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Corporate M&A 2022

Myanman: Law & Practice
and
Myanmar: Trends & Developments

Kana Manabe, Win Naing,
Julian Barendse and Nirmalan Amirthanesan
Myanmar Legal MHM Limited

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Law and Practice

Contributed by:

Kana Manabe, Win Naing,
Julian Barendse and Nirmalan Amirthanesan
Myanmar Legal MHM Limited see p.15



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1. TRENDS

1.1 M&A Market

The Myanmar M&A market has remained slow over the past 12 months, due to the ongoing effects of the COVID-19 pandemic and the state of emergency declared on 1 February 2021 under Order No 1/2021 of the Office of the President of Myanmar (Pro Tem) (State of Emergency Order).

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

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 then Ministry of Health and Sports (MOHS), with further townships across Myanmar added in subsequent orders of the MOHS. On 15 July 2021, the State Administration Council issued Order No 211/2021 declaring a week of national holidays from 17-25 July 2021; it also issued a lockdown across Myanmar over the same period, aimed at curbing the spread of COVID-19. The holidays and lockdown were extended by governmental notifications until 10 September 2021.

The targeted lockdowns implemented by the MOHS began to be eased in late 2021, with lockdowns relaxed in 44 townships in Yangon Region, Mandalay Region, Bago Region, Magway Region, Sagaing Region, Mon State, Aye-yarwady Region and Chin State on 27 October 2021 under Order No 465/2021 of the Ministry of Health (formerly the MOHS), and lockdowns in further townships lifted in December 2021 and January 2022.

The rapid increase in COVID-19, together with the government's response, had a serious impact on the operation of businesses and investments in Myanmar. There were also significant disruptions to the operation of government departments and agencies, with government offices closed during the continuous public holidays.

With vaccination rates in Myanmar remaining relatively low, there is a risk of further disruptions to Myanmar's economy due to COVID-19.

The State of Emergency Order was issued in response to alleged fraud regarding voter lists in the 2020 general elections and the former government's decision not to postpone the opening of Myanmar's parliament. It applies across the country and involves the transfer, pursuant to Article 418(a) of Myanmar's Constitution, of all of the legislative, executive and judicial powers of Myanmar's government to the Commander-in-Chief (CIC) of Myanmar's armed forces. The term of the state of emergency (originally one year) was extended by a further six months on 31 January 2022 under Announcement No 1/2022 of the National Defence and Security Council issued by U Myint Swe (Pro Tem President).

The State of Emergency Order was initially met with protests and a civil disobedience movement involving strikes by public and private sector employees (particularly in the banking sector).

The security situation (in particular outside of Yangon) has also become increasingly challenging since the State of Emergency Order, with the British Embassy warning in its travel advisory of the risk of political violence and increasingly sophisticated explosions, particularly targeting official buildings.

The State of Emergency Order has also been met with targeted sanctions by major western jurisdictions. In particular, US President Biden

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issued a new Executive Order 14014 titled “Blocking Property with Respect to the Situation in Burma” on 11 February 2021. As at 14 March 2022, over 80 individuals, government entities and businesses have been sanctioned by the USA, including current and former military leaders and senior government officials (including the CIC, who was already a sanctioned individual), and their family members, as well as the State Administration Council (SAC), government enterprises (such as the Myanma Gems Enterprise, Myanma Timber Enterprise and Myanma Pearl Enterprise) and companies affiliated with the Myanmar armed forces (including the major military-affiliated conglomerates Myanma Economic Holdings Public Company Limited (MEHPCL) and Myanmar Economic Corporation (MEC)), as well as Myanmar businessmen such as Tay Za and Jonathan Myo Kyaw Thawng. The USA has also announced a freeze of USD1 billion in Myanmar government assets held in the USA and has implemented a ban on the export of sensitive defence equipment to Myanmar’s armed forces, and businesses with alleged links to Myanmar’s armed forces (King Royal Technologies Co., Ltd. and Wanbao Mining and its Myanmar subsidiaries).

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

In response to these events, planned new investments and expansions of existing projects have stalled, as businesses pause to evaluate the effect of the State of Emergency Order on their operations. Some high-profile foreign investors have recently chosen to exit their investments in Myanmar.

For all investors, whether remaining in Myanmar, seeking to exit Myanmar or considering new investments, it has become increasingly important to undertake a due diligence review of their operations to ensure they are undertaking their operations in Myanmar in an ethical and appropriate manner, and in accordance with applicable sanctions.

1.2 Key Trends

Corporate activity in the past 12 months has included exits by existing investors from Myanmar. High profile examples include Norway’s Telenor, which is currently in the process of exiting its telecommunications business in Myanmar, through a sale of its business to Lebanon’s M1 Group and Myanmar’s Shwe Byain Phyu Group for USD105 million. The transaction has faced a number of difficulties, with the authorities initially refusing to approve a sale of Telenor Myanmar’s business to M1 Group.

In the oil and gas sector, TotalEnergies and Chevron announced on 21 January 2022 that they would withdraw from the Yadana gas field project, and on 27 January 2022, Woodside announced it was withdrawing its interest in Myanmar (including the A-6, AD-1 and AD-8 blocks).

On 14 February 2022, Kirin Holdings Company, Limited announced that it would withdraw from its business in Myanmar and exit its joint venture partnership with Myanma Economic Holdings Public Company Limited by the end of June 2022.

A further important development is that for all investors, whether remaining in Myanmar, seeking to exit Myanmar or considering new investments, it has become increasingly important to undertake enhanced due diligence in Myanmar. A number of multilateral organisations, such as the OECD and the United Nations Development

Programme, have recently facilitated webinars to enable businesses to share international best practice and their experiences since 1 February 2021 undertaking enhanced due diligence in Myanmar. In addition, the Yangon-based Myanmar Centre for Responsible Business is working on a guide to “Conducting Heightened Due Diligence in Myanmar under Military Rule”, which is expected to provide important practical guidance drawing on international best practice to support businesses to undertake due diligence in Myanmar.

1.3 Key Industries

Statistics from Myanmar’s companies registrar, the Directorate of Investment and Company Administration (DICA), show that as of 31 January 2022, foreign investment has been particularly strong recently in the services and manufacturing sectors, and that historically it has also been strong in oil and gas, real estate and transport and communications.

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

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

Acquisitions in Myanmar may be undertaken by way of the acquisition of shares in, or a transfer of the business or assets of, the target. In terms of share acquisitions in listed companies, foreign share trading is now possible for companies listed on the Yangon Stock Exchange (YSX), and the Pre-Listing Board (PLB) established by the

Securities and Exchange Commission of Myanmar (SECM) under Notification No 1/2022 dated 1 February 2022 as a precursor to a listing on the YSX; see further **2.3 Restrictions on Foreign Investments**.

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

The Myanmar Companies Law (Law No 29/2017) (MCL) also provides for schemes of arrangement. Schemes approved by 75% of shareholders (or creditors) are binding on all shareholders (or creditors) and the MCL provides for a court, either by the order sanctioning such scheme or a subsequent order, to make provision for the transfer of a company’s undertaking or its shares, pursuant to such scheme. However, there is no precedent in Myanmar for schemes of arrangement, so the courts have not yet developed their practice regarding such schemes.

2.2 Primary Regulators

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

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

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2.3 Restrictions on Foreign Investments Foreign Investment Regulation

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

Foreign investment restrictions

The MIC issued Notification No 15/2017 titled List of Restricted Investment Activities in relation to Section 42 of the MIL (Negative List) on 10 April 2017, setting out the types of investments that are restricted to foreign investment, require approval of a Myanmar government ministry or may only be made through a joint venture with a Myanmar company; under the MIR, a Myanmar company is required to have at least a 20% shareholding in such a joint venture.

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

Permissions to avoid foreign investment restrictions on land ownership

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

Approvals applicable for Myanmar projects

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

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

MIC approval will also be required for the direct (and potentially, indirect) acquisition of a majority of shares or controlling interest in a company with an MIC permit or endorsement. While the MIC has advised in the past that it does not need to be notified of indirect transfers of shares in companies with MIC permits or endorsements, a prudent approach would be to confirm this with the MIC on a case-by-case basis, as indirect interests are within the scope of the approval requirement under the MIL.

Foreign Ownership Restrictions in Relation to Property

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

Foreign Share Trading on the YSX and PLB

The YSX, established in 2015, is still developing as a stock exchange, and there are currently only seven listed companies. The SECM and

YSX have implemented a number of measures to encourage further listings and share trading.

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

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

On 28 September 2020, the YSX also announced that it was launching the PLB to provide greater opportunities for unlisted public companies to raise funds and to act as an initial step towards listing on the main board of the YSX. The Securities Registration Business Regulations and Business Operations Manual for Pre-Listing Board were subsequently published on 2 October 2020. The PLB was formally established by the SECM on 1 February 2022. As at 14 March 2022 no companies have registered on the PLB, however, as with the YSX, foreign share trading is permitted on the PLB. In the future, it is likely that potential listing candidates on the YSX will register on the PLB first.

2.4 Antitrust Regulations

Myanmar's Competition Law entered into force on 24 February 2017. This Law prohibits collaborations that have the purpose of "extremely raising market dominance" or lessening competition in a limited market, or which would result in a market share above the prescribed amount.

Business combinations prohibited under the Competition Law may be exempt in certain circumstances, including if the acquired business is at risk of insolvency or if it will promote exports, technology transfer or productivity. However, the Competition Law is a relatively new law and it is not yet clear how its requirements will be applied in practice. The Competition Commission is yet to systematically enforce compliance with this Law.

2.5 Labour Law Regulations

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

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

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2.6 National Security Review

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

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

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

The MCL reforms were accompanied by the introduction of an electronic companies registry (called MyCo), improving the process for corporate filings and transparency around the ownership and management of businesses in Myanmar. Under the MCL, any person may obtain an extract of the corporate information of a registered company from MyCo on payment of the prescribed fees, as set out in Notification No 57/2018 issued by the DICA on 9 July 2018.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover laws, and no changes are expected over the next 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

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

4.2 Material Shareholding Disclosure Threshold

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

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

4.3 Hurdles to Stakebuilding

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

4.4 Dealings in Derivatives

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

4.5 Filing/Reporting Obligations

There is currently no market for derivative instruments in Myanmar.

4.6 Transparency

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

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

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

5.2 Market Practice on Timing

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

5.3 Scope of Due Diligence

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

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

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

- sanctions risk – as noted in **1.1 M&A Market**, following the State of Emergency Order, sanctions have been imposed by a number of jurisdictions, including the USA, EU and

the UK, and as a result it will be important to review the ownership and management of potential targets to assess if there are any risks to the transaction under an applicable sanctions programme;

- human rights due diligence – as noted in **1.1 M&A Market**, businesses intending to operate in Myanmar would be advised to undertake a human rights due diligence review prior to making their investment (and while undertaking their business in Myanmar) to ensure that their operations in Myanmar will be conducted in an ethical and appropriate manner;
- the licences and approvals obtained by the target company for its business – in particular, as there are varying levels of understanding of, and compliance with, applicable licensing and approval requirements in Myanmar;
- interests in land – this can be challenging due to the poor quality of official documentation regarding land title (Myanmar lacks a comprehensive land titles registry), and the prevalence of informal arrangements for land use in Myanmar (eg, companies often operate on land belonging to a third person such as a major shareholder); and
- corruption, money laundering and terrorism financing – in February 2020, the Financial Action Task Force returned Myanmar to its grey list of countries which pose a higher risk of money laundering and terrorism financing, only four years after removing Myanmar from the grey list.

As a result of the COVID-19 pandemic and the State of Emergency Order, to the extent that a target does not have information easily available in electronic format (which can often occur in Myanmar), there may be delays in obtaining relevant information.

Generally, due diligence for acquisitions continues to be challenging in Myanmar; this is mainly

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

5.4 Standstills or Exclusivity

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

5.5 Definitive Agreements

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

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

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

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

6.2 Mandatory Offer Threshold

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

6.3 Consideration

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

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

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

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

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

6.4 Common Conditions for a Takeover Offer

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

6.5 Minimum Acceptance Conditions

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

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

6.6 Requirement to Obtain Financing

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

6.7 Types of Deal Security Measures

Deal protection and cost coverage mechanisms typical to M&A (such as confidentiality or non-disclosure agreements, non-solicitation agreements and break-up fees or reverse break-up fees) are not prohibited in Myanmar and may be used to protect deals from third-party bidders as in other jurisdictions.

No specific contractual considerations have developed in response to COVID-19, reflecting

the slowing of new investments in sectors affected by the pandemic (and more recently by the State of Emergency Order). Given the changing situation and the potential for further down-side risk, it is expected that acquirers and investors would seek to include material adverse change clauses as a condition to transactions.

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

6.8 Additional Governance Rights

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

6.9 Voting by Proxy

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

6.10 Squeeze-Out Mechanisms

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

6.11 Irrevocable Commitments

Irrevocable commitments of shareholders in relation to an acquisition are not used in Myan-

mar, which reflects the fact that there is not a developed public takeover market.

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

7. DISCLOSURE

7.1 Making a Bid Public

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

7.2 Type of Disclosure Required

Companies may issue shares to individual investors from time to time, although a prospectus approved by the SECM would need to be prepared under the MCL and SEL in connection with an offer to the public (except in the situations described in Notification No 1/2020 of the SECM dated 15 May 2020, such as offers to prescribed classes of sophisticated investors).

7.3 Producing Financial Statements

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

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

7.4 Transaction Documents

On 1 December 2020, the Office of the President issued Notification No 118/2020, further implementing the Extractive Industries Transparency Initiative, adopted in 2014 by Myanmar, by requiring all contracts in the extractives sector to be made publicly available from 1 January 2021. This requirement has not been enforced to date.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

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

8.2 Special or Ad Hoc Committees

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

8.3 Business Judgement Rule

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

8.4 Independent Outside Advice

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

8.5 Conflicts of Interest

The MCL provides for statutory directors' duties, including the duty to act in good faith in the

company's best interests. However, there has not been judicial scrutiny of these duties as yet. While obligations regarding conflicts of interest also applied to directors under Former MCA, this has not to date been the subject of judicial scrutiny in Myanmar.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

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

9.2 Directors' Use of Defensive Measures

See **9.1 Hostile Tender Offers**.

9.3 Common Defensive Measures

See **9.1 Hostile Tender Offers**.

9.4 Directors' Duties

See **9.1 Hostile Tender Offers**.

9.5 Directors' Ability to "Just Say No"

See **9.1 Hostile Tender Offers**.

10. LITIGATION

10.1 Frequency of Litigation

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

10.2 Stage of Deal

The matter is not applicable in this jurisdiction.

10.3 "Broken-Deal" Disputes

While there are ongoing commercial disputes regarding broken-deal disputes, these have not yet been resolved, and as a result, no major precedents were established in 2021 regarding "broken-deal" disputes.

11. ACTIVISM

11.1 Shareholder Activism

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

11.2 Aims of Activists

The aim of activists is primarily to pressure companies with business ties to Myanmar's armed forces to sever those ties, including by withdrawing from supply or purchase arrangements or investments, although as noted at **11.1 Shareholder Activism**, this has also had a broader effect on companies which are operating in Myanmar.

11.3 Interference with Completion

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

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AUTHORS



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Myanmar Legal MHM Limited*



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Myanmar Legal MHM Limited

#16-01/02
Junction City Tower, No 3A
Bogyoke Aung San Road
Pabedan Township
Yangon
Myanmar

Tel: +95 1 925 3650
Fax: +95 1 925 3651
Email: mhm_yangon_info@mhm-global.com
Web: www.mhmjapan.com

MYANMAR LEGAL MHM

Trends and Developments

Contributed by:

*Kana Manabe, Win Naing, Julian Barendse and
Nirmalan Amirthanesan*

Myanmar Legal MHM Limited see p.21

The Business Context for Recent M&A Activity in Myanmar

On 1 February 2021, a state of emergency was declared under Order No 1/2021 of the Office of the President of Myanmar (Pro Tem) (State of Emergency Order). The State of Emergency Order applies across Myanmar, and involves the transfer, pursuant to Article 418(a) of Myanmar's Constitution, of all of the legislative, executive and judicial powers of Myanmar's government to the Commander-in-Chief (CIC) of Myanmar's armed forces, Min Aung Hlaing. The term of the State of Emergency (originally one year) was extended by a further period of six months on 31 January 2022 under Announcement No 1/2022 of the National Defence and Security Council issued by U Myint Swe (Pro Tem President).

Below is a summary of some of the major recent implications of the State of Emergency Order for business and M&A activity in Myanmar. It is likely that the operating environment in the country will remain challenging during the term of the State of Emergency Order and that the situation may continue to change rapidly. In response to these events, there has generally been a suspension of planned new investments and expansions of existing projects, as businesses pause to evaluate the effect of the State of Emergency Order on their operations. It is expected that investors will be waiting to see signs that the situation has stabilised prior to considering further investment into Myanmar. Some high-profile foreign investors have recently chosen to exit their investments in Myanmar.

For example, Norway's Telenor is currently in the process of exiting its telecommunications busi-

ness in Myanmar, through a sale of its business to Lebanon's M1 Group and Myanmar's Shwe Byain Phyu Group for USD105 million (having previously written off its investment, worth USD782 million). The transaction has faced a number of difficulties, with the authorities initially refusing to approve a sale of Telenor Myanmar's business to M1 Group.

In the oil and gas sector, TotalEnergies and Chevron announced on 21 January 2022 that they would withdraw from the Yadana gas field project, and on 27 January 2022, Woodside announced it was withdrawing from its interests in Myanmar (including the A-6, AD-1 and AD-8 blocks). In its press release announcing its withdrawal, TotalEnergies noted it would withdraw "without any financial compensation for TotalEnergies", potentially signalling a similar approach to Telenor of exiting without recovering its investment value.

On 14 February 2022, Kirin Holdings Company, Limited also announced that it would withdraw from its business in Myanmar and exit its joint venture partnership with MEHPCL by the end of June 2022.

A notable feature of the exit by Kirin is that MEHPCL had petitioned the Yangon Western District Court to wind up its joint venture business with Kirin, Myanmar Brewery Limited (MBL). Kirin had previously announced on 26 January 2022 that the Yangon Western District Court issued an order to dismiss an earlier petition of MEHPCL to wind up MBL.

Insolvency legislation has not previously been used to terminate joint ventures in Myanmar, where the practice of insolvency law is at an early stage of development. The winding-up of companies to date has primarily focused on voluntary, solvent winding-ups. It is expected that there may be an increase in the use of insolvency legislation as Myanmar's new Insolvency Law (Law No 1/2020), which introduces an international standard insolvency framework to Myanmar, is progressively implemented. The Insolvency Law is a complex legal code which may present challenges to those who have to implement and administer it. While the Insolvency Law entered into force on 25 March 2020 (except for Part X relating to cross border insolvency), it has not yet been fully implemented. To date, no insolvency practitioner – who will oversee liquidations and other processes under the Insolvency Law – has been appointed.

Enhanced due diligence

For all investors, whether remaining in Myanmar, seeking to exit Myanmar or considering new investments, it has become increasingly important to undertake an enhanced due diligence review of their operations (or any proposed acquired operations) to ensure that such operations are undertaken in an ethical and appropriate manner, in accordance with applicable sanctions and with regard to human rights considerations.

A number of multilateral organisations such as the OECD and the United Nations Development Programme have recently facilitated webinars to enable businesses to share international best practice and their experiences since 1 February 2021 undertaking enhanced due diligence in Myanmar. In addition, the Yangon-based Myanmar Centre for Responsible Business is working on a guide to “Conducting Heightened Due Diligence in Myanmar under Military Rule”, which is expected to provide important practical guid-

ance drawing on international best practice to support businesses to undertake due diligence in Myanmar.

Sanctions and other responses to the state of emergency

A number of countries, such as the USA and the UK, have imposed sanctions in response to the State of Emergency Order, although so far these have been targeted. The targeted nature of these sanctions reflects a policy imperative of not generally restricting investment into Myanmar. That said, any proposed investment in Myanmar or dealings in relation to existing Myanmar investments need to be undertaken with diligence to ensure compliance with any applicable sanctions regimes.

In relation to the USA, President Biden issued a new Executive Order 14014, titled “Blocking Property with Respect to the Situation in Burma” on 11 February 2021. As at 14 March 2022, over 80 individuals, government entities and businesses have been sanctioned by the USA, including current and former military leaders and senior government officials (including the CIC, who was already a sanctioned individual), and their family members, as well as the State Administration Council (SAC), government enterprises (such as the Myanma Gems Enterprise, Myanma Timber Enterprise and Myanma Pearl Enterprise) and companies affiliated with the Myanmar armed forces (including the major military-affiliated conglomerates Myanma Economic Holdings Public Company Limited (MEHPCL) and Myanmar Economic Corporation (MEC)), as well as Myanmar businessmen such as Tay Za and Jonathan Myo Kyaw Thaung. The USA has also announced a freeze of USD1 billion in Myanmar government assets held in the USA and has implemented a ban on the export of sensitive defence equipment to Myanmar's armed forces and businesses with alleged links to Myanmar's armed forces (King Royal Tech-

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nologies Co., Ltd. and Wanbao Mining and its Myanmar subsidiaries). Under these sanctions, a broad asset freeze and restrictions on entry into the USA have been imposed on sanctioned individuals and entities.

The USA has also announced a freeze of USD1 billion in Myanmar government assets held in the USA. The US Department of Commerce has implemented a ban on the export of sensitive equipment subject to the US Export Administration Regulations to Myanmar's armed forces. Since a specific designation on 4 March 2021 by the Department of Commerce, this includes exports of such equipment to Myanmar's Ministry of Home Affairs, Ministry of Defence, MEHPCL and MEC, and businesses with alleged links to Myanmar's armed forces (King Royal Technologies Co., Ltd. and Wanbao Mining and its Myanmar subsidiaries).

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

- individuals from Myanmar's armed forces, police force or Border Guard Police (including those responsible for obstructing the provision of humanitarian assistance or 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 which generate revenue for, provide support to, or benefit, Myanmar's armed forces; and
- associated individuals and entities.

As at 14 March 2022, 65 individuals and 10 entities have been designated, including the CIC, MEHPCL and MEC, government enterprises (including the Myanma Oil and Gas Enterprise), and Myanmar businesses such as Htoo Group of Companies and International Group of Entrepreneurs (IGE) Company Limited.

The sanctions imposed by the UK are pursuant to the new sanctions regime established following Brexit under the Sanctions and Anti-Money Laundering Act 2018 and the Burma (Sanctions) (EU Exit) Regulations 2019 established concurrently with Brexit to preserve certain existing sanctions, both comprising asset freezes and travel bans of sanctioned individuals. As at 14 March 2022, the UK has sanctioned over 20 individuals and business entities in connection with the State of Emergency Order, including the CIC, the SAC, MEHPCL and MEC, and Htoo Group of Companies. These are in addition to existing sanctions which had been in place for certain Myanmar military personnel under the Global Human Rights Sanctions Regulations (2020). Canada has added over 30 individuals and entities, including the CIC, to its list of sanctioned individuals under the Special Economic Measures (Burma) Regulations of 2007, which impose freezes on the Canadian assets of, and prohibits certain transactions with, sanctioned individuals (in addition to existing sanctions of military personnel and military-linked entities).

Further sanctions may be expected from those jurisdictions and potentially other jurisdictions.

The response to the State of Emergency Order has included a multi-faceted civil disobedience movement (CDM). The CDM involves, among others, street protests, mass strikes, boycotts of goods and services produced by or otherwise associated with the Myanmar armed forces, as well as seeking suspension of payment of government taxes.

These developments pose significant challenges for businesses operating in Myanmar, which must navigate the imperative to maintain business operations and comply with local legal requirements as enforced in Myanmar (such as paying taxes) while bearing in mind the expectations of staff and the broader Myanmar community.

The security situation in Myanmar (in particular outside of Yangon) has become increasingly challenging since the State of Emergency Order.

As a result of the overall security situation, foreign embassies have issued alerts to their citizens, with the British Embassy advising in its travel advisory of the risk of political violence and increasingly sophisticated explosions, particularly targeting official buildings. The situation, together with the continuing impact of the COVID-19 pandemic, has resulted in a decrease in the expatriate labour force in Myanmar.

MYANMAR TRENDS AND DEVELOPMENTS

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Junction City Tower, No 3A
Bogyoke Aung San Road
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Yangon
Myanmar

Tel: +95 1 925 3650
Fax: +95 1 925 3651
Email: mhm_yangon_info@mhm-global.com
Web: www.mhmjapan.com

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