notification up to date. On 9 April 2018, the criteria for approvals from the Ministry of Electricity and Energy for energy sector projects were updated. Investors are advised to obtain advice on the particular approvals applicable at the time of their investment.

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

On the other hand, only Myanmar companies may undertake certain investments that are of a local character (eg, printing local language periodicals) or relate to certain businesses, including artisanal oil wells and mini-markets. The MCL permits up to 35 per cent foreign ownership in Myanmar companies.

The MIL Notification also lists sector approvals required prior to investment. Government ministries have continued to refine and update the sector approvals for which they are responsible since the implementation of the MIL Notification. See examples of requirements for various sectors below.

Health services

The approval of the Ministry of Health and Sports is required for investments in businesses for the supply of health services.

Retail and wholesale distributors

The List of Restricted Investment Activities provides that the approval of the MOC is required for investment in businesses providing retailing and wholesale services (mini-markets and convenience stores are separately listed as sectors in which foreign investment is not permitted).

On 9 May 2018, MOC issued Notification No. 25/2018 setting out the criteria for foreign and local companies and foreign and local joint ventures to engage in retail or wholesale distribution in Myanmar. This clarifies the rights of foreign businesses to invest in, and liberalises restrictions on, trading activities in Myanmar. On 26 July 2018, it issued News Bulletins 2/2018 and 3/2018 setting out, respectively, its standard operating procedure for registering retail and wholesale distributors in Myanmar, and the list of priority goods permitted to be distributed by foreign companies and foreign-local joint ventures.

A number of retailers and wholesalers have been registered by the MOC to date, and in June 2020 the MOC also registered Meeyatha Development Limited to carry out the first registered shopping mall project in Myanmar. A further foreign-local joint venture shopping mall development project was registered in September 2020.

Insurance sector

Significant liberalisation of the insurance sector occurred in 2019. Prior to 2019, no foreign insurer had been awarded a licence under the Insurance Business Law of 1996 to undertake an insurance business in Myanmar (outside of special economic zones under Notification 2/2017 of the Insurance Business Regulatory Board of Myanmar). On 2 January 2019, the Ministry of Planning and Finance issued Announcement No.

1/2019, stating it would liberalise foreign investment restrictions in this sector. On 28 November 2019, licences were issued to five foreign life insurers and three life and three non-life foreign-local joint ventures to conduct insurance businesses in Myanmar.

Banking sector

Banking businesses are regulated by the Central Bank of Myanmar (CBM) under the Financial Institutions Law (Law No. 20/2016) (FIL). Under the FIL, a foreign bank may only sell its business or acquire a local bank's business (or a substantial part of either) with the approval of the CBM. In addition, a person must obtain CBM's approval prior to acquiring (whether directly or indirectly) a 'substantial interest' in a bank (defined as 10 per cent or more of the shares in, or the capacity to control the management of, a bank).

On 7 November 2019, CBM announced that it may permit more than 35 per cent foreign investment in local banks on a case-by-case basis. In the same announcement, it explained that it would hold a new round of foreign bank licensing. Two types of licences would be available for foreign banks: a branch licence and a subsidiary licence.

Under the subsidiary licence, foreign banks would be entitled to carry out the activities currently permitted for branch licence holders (that is, providing wholesale banking services to foreign-owned companies and Myanmar banks), and the licence would also permit onshore retail banking from 1 January 2021. Existing branch office licences would be permitted to convert to a subsidiary office licence from June 2020, provided the foreign branch has operated in Myanmar for at least three years.

The CBM issued the first two subsidiary licences to the Myanmar subsidiaries of South Korea's KB Kookmin Bank and Industrial Bank of Korea in December 2020, and subsequently to Mega International Commercial Bank Co, Ltd, Korea Development Bank, Cathay United Bank Co, Ltd and Siam Commercial Bank in January 2021.

Previously, on 9 April 2020, it had also approved the investment by Thailand's Kasikorn Bank in up to 35 per cent of Ayeyarwaddy Farmers Development Bank Limited.

Timing for MIC consideration

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

The MIC typically takes around two weeks to one month to process transfers of shares or assets of a target company holding a permit under the MIL (or its predecessor legislation, the Foreign Investment Law (Law No. 21/2012)).

In relation to applications for a permit or endorsement under the MIL, the MIC has 15 business days to undertake an initial assessment regarding whether the application is complete and a further 60 business days for a permit or 30 business days for an endorsement, to undertake a substantive assessment of the application and grant the permit or endorsement. The approval is required to be issued within a further 10 business days.

7 | Are any other third-party consents commonly required?

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

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

Regulatory filings

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

We set out below a summary of key regulatory filings.

MCL

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

MIL

Under the MIL, a notice must be filed with the MIC for any transfers of shares in, or the business of, a company with an MIC permit or endorsement. The prior approval of the MIC will be required for any transfer of shares in, or the business of, a company that has an MIC permit or endorsement, if it will result in an entity that is not an affiliate of the transferor acquiring majority ownership or control of the shares, or more than 50 per cent of the assets of the business. While the MIC has advised that indirect transfers of shares in companies with MIC permits or endorsements that occur because of a transfer of shares in an entity located offshore do not need to be notified to it, a prudent approach would be to seek a view from MIC on a matter-by-matter basis.

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

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

Certain acquisitions of property may also be registrable under the Registration of Instruments Law. Instruments that, among other things, create or assign rights to immovable property valued above approximately US\$70, and leases of immovable property for a term of more than one year or fix an annual rent, must be registered unless they relate to a land grant from the government. A failure to register such instruments will affect their validity.

1899 Myanmar Stamp Act

Under the 1899 Myanmar Stamp Act, the amount of stamp duty payable depends on the document. For share transfers, stamp duty of 0.1 per cent of the value of the transfer price applies. For joint venture agreements, stamp duty of about US\$110 will generally apply.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

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

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

Duty of good faith

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

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

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

Documentation

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

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

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

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

There are generally no specific formality requirements to execute documents in Myanmar. Under the MCL, documents may be executed by a company either by affixing its common seal, or by the signature of two directors (or if the company has only one director, that director) or a director and company secretary. The MCL does not limit the ways in which a company may execute a document, and a common practice in Myanmar is for a company to execute documents by the signature of its managing director.

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

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

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

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

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

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

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

- sanctions risk – sanctions have been imposed by a number of jurisdictions, including the United States, the European Union, the United Kingdom and Canada; therefore, it will be important to review the ownership and management of potential targets (as well as the ownership of any applicable land) to assess if there are any risks to a potential transaction under an applicable sanctions programme;
- the licences and approvals obtained by the target company for its business – in particular, there are varying levels of understanding of, and compliance with, applicable licensing and approval requirements in Myanmar;
- interests in land – this can be challenging owing to the poor quality of official documentation regarding land title (Myanmar lacks a comprehensive land titles registry) and the prevalence of informal arrangements for land use in Myanmar (eg, companies often operate on land belonging to a third person, such as a major shareholder); and
- corruption, money laundering and terrorism financing – in February 2020, the Financial Action Taskforce returned Myanmar to its grey list of countries that pose a higher risk of money laundering and terrorism financing, only four years after removing Myanmar from the grey list. As it can be difficult to ascertain evidence of corruption from corporate records (given common deficiencies in record-keeping by Myanmar companies), this would generally require interviews with the target company's management.

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, particularly as a result of the covid-19 pandemic and restrictions on movement within Myanmar at this time. 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.

Liability for statements

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

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

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

Publicly available information

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

Under the Myanmar Companies Law (MCL), private companies registered in Myanmar are required to maintain registers, among other

things, of shareholders at their registered office or principal place of business and make them available to shareholders. However, few companies currently comply with this requirement and, in general, limited information is publicly available about unlisted companies registered in Myanmar.

Under the MCL, any person may obtain an extract of the corporate information of a registered company from the electronic register of the Directorate of Investment and Company Administration (DICA), called MyCo, on payment of the prescribed fee. DICA published Notification No. 57/2018 on 9 July 2018 setting out its filing fees, including for requesting extracts of the corporate information of a company, being approximately US\$15 for current and historical information.

Apart from the companies' registry under the MCL, Myanmar does not maintain computerised records of ownership of property or security taken on such property. For example, while it is possible to register a declaration of ownership of intellectual property rights such as trademarks under the Registration of Instruments Law (Law No. 9/2018), such records are filed in paper format and are not easily searchable.

Impact of deemed or actual knowledge

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

Under the 1872 Contract Act, a contract resulting from misrepresentation (including silent misrepresentation) or fraud will not be voidable if the party whose consent to the contract was caused by the misrepresentation or fraud had the means of discovering the truth with ordinary diligence.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

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

Obtaining accurate financial information on a target company in Myanmar is often challenging owing to the poor accounting practices and record-keeping of companies in Myanmar. While there is no restriction in Myanmar on the use of closing accounts or locked-box structures, in practice, the purchase price is generally not adjusted, reflecting in part the difficulty of obtaining relevant financial information.

Form of consideration

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

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

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

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

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

Financing

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

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

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

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

Limitations on financing structure

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

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

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

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

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

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

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

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

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

Pre-closing covenants

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

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

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

Termination rights

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

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

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

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

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

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

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

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

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

- title and authority to transfer the transferred business or assets;
- accuracy of corporate and financial records;
- disclosure of litigation risks;

- material contracts;
- solvency of the target and seller;
- compliance with Myanmar law;
- the maintenance of required licences and permits;
- labour and environmental compliance;
- intellectual property rights; and
- insurance.

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

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

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

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

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

Limitations on liability

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

Sellers customarily limit liability by negotiating the scope of individual representations and warranties and excluding warranties other than those set out in the agreement. A typical limitation that may also be found in sale and purchase agreements is to limit liability of the seller for breach of warranties to a maximum of the purchase price.

Transaction insurance

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

Warranty and indemnity insurance is not available in Myanmar.

Post-closing covenants

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

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

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

TAX**Transfer taxes**

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

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

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

Corporate and other taxes

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

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

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

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

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

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

EMPLOYEES, PENSIONS AND BENEFITS**Transfer of employees**

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

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

Notification and consultation of employees

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

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

Transfer of pensions and benefits

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

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

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

UPDATE AND TRENDS**Key developments**

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

A state of emergency was declared on 1 February 2021 under Order No. 1/2021 of the Office of the President (Pro Tem) (the State of Emergency Order) in response to alleged fraud regarding voter lists in the 2020 general elections and the Myanmar Union government's decision not to postpone opening Parliament. The state of emergency is stated to apply across Myanmar for a period of one year.

According to the State of Emergency Order, it is issued under article 417 of the Constitution and transferred the legislative, executive and judicial powers of the government to the commander-in-chief of Myanmar's armed forces (CIC) under article 418(a) of the Constitution.

The State of Emergency Order has been met with protests across Myanmar, and a civil disobedience movement 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, President Biden issued a new Executive Order 14014 titled 'Blocking Property With Respect To The Situation In Burma' on 11 February 2021. As at 22 March 2021, almost 80 individuals, companies

and government entities have been sanctioned by the United States, including current and former military leaders (including the CIC, who was already a sanctioned individual) and their family members, as well as the State Administration Council, government enterprises (such as the Myanma Gems Enterprise, the Myanma Timber Enterprise and the Myanmar Pearl Enterprise) and companies affiliated with the Myanmar armed forces (including the major military-affiliated conglomerates Myanma Economic Holdings Public Company Limited (MEHPCL) and the Myanmar Economic Corporation (MEC)). The United States has also announced a freeze of US\$1 billion in Myanmar government assets held in the United States and implemented a ban on the export of sensitive defence equipment to Myanmar's armed forces (and certain affiliated commercial entities).

The European Union, the United Kingdom and Canada have also imposed targeted sanctions. 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, the police force or the Border Guard Police (including those responsible for obstructing the provision of humanitarian assistance or independent 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 that generate revenue for, provide support to, or benefit Myanmar's armed forces; and
- associated individuals and entities.

As at 23 July 2021, 29 individuals have been designated (including the CIC), as well as MEHPCL, MEC and four government enterprises (including the Myanma Gems Enterprise and the Myanma Timber Enterprise).

In the case of the United Kingdom, the sanctions are pursuant to the new sanctions regime established following Brexit under the Sanctions and Anti-Money Laundering Act 2018 and the Myanmar (Sanctions) Regulations 2021 and comprise asset freezes and travel bans of sanctioned individuals. As at 23 July 2021, 10 individuals have been designated (including the CIC) in connection with the State of Emergency Order, including the CIC, the State Administration Council, MEHPCL, MEC and three government enterprises (the Myanma Gems Enterprise, the Myanma Timber Enterprise and the Myanmar Pearl Enterprise). These are in addition to existing sanctions that had been in place for certain Myanmar military personnel under the Global Human Rights Sanctions Regulations 2020.

Canada added 16 individuals (including the CIC) to its list of sanctioned individuals, seven companies affiliated with the CIC's children and the Myanmar military and three government enterprises (the Myanma Gems Enterprise, the Myanma Timber Enterprise and the Myanmar Pearl Enterprise) under the Special Economic Measures (Burma) Regulations 2007, which impose freezes on the Canadian assets of, and prohibit certain transactions with, sanctioned individuals (in addition to existing sanctions that had been in place).

Further sanctions may be expected from those jurisdictions and potentially other jurisdictions (eg, Australia). Investments and planned expansions have stalled as businesses monitor the situation in Myanmar and the effect of the State of Emergency Order on their operations. The events of 1 February 2021 have increased the reputational and operational risks of doing business in Myanmar.

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Coronavirus

- 37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There has been a sudden and rapid increase in the spread of covid-19 in Myanmar in July 2021. In response, the government has been widening targeted lockdowns to restrict movement in areas where there has been a sudden increase in covid-19 cases.

On 7 July 2021, lockdowns were imposed in a number of townships in Magway Region, Mon State and Yangon Region under Order No. 278/2021 of the Ministry of Health and Sports (MOHS), with further townships in Yangon Region and Bago Region added on 11 July 2021 under Order No. 285/2021 of the MOHS.

On 12 July, a number of townships from Kachin State, Kayin State, Sagaing Region, Magway Region, Shan State and Ayeyarwady Region were placed under lockdown under Order No. 278/2021 of the MOHS. Further, on 15 July 2021, the State Administration Council issued Order No. 211/2021, declaring a week of national holiday from 17 to 25 July 2021 (and extended to 1 August 2021), and issuing a lockdown over the same period across Myanmar, aimed at curbing the spread of covid-19.

Restrictions to movement within and to Myanmar in relation to the pandemic may affect the operation of and investment in projects in Myanmar in the short to medium term, as in other jurisdictions. In addition, there continue to be restrictions on the operation of businesses to minimise the spread of covid-19, including requirements for inspections of workplaces by authorities. There are also significant disruptions to the operation of government departments and agencies.

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