

Doing business in Myanmar: overview

Michael Ramirez, Nwe Oo and Shalini Ghosh
Tilleke & Gibbins (Lex Mundi Member Firm)

global.practicallaw.com/9-591-0368

OVERVIEW

1. What are the key recent developments affecting doing business in your jurisdiction?

Nine foreign banks were recently granted licenses to operate in Myanmar by the Foreign Bank Licensing Committee. The banks are restricted from retail banking but are allowed to extend loan facilities to foreign investors. In addition, in August 2014, the restrictions on foreign trade for foreign investment law companies were relaxed, with the opening up of the retail and wholesale sectors to 100% foreign investment expected to have a substantial effect on foreign direct investment. The draft arbitration and trademark bills were not implemented as expected in 2014. However, it is likely that they will become effective during 2015 and will continue to facilitate foreign investment decisions.

There also remains some uncertainty regarding the upcoming 2015 national elections, and some foreign investment decisions have been delayed as a result. In addition, some sensitive foreign investors are troubled by Myanmar's failure to fully rectify regional ethnic conflicts and remain cautious about the prospects of a sustainable long-term resolution.

LEGAL SYSTEM

2. What is the legal system based on (for example, civil law, common law or a mixture of both)?

Myanmar is a former Lieutenant Governorship of British Colonial India and still carries this colonial legacy in its legal system. It has retained much of the English common law system, despite its independence in 1948. Many of the country's applicable laws date back to the colonial period (although Myanmar is keen to modernise its laws and legal practice).

FOREIGN INVESTMENT

3. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

The Foreign Investment Law (FIL) was passed in 2012, and supplemented by the Foreign Investment Rules in 2013 and the Myanmar Investment Commission notifications, regulates foreign investment in Myanmar. Some restrictions are still in place (depending on the industry) and these are provided for in Notification No. 1/2013 and 49/2014.

The Ministry of Commerce is the main body in charge of approving medium to large scale industrial proposals for foreign investors, while applications for company formation must be placed with the Directorate of Investment and Company Administration (DICA).

4. Are there any restrictions on doing business with certain countries or jurisdictions?

Myanmar does not have any restrictions on doing business with other countries. However, the US Specially Designated Nationals (SDN) list has an effect on US entities wanting to invest in Myanmar. These restrictions have implications on the nature of due diligence, which US companies are obliged to comply with to ensure that they are not improperly dealing with those on the SDN list, for example partners and agents. This is a burden that is not necessarily shared by non-US businesses and individuals. However, it should be noted that the US Treasury Department's Office of Foreign Assets Control has shown its willingness to fairly evaluate the list and to remove or otherwise modify the list as individuals/entities take concrete action to improve their business practices and associations.

In addition, communal tensions in the Rakhine state have resulted in some limited sanctions, particularly by governments in the Middle East and in some parts of South Asia.

5. Are there any exchange control or currency regulations?

Exchange control and currency control are regulated by the Central Bank of Myanmar Law and the Foreign Exchange Management Law.

6. What grants or incentives are available to investors?

The Foreign Investment Law (FIL) and the Myanmar Special Economic Zone Law (SEZ) are two significant laws offering incentives to foreign investors. Under the FIL and the SEZ, the Government of Myanmar guarantees:

- Protection against nationalisation/expropriation.
- Protection against the suspension of businesses before the expiration of the permit to trade.
- Right of the investor to disburse holdings in foreign currency.
- A five-year tax holiday, including:
 - income tax exemption on profits;
 - relief from customs duties;
 - accelerated depreciation on machinery, equipment and other capital assets;
 - losses to be carried forward for three consecutive years;
 - exemption from commercial tax on exports.

The SEZ law provides:

- Income tax exemption on profits for the first seven years within an exempted zone.
- 50% income tax reduction for the second five-year period.
- Import duty relief on raw materials, machinery, equipment and other goods as specified.
- Losses may be carried forward for five years.

However, the extent and applicability of these incentives will vary from case to case and are subject to governmental approvals.

BUSINESS VEHICLES

7. What are the most common forms of business vehicle used in your jurisdiction?

The main business vehicles available in Myanmar are joint venture partnerships, private limited companies, branch offices, associations and representative offices. The most commonly used form is setting up a company under the Myanmar Companies Act. The simple procedure and minimum capital requirements provided under the Act is advantageous to many foreign investors, particularly those in the service sector.

8. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, what are the main registration and reporting requirements?

Registration

Registration of a company under the Myanmar Companies Act consists of two main steps:

- Application for a trade permit.
- Registration with the Companies Registration Office.

There is an additional step for investments with a high capital outlay or those intending to operate under the Foreign Investment Law (FIL). They must also apply for an investment permit from the Ministry of Commerce (please see www.dica.gov.mm for more information).

Reporting requirements

Every company registered under the Myanmar Companies Act is required to comply with its provisions and file the following with the Companies Registration Office (CRO):

- Renewal of permit to trade.
- Change of registered address of business.
- Particulars of directors, managers and managing agents and of any applicable changes (Form XXVI).
- Return of allotment of shares (Form VI).
- Annual list of shareholders (Form E).
- Special and extraordinary resolutions.
- Return of persons authorised to accept services of process and notices (foreign branches and representative offices).
- Change of scope of activities (business objectives).
- Increase in authorised capital of company.
- Change of company name.
- Share transfer in certain cases.

- Head office's audited financial statements/annual report in case of foreign branches and representative offices.
- Statement of holding of shares (foreign branches and foreign representative offices).
- Change of directors of head office (foreign branches and representative offices).
- Change in Memorandum of Association and Articles of Association of incorporated companies and of head office (foreign branches and representative offices).
- Display name of company.
- Banking companies and insurance companies regarding publication and authentication of financial statements.
- Annual audited financial statements.

It is mandatory for every company to maintain the following records:

- Members' register.
- Index to members in certain cases.
- Directors' register.
- Register of mortgages and charges.
- Share certificates.
- Minutes of the board of directors' meetings.
- Minutes of the annual general meetings.

Share capital

Registration under the Myanmar Companies Act requires a minimum share capital of:

- US\$50,000: Service companies.
- US\$150,000: Manufacturing companies.

The new Foreign Investment Law (FIL) does not prescribe specific minimum capital requirements; they are set on a case-by-case basis. However, recent practice trends are for the Myanmar Investment Commission (MIC) to generally follow the capital limits set by the old FIL:

- US\$300,000: Service companies.
- US\$500,000: Manufacturing companies.

Non-cash consideration

This can be issued at the discretion of the directors in accordance with the Memorandum of Association and Articles of Association.

Rights attaching to shares

Restrictions on rights attaching to shares. This depends on the nature of the shares, for example, ordinary, preference or management shares.

Automatic rights attaching to shares. Ordinary shareholders and management shareholders have automatic rights.

9. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, outline the management structure and key liability issues.

Management structure

Foreign companies established in Myanmar require a minimum of two shareholders and three directors (one being the managing director).

Management restrictions

There are no restrictions on foreign managers.

Directors' and officers' liability

A director may be liable if he exceeds the scope of the company's objectives or exceeds his authorised power or breaches fiduciary duties. The directors' may also be held personally liable in the event of the company failing to comply with the various requirements imposed by law.

Parent company liability

For limited liability companies, parent companies will be liable to the extent of the value of their shares. However, for corruption and other offences, liability may extend to the parent company, depending on the nature of the offence and knowledge of the management/controller company.

EMPLOYMENT

Laws, contracts and permits

10. What are the main laws regulating employment relationships?

There is no single universal legislation that applies to all sectors, and the labour laws of Myanmar unite many different legal focus points. The most significant laws are the:

- Employment & Skills Development Law.
- Leave & Holidays Act 1951.
- Minimum Wages Law.
- Social Security Law 2012.
- Shops and Establishments Act 1951.
- The Factories Act 1951.

Most of the provisions in these laws apply to foreign employees based in Myanmar. Employment contracts for local employees working outside of Myanmar are likely to be governed by the labour laws of the country where they are working. Employment contracts are generally guided by Myanmar law and may be subject to review by the local township authorities.

11. Is a written contract of employment required? If so, what main terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

Employment contracts must be written in compliance with the Employment & Skills Development Law. The law lists the mandatory provisions that must be included in the employment contract. For example, standard clauses on remuneration, termination, duration and social security benefits must be explicitly stated in the employment contract.

12. Do foreign employees require work permits and/or residency permits?

The government is currently preparing appropriate work permit procedures and they are expected to be in place by the end of 2014. On 18 November 2014, the Ministry of Immigration and Population issued an announcement through Notification No. 1/2014 that will establish a permanent residency system that will grant foreign employees a permit to stay in Myanmar for up to five years, renewable for subsequent five year periods at a time. There is expected to be further details about the implementation of the

scheme from 5 December 2014. Until this point the general procedure must be followed, where foreign employees may work in Myanmar on a single entry business visa granting a stay of up to 70 days. Foreign employees who wish to stay longer, need to apply for a multiple entry business visa as provided in the stipulated visa rules. Costs are determined by the relevant Myanmar embassy in the jurisdiction where the application is filed.

TERMINATION AND REDUNDANCY

13. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

There is no provision for management representation for employees in the Labor Organization Law or the Settlement of Labor Disputes Law. However, employees can negotiate their conditions of employment and general welfare through their Workplace Coordinating Committee.

14. How is the termination of individual employment contracts regulated?

Termination of employment contracts in Myanmar is generally not at will and must be accompanied by clear notice (depending on how long the employee has worked with the company). The distinction of unfair and fair dismissal depends on the facts of each case and consideration by the conciliatory body. For wrongful conduct, dismissal may be without statutory severance pay.

In general, for employment of:

- Less than three months: severance pay plus one month's notice pay is due.
- Between three months and one year: severance pay plus two months' notice is due.

The amounts above increase depending on the number of years of service.

An employee can initiate alternative dispute resolution by approaching the local labour conciliation body for relief.

15. Are redundancies and mass layoffs regulated?

Mass layoffs and associated labour disputes are regulated by the Labour Organisation Law 2011 and Settlement of Labour Disputes Law 2012. There is no obligation for the employer to consult with union representatives prior to management decisions, including layoffs.

TAX

Taxes on employment

16. In what circumstances is an employee taxed in your jurisdiction and what criteria are used?

Employees are taxed based on their residency. Foreign employees who have resided in Myanmar for at least 183 days of any financial year will be considered a tax resident.

17. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

Tax resident employees

Both local Burmese employees and foreign employees that have resided for at least 183 days in Myanmar are subject to the following rates of tax:

- Income tax: Between 0% and 25%.
- Social security: 2%.

Non-tax resident employees

Foreign employees that have been resident in Myanmar for between one and 183 days are subject to a flat rate of 35% that will be taxed on income derived from all sources in Myanmar.

Employers

From 1 April 2014, employers must contribute 3% of the employee's salary towards the social security fund.

BUSINESS VEHICLES

18. When is a business vehicle subject to tax in your jurisdiction?

Tax resident business

Resident companies are generally taxed on their worldwide income, including income accrued outside of Myanmar. A resident company is a company as defined and formed under the Myanmar Companies Act, 1913 (MCA). Myanmar companies formed under the Foreign Investment Law (FIL) are also treated as resident companies for the purposes of taxation. However, FIL companies are not taxed on their foreign income and receive certain tax exemptions under the FIL.

Non-tax resident business

A non-resident company is one that is not formed under the MCA or any other existing law of Myanmar. Non-resident companies are only taxed on income derived from sources in Myanmar. Income received from any capital assets within Myanmar and from any source of income within Myanmar is deemed to be income received within Myanmar for tax purposes.

19. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction (including tax rates)?

Corporate tax is generally levied between 25% and 35% for businesses in Myanmar.

Commercial tax is levied on transactions specified in the Commercial Tax Law and applies to Myanmar-resident entities that produce, manufacture or import items in Myanmar. However, it is not applicable to non-resident entities.

In addition, withholding tax may be deducted on the sale of certain goods at a rate of between 2% and 3.5%.

Companies must register when commencing business, and file quarterly and annual tax returns for commercial tax. There is a 10% penalty applicable for each default, including failure to retain invoices and/or receipts. This penalty is calculated based on the deficit amount that the tax falls short of what is required by law.

DIVIDENDS, INTEREST AND IP ROYALTIES

20. How are the following taxed:

- Dividends paid to foreign corporate shareholders?
 - Dividends received from foreign companies?
 - Interest paid to foreign corporate shareholders?
 - Intellectual property (IP) royalties paid to foreign corporate shareholders?
-

Dividends paid

There is no tax on dividends paid. There is stamp duty payable of 5 Kyats.

Dividends received

There is no tax on dividends received.

Interest paid

There is a 15% withholding tax on interest paid to non-resident foreigners.

IP royalties paid

There is a 20% withholding tax on royalties paid to non-resident foreigners and 15% withholding tax on royalties paid to resident citizens and foreigners.

21. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

There are no specific regulations on thin capitalisation.

Foreign Investment Law (FIL) companies can obtain loans from foreign banks or business entities.

22. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

There are no controlled foreign company rules in Myanmar.

23. Are there any transfer pricing rules?

There are no specific transfer pricing rules. However, section 19(c) and (d) of the Income Tax Law provides for an arms-length assessment.

CUSTOMS DUTIES

24. How are imports and exports taxed?

Customs tariffs vary between 0% and 10% depending on the item and whether in part or whole. However, most export items are exempt from export duty.

Double tax treaties

25. Is there a wide network of double tax treaties?

Myanmar has double taxation treaties with the United Kingdom, Malaysia, Singapore, India, South Korea, Thailand, Bangladesh, Laos and Vietnam.

COMPETITION

26. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single-firm) conduct regulated by competition law?

Competition authority

There is no Competition Authority. Myanmar's draft Competition Law is currently under review.

Restrictive agreements and practices

Section 27 of the Myanmar Contracts Act provides that an agreement in restraint of trade may be considered void. However, in practice, such agreements are acceptable (provided they are reasonable in duration, scope and territory).

Unilateral conduct

Article 36(b) of the Constitution of the Union of Myanmar provides that the public must be protected from monopolistic practices and unfair competition.

27. Are mergers and acquisitions subject to merger control?

There are no specific regulations on mergers and acquisitions. Foreign Investment Law (FIL) companies must submit to the Myanmar Investment Commission (MIC) and Directorate of Investment and Company Administration (DICA) for approval when selling or transferring shares.

INTELLECTUAL PROPERTY

28. Outline the main IP rights in your jurisdiction.

Patents

Definition and legal requirements. There is currently no specific patent law in Myanmar.

Registration. For the protection of a patent, the patent owner can record the patent by recording a Declaration of Ownership and publishing a Cautionary Notice with a local newspaper.

Enforcement and remedies. Recording a Declaration of Ownership (*see above*) helps to establish prior use for enforcement. The relevant date would be the registration date of the declaration and the first date of use in Myanmar. This would be decided by the court.

A patent owner can launch a civil action against an infringer for infringement under section 54 of the Specific Relief Act to obtain a permanent injunction.

Length of protection. The length of protection for a patent is three years from the date of recording a Declaration of Ownership (*see above*). This can be renewed either by re-recording the patent or by republishing the Cautionary Notice (*see above*) in a local newspaper.

Trade marks

Definition and legal requirements. In Myanmar, there is currently a draft Trademark Law under review that will define a "mark", which covers perceptible signs, including sounds, smells, and touch, or any visible signs including pictures, names, domain names, signatures, letters, words, numerals, brands, labels, configurations, trade dress, packaging, colours or combinations of colours.

Protection. There is currently no authority that protects the registration of trademarks. However, the traditional practice is to record trademarks through a Declaration of Ownership with the Registry of Deeds & Assurances.

Enforcement and remedies. See above, *Patents*. In addition, under sections 482, 483, 485 and 486 of the Penal Code, trademark infringement is considered a criminal offence for which both a fine and imprisonment can be imposed. The court can also confiscate all counterfeit goods and items used to infringe.

Length of protection and renewability. See above, *Patents*.

Registered designs

Definition and legal requirements. There is currently no specific design law in Myanmar.

Registration. For the protection of a design rights, the owner can record the design by recording a Declaration of Ownership and publishing a Cautionary Notice with the local newspaper.

Enforcement and remedies. See above, *Patents*.

Length of protection and renewability. See above, *Patents*.

Unregistered designs

Definition and legal requirements. There are no definitions available under Myanmar law.

Enforcement and remedies. There are no enforcement mechanisms or remedies for infringement of unregistered designs in Myanmar.

Length of protection. There is no protection available.

Copyright

Definition and legal requirements. The only copyright law is substantially out of date and precedes the colonial period. The law only applies to publications in Myanmar, and foreign copyrighted works are not recognised.

Protection. There is no protection available.

Enforcement and remedies. There are no enforcement mechanisms or remedies for infringement of copyright in Myanmar.

Length of protection and renewability. Copyright protection lasts for 50 years but only for local works published in Myanmar.

MARKETING AGREEMENTS

29. Are marketing agreements regulated?

There are no specific laws regulating agency, distribution or franchising agreements. These types of agreement would need to be read alongside the general principles of the Myanmar Contracts Act 1872 (MCA). Many business partners contract using local or foreign choice of law provisions. However, it is mindful to be aware of applicable local laws, such as the Import and Export Rules framed by the Ministry of Commerce, which require qualified contracts to be governed by and conducted in accordance with the laws of Myanmar.

In addition, it is common practice for foreign companies to insert an exclusivity clause in agreements to limit the distributor from selling competitor products within the same market. Section 27 of the MCA provides that any contract in restraint of trade will be void. In practice, this is not an absolute rule, but any post contractual clauses must be reasonable in duration, limit and territory.

Myanmar is not typically considered a freedom to contract jurisdiction, and every agreement must adhere to certain standards provided in the law of contract. Any reasonably presumed unfair

clauses would be scrutinised by the court if disputed. Open-ended distributor agreements can be terminated without any obligation to pay compensation, whereas one that is limited in time may involve an obligation to pay compensation if sufficient cause for termination cannot otherwise be shown.

E-COMMERCE

30. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)?

There are no specific laws for e-commerce in Myanmar. However, the Electronic Transaction Law of 2004 specifically focuses on electronic contracting and signatures.

ADVERTISING

31. Outline the regulation of advertising in your jurisdiction.

The draft Public Service Media Bill, once enacted, will regulate most media activity, including advertising.

DATA PROTECTION

32. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

Myanmar does not currently have data protection laws.

PRODUCT LIABILITY

33. How is product liability and product safety regulated?

Myanmar has not passed any legislation dealing with product liability. However, some laws regulate certain aspects of product liability, including the:

- Contracts Act.
- Sale of Goods Act.
- Penal Code.
- National Drug Law.
- National Food Law.

MAIN BUSINESS ORGANISATIONS

Directorate of Investment and Company Administration (DICA)

W www.dica.gov.mm

Main activities. Government department in charge of company formations and administering MOC policies, guidelines and regulations.

Internal Revenue Department (IRD)

W www.irdmyanmar.gov.mm

Main activities. Responsible for tax collections, e-filings, tax rulings, formulation and publications of laws and notifications.

Myanmar Customs Department

W www.myanmarcustoms.gov.mm

Main activities. Main government authority for setting tariff rates, rules, customs inspections, approvals, exemptions for regulating import and export.

Ministry of Commerce

W www.commerce.gov.mm

Main activities. Government Ministry in charge of formulating policies, guidelines, notifications and approvals for FIL companies.

Ministry of Labour, Employment and Social Security

W www.mol.gov.mm

Main activities: Ministry responsible for regulating labour affairs, including formulation of policies, laws, notifications and guidelines.

ONLINE RESOURCES

Ministry of Information

W www.moi.gov.mm/laws

Description. Maintained by the Ministry of Information. Provides newly enacted laws available in Burmese.

Directorate of Investment and Company

W www.dica.gov.mm

Description. Maintained by the Directorate of Investment and Company Administration (DICA). Official English language versions of some laws are available, such as the Foreign Investment Law.

Polastri Wint & Partners

W www.pwplegal.com

Description. Polastri Wint & Partners maintains a sizeable number of up to date unofficial English language versions of Burmese laws, some of which are available on request.

Practical Law Contributor profiles

**Michael Ramirez, Senior Consultant**

Tilleke & Gibbins

T +66 2653 5794

F +66 2653 5678

E michael.r@tilleke.com

W www.tilleke.com

**Nwe Oo, Attorney-at-Law**

Tilleke & Gibbins

T +95 1 255 208

F +95 1 255 207

E nweoo@tilleke.com

W www.tilleke.com

Professional qualifications. State Bar of California, 2003; Chartered Institute of Arbitrators, 2007

Areas of practice. Dispute resolution and litigation; employment; anti-corruption; transportation and logistics.

Professional qualifications. Bar Council of Myanmar, 1997

Areas of practice. Corporate services; commercial transactions and M&A; dispute resolution and litigation.

**Shalini Ghosh, Consultant**

Tilleke & Gibbins

T +66 2653 5623

F +66 2653 5678

E shalini.g@tilleke.com

W www.tilleke.com

Professional qualifications. Bar Council of India, 2012

Areas of practice. Intellectual property; regulatory affairs; commercial transactions and M&A; corporate services; anti-corruption.