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## Navigator

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# M&A

## in Myanmar



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- Correct as of





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## Country snapshot

### Trends and climate

#### What is the current state of the M&A market in your jurisdiction?

According to statistics released by the Directorate of Investment and Company Administration (DICA), Myanmar recorded direct foreign investment of \$5.71 billion in the financial year ending 31 March 2018. The majority of foreign investment originates from investors in Singapore, Thailand, Japan, China and Hong Kong. The outlook remains positive despite a slowdown in the market, with the enactment of new laws, such as the Myanmar Companies Law 2017, the Myanmar Investment Law 2016 and the Myanmar Investment Rules 2017.

Myanmar is an attractive destination for many investors – and particularly those in manufacturing-intensive industries, thanks to its low labour costs. The minimum wage was recently increased to Kt4,800 a day (approximately \$4); this is based on Kt600 per hour (\$0.50), for eight hours of work. The increase comes pursuant to Notification 2/2018 issued by the National Minimum Wage Committee of the Ministry of Labour, Immigration and Population, in accordance with the Minimum Wages Act 2013. Nevertheless, compared to its regional neighbours, Myanmar has yet to experience a large number of high-profile M&A transactions.

#### Have any significant economic or political developments affected the M&A market in your jurisdiction over the past 12 months?

The ethnic tensions in Rakhine State may have deterred some prospective entrants into the market in the past year. According to the October 2017 World Bank Myanmar Economic Monitor, the escalation of tensions in Rakhine State could further heighten investor perceptions of risk and negatively affect investment flows in the country, despite being geographically contained.

There are also prevailing sanctions against Myanmar – for example, the European Union extended its arms embargo against Myanmar at the end of April 2018, citing human rights violations.

#### Are any sectors experiencing significant M&A activity?

While M&A activities in Myanmar are spread across different industries, there have been notable transactions in the manufacturing and telecoms sectors in recent years. According to statistics compiled by the DICA, as of 31 March 2018 the sectors with the highest levels of foreign investment were:

- manufacturing;
- real estate;
- transport and communications;
- power; and
- services.

On 9 May 2018 the Ministry of Commerce issued Notification 25/2018, enabling foreign companies and foreign joint venture companies to operate wholesale and retail businesses subject to certain requirements. This is expected to be an area of substantial activity in the near future.

#### Are there any proposals for legal reform in your jurisdiction?

There are currently no further proposals for substantive legal reform targeting the regulation of M&A activity in Myanmar, although there has been substantial company law reform in the past few years aimed at modernising the country's commercial legal framework. The Myanmar Investment Law was passed in October 2016, replacing the Foreign Investment Law 2012 and Citizen Investment Law 2013; its subsidiary legislation, the Myanmar Investment Rules, was issued in March 2017. The new Myanmar Companies Law, which repealed the century-old Companies Act 1914, was passed in December 2017 and is slated to enter into force in August 2018. Related to the reform seen in the new Myanmar Companies Law, a new insolvency law is currently being drafted to replace the century-old Burma Insolvency Act 1920. This is intended to meet the need to match modern business practices with modern laws and regulations.

## Legal framework

### Legislation

#### What legislation governs M&A in your jurisdiction?

The principal legislation governing M&A in Myanmar is:

- the newly enacted Myanmar Companies Law, which is scheduled to enter into force in August 2018;
- the Myanmar Investment Law 2016; and
- the Competition Law 2015.

Other general laws governing business relationships in Myanmar are also applicable, including the Contract Act 1872 and the Consumer Protection Law 2014.

## Regulation

### How is the M&A market regulated?

The direct or indirect acquisition of the majority of shares or controlling interest in a Myanmar company will be regulated under the share transfer and registration requirements in the new Myanmar Companies Act. However, the acquisition of shares in Myanmar companies which hold a Myanmar Investment Commission (MIC) permit can only be done with the prior written approval of the MIC.

### Are there specific rules for particular sectors?

Yes. There are restrictions against foreign investment in certain sectors. For example, foreigners are generally prohibited from engaging in tour-guide service activities in Myanmar. As such, the acquisition of shares in a citizen-owned tour-guide service company by a foreign investor would not be allowed in Myanmar. Further, in the telecoms sector, M&A is regulated by the Posts and Telecommunications Department of the Ministry of Transport and Communications, under the Telecommunications Law 2012 and Competition Rules for the Telecommunications Sector 2013. The Competition Rules for the Telecommunications Sector stipulate:

- the circumstances under which the approval of the Posts and Telecommunications Department must be obtained;
- the procedure to obtain approval; and
- the criteria for approval.

## Types of acquisition

### What are the different ways to acquire a company in your jurisdiction?

Acquisition of a company can be done through share purchases, business or asset transfers or schemes of arrangement. In the acquisition of shares, the restrictions applicable to foreign investment must be noted. For example, a foreign investor is generally prohibited from acquiring shares in a Myanmar company engaged in the pharmaceutical distribution business. Therefore, business or asset transfers are common due to the difficulties in acquiring shares in Myanmar companies. Schemes of arrangement are also allowed under the Myanmar Companies Law, permitting the acquisition of a company where 75% of the shareholders' vote has been obtained, subject to court supervision.

## Preparation

### Due diligence requirements

### What due diligence is necessary for buyers?

As with other jurisdictions, thorough legal and financial due diligence is necessary before entering into an M&A transaction in Myanmar. Public records are not well maintained and not generally accessible to members of the public, which poses significant challenges during the due diligence process, with the buyer often relying primarily on disclosures by the seller. Land due diligence and legal due diligence are particularly challenging in Myanmar, for reasons discussed in the next section.

## Information

### What information is available to buyers?

For share offerings of public companies under the new Myanmar Companies Law, a prospectus providing a variety of detailed information on the company must be registered and made available to the public. The published information must include:

- the details of the company constitution;
- the names and addresses of the directors, initial company shareholders (for initial public offerings) and auditor;

- acquisition details for interested purchasers;
- initial public offering preliminary expenses (if applicable);
- details of material contracts;
- details of the rights of different classes of shares, if any; and
- auditors' reports for the past three years.

At the time of writing, very limited basic information on private companies is available from the Directorate of Investment and Company Administration (DICA). However, as part of the implementation of the new Myanmar Companies Law, an online registration system will be put in place by 1 August 2018. It is unclear to what extent the registered information will be accessible to the public online.

There is generally no way of determining the assets held by a company, or the value of those assets, from public records. There is no asset registration for mortgages or other purposes. There are no laws for the creation or registration of security interests in movable property.

Due diligence of land ownership and lease holdings is necessary but often challenging, due to the following factors:

- the absence of an accessible electronic filing system;
- the need to attend the local land office in the region where the land is located; and
- the challenge of obtaining cooperation from land officials in order to access documents and information.

Documents and information obtained from the property owner are generally the primary source in due diligence investigations.

Due diligence of existing or potential legal liability is similarly challenging. The effectiveness of litigation, arbitration and bankruptcy searches is very limited in Myanmar. There is no online keyword search facility available to check pending cases filed before the courts, although the Union Supreme Court maintains the case list and judgment order date of active civil and criminal cases at the state and regional high courts. File searches for pending litigation matters must be conducted manually at the individual courts, since no centralised filing system exists. It is sometimes difficult to obtain approval to conduct these searches, as detailed information about litigation is often kept confidential by court officials, with only the relevant parties and their legal advisers allowed access. Again, it is often necessary to rely primarily on information provided by the target company or the seller.

## What information can and cannot be disclosed when dealing with a public company?

Under Section 202 of the Myanmar Companies Law, a public company issuing shares must issue a prospectus or similar document, registered with the DICA and made available to the public, providing a long list of company details, including:

- the details of the company constitution;
- the names and addresses of the directors, initial company shareholders (for initial public offerings) and auditor;
- acquisition details for interested purchasers;
- initial public offering preliminary expenses (if applicable);
- details of material contracts;
- details of the rights of different classes of shares, if any; and
- auditors' reports for the past three years.

There are no other specific regulations regarding disclosure by either party when dealing with a public company.

### Stakebuilding

## How is stakebuilding regulated?

There are no specific laws or regulations concerning stakebuilding, except that foreign shareholding in companies operating in certain industries is limited to 35% (or other maximum amounts, as announced from time to time). Foreign shareholding exceeding the limit must be reported by the company and action must be taken to address the excess. Also, the legal prohibition on foreign companies holding land would create a legal issue for:

- any potential foreign purchaser of shares in a 100% Myanmar-owned company that owns land; or
- any Myanmar company with foreign share ownership seeking to purchase land.

### Documentation



## Preliminary agreements

### What preliminary agreements are commonly drafted?

The following preliminary agreements are commonly drafted:

- memoranda of understanding;
- joint venture agreements;
- shareholder agreements; and
- non-disclosure agreements.

## Principal documentation

### What documents are required?

Documents required for acquisition by share purchase include an executed share transfer agreement in the form specified by the company and the issuance of a new share certificate by the company. The Myanmar Companies Law 2017 also requires the transaction to be registered in the company share registry, and notice of the transfer filed with the Directorate of Investment and Company Administration.

For acquisition of a company by purchase of assets, required documents include a sale and purchase agreement and ancillary documents, such as assignment agreements for certain rights, assets and existing contracts that are being transferred, and land sale and title transfer documents.

### Which side normally prepares the first drafts?

This is at the parties' discretion.

### What are the substantive clauses that comprise an acquisition agreement?

The substantive clauses in an acquisition agreement are:

- a definition or list of what is being sold;
- details of transfer logistics;
- payment details;
- conditions of sale (ie, preconditions and subsequent conditions);
- pre-closing undertakings;
- extensive seller warranties and representations;
- basic purchaser warranties of capacity; and
- confidentiality and non-disclosure clauses.

### What provisions are made for deal protection?

Alongside other protections chosen by the parties, the provisions for deal protection may include:

- contractual warranties and representations;
- conditions subsequent to completion of sale;
- remedies specified for breach of contract;
- the right to cure breach;
- provisions to prevent deadlock; and
- buyout rights.

## Closing documentation

### What documents are normally executed at signing and closing?

If acquisition of a company is by transfer of shares, the typical documents at closing are the share transfer agreement and a shareholders' agreement. A business plan separately developed and agreed by the parties may be attached as a schedule to the shareholders' agreement.



## Are there formalities for the execution of documents by foreign companies?

Stamp duty must be paid and stamps affixed to:

- share transfer agreements;
- land conveyance documents;
- powers of attorney;
- agreements or memoranda of agreement “for or relating to the sale of goods or merchandise”; and
- other documents specified in the Burma Stamp Act.

A foreign party is usually required by the Myanmar party (and vice versa) to produce:

- certified corporate registration documentation;
- a power of attorney authorising the company representative to sign (if not authorised in the registration document); and
- a board of directors resolution, if required by the company’s constitution or articles of association.

## Are digital signatures binding and enforceable?

The Electronic Transaction Law 2004 and Evidence Act 1872 (as amended in 2015) recognise digital signatures as valid and enforceable in Myanmar.

### Foreign law and ownership

#### Foreign law

## Can agreements provide for a foreign governing law?

With reference to private international law concepts, the general view in Myanmar is that the governing law of the target company’s jurisdiction is more reliable and appropriate for local company share transfers and asset transfers (especially if land is being transferred). However, using foreign governing law in purchase agreements is acceptable in principle.

#### Foreign ownership

## What provisions and/or restrictions are there for foreign ownership?

Ownership of immovable properties by foreign entities or persons in Myanmar is prohibited under the Transfer of Immovable Properties Restriction Law. Operation of certain types of business is also prohibited to foreigners and Myanmar companies with more than 35% foreign ownership (or other proportions, as may be specified in notifications or other government regulations).

### Valuation and consideration

#### Valuation

## How are companies valued?

Assets or shares can be:

- valued by a third-party professional valuation service provider;
- agreed by the parties;
- agreed by a financial formula, such as a multiple of average earnings before interest, taxes, depreciation and amortisation; or
- calculated and proposed by the seller’s auditor or another auditor and reviewed and verified by an accountant, auditor or valuation professional selected by the purchaser, often as a result of the purchaser’s due diligence investigation.

Parties generally negotiate and mutually agree on the final valuation to be specified in the purchase and sale or share transfer agreement.

#### Consideration



## What types of consideration can be offered?

From 1 August 2018, following the implementation of the new Myanmar Companies Law, the consideration for which a share is issued may take any form as determined by the board. If the consideration for the issue is to be other than cash, the board must:

- record the consideration in sufficient detail to identify it;
- determine and record the reasonable present cash value of the consideration for the issue and the basis for assessing it; and
- resolve that, in its opinion:
  - o the consideration for and the terms of the issue of shares are fair and reasonable to the company and to all existing members; and
  - o the present cash value of such consideration is not less than the amount to be credited for the issue of the shares.

## Strategy

### General tips

## What issues must be considered when preparing a company for sale?

A well-considered plan must be developed, mapping the transaction to close, including preparation of a list of tasks and timelines.

The following issues must be considered:

- the extent to which the negotiation and consolidation of terms have been agreed by the parties;
- the extent to which the seller is committed to closing the transaction;
- the outstanding issues, including details not addressed by the parties;
- the client's position and degree of flexibility, as well as the purchaser's position (if known) on all outstanding issues, with special emphasis on financial issues;
- what is known about the purchaser; and
- the time constraints.

Tax issues should not be disregarded. Unfortunately, parties frequently delay resolving this issue because it requires expert input.

## What tips would you give when negotiating a deal?

A good negotiator will:

- be the most prepared person at the table;
- maintain composure and not overreact to unattractive offers or assessments;
- set goals, but be flexible and open to options;
- pay attention to details of the other party's positions and changes in position;
- be prepared to amend the strategy when new information surfaces or the purchaser's approach changes; and
- when possible, begin negotiating communications by covering the issues on which agreement has been reached or can be reached without too much difficulty, providing a platform for moving to the more contentious issues.

### Hostile takeovers

## Are hostile takeovers permitted and what are the possible strategies for the target?

There is no specific legislation that applies to hostile takeovers. Hostile takeovers are uncommon in Myanmar because there are only a handful of publicly traded shares for companies listed on the local stock exchange, and shares of private companies cannot be transferred without the approval and signature of transferors and the registration of the transfer by the company's board of directors.

## Warranties and indemnities

### Scope of warranties

#### What do warranties and indemnities typically cover and how should they be negotiated?

Beyond the boilerplate representations (eg, concerning the capacity of the company and its representative to execute the agreement and the absence of encumbrances on the shares or assets being sold), warranties and indemnities are typically prepared by the purchaser, simply because the purchaser is more motivated to protect its interests through comprehensive warranties on a company's assets and regulatory compliance in all aspects of its operations.

Warranties may cover matters including:

- financial good standing;
- the accuracy and completeness of financial documents and other documents provided to the purchaser;
- licensing compliance;
- filing compliance;
- tax filings and withholdings;
- holding good title to assets;
- compliance with environmental regulations;
- the absence of bankruptcy or other legal proceedings;
- claims or potential claims;
- adequate insurance policies;
- validity of IP rights;
- no infringement of IP rights of others; and
- assurances regarding the transfer or retention of employees or key staff.

### Limitations and remedies

#### Are there limitations on warranties?

The parties may agree to time and financial limitations on the warranties included in the purchase agreement. There are no limitations imposed by law. Myanmar is a 'freedom of contract' jurisdiction, with judges normally enforcing the terms and conditions freely entered into by the parties to an agreement, and this holds true for limitations on warranties. Contract terms between parties with relatively equal bargaining power which place a reasonable maximum limit on the liability of one (or both) parties, or which exclude indirect and consequential loss provisions, are generally enforceable under Myanmar law; indeed, both are often included in international agreements of various kinds. Sometimes the contract value is the maximum limit on a party's liability.

The general consensus in Myanmar is that a maximum liability amount is enforceable even if unfair, but there is a minority argument for an exception in the case of egregious circumstances, where a public policy exception may be found by a court.

Under Section 74 of the Contracts Act 1872, as amended, parties may stipulate in their contract the amount to be paid as a penalty in the event of breach of contract by one party. However, Section 24 also says the non-breaching party is entitled to an amount up to the specified penalty.

#### What are the remedies for a breach of warranty?

Breach of warranty is treated like breach of any other provision of a contract. The remedies for a breach of warranty can be stipulated in the contract by the parties and may be in the form of a penalty. If remedies are not stated in the contract then the provisions of the Contracts Act applies. Remedies can include:

- rescission of the contract;
- specific performance; or
- compensation for loss or damage suffered by the non-breaching party.

#### Are there time limits or restrictions for bringing claims under warranties?

The limitation period in Myanmar is three years for claims for breach of a promise to do anything at a specified time or on the occurrence of a specified contingency.

## Tax and fees

### Considerations and rates

#### What are the tax considerations (including any applicable rates)?

When acquiring a company by purchase of shares, the seller will be subject to capital gains tax on the profit resulting from the sale. Both residents and non-residents must pay capital gains tax on profit from the sale, exchange or transfer of capital assets. The person or company receiving profit from the sale of capital assets (including shares) must pay capital gains tax. The seller or transferor of the shares must file a record of the sale with the Directorate of Investment and Company Administration (DICA), even if there is a loss.

The tax rate on capital gains on profits for all taxpayers, except for oil and gas profits, is 10%. A special higher rate is imposed for capital gains profits derived from companies engaged in oil and gas operations.

The current corporate income tax rate for Myanmar-registered companies (eg, local, foreign-owned and Myanmar Investment Commission (MIC)-permitted companies and branches) is 25% on net profit.

Withholding tax rates are as follows:

Lease agreements executed in Myanmar must be affixed with stamp duty at the rate prescribed below and endorsed by the relevant revenue department within one month of the execution date.

### Exemptions and mitigation

#### Are any tax exemptions or reliefs available?

Tax exemptions may be available if the seller of the shares has obtained privileges under the Myanmar Investment Law 2016 for tax relief benefits for a specified limited period. Under the Myanmar Investment Law, all companies which obtain a permit from the MIC are eligible for income tax exemptions for:

- up to seven years, if investing in the least-developed areas;
- up to five years, if investing in moderately developed areas; and
- up to three years, if investing in developed areas.

All companies with MIC permits are also eligible for tax relief for internal taxes on imported machinery and raw materials to be used for investment projects.

#### What are the common methods used to mitigate tax liability?

Applying for and obtaining a MIC permit for eligible investment activities is the most common and useful method of mitigating tax liability in Myanmar. Myanmar also has double taxation treaties with many countries, which may benefit foreign sellers facing taxation both in Myanmar and at home.

### Fees

#### What fees are likely to be involved?

The most significant fees for the purchaser in an acquisition transaction are the legal fees to be paid for:

- due diligence investigation;
- assistance in preparing and negotiating the key document terms and conditions;
- advice on legal issues and procedures for the sale of shares or assets;
- preparation of sale transaction documents and ancillary documents;
- preparation of the execution form for the transaction documents;
- closure of the contract and signing of documentation; and
- filing of share transfer details with the DICA.

There are government fees and stamp duties to be paid related to:

- company registration;
- issuance of share certificates;
- registration of share transfer documents;
- execution of any power of attorney for a person acting on behalf of a company (or other person) in order to sign documents or take other actions;
- MIC applications;
- exporter or importer registration;
- lease agreement registration; and
- other documents required to be registered or subject to stamp duty under the applicable law.

## Management and directors

### Management buy-outs

#### What are the rules on management buy-outs?

There are no specific regulations in Myanmar for management buy-outs; no restrictions prevent the management of a company from buying shares in the same manner as any other person or shareholder.

### Directors' duties

#### What duties do directors have in relation to M&A?

There are no laws or regulations specifically related to directors' duties in relation to M&A. The directors are responsible for ensuring that the acquisition of shares is recorded in the company registry on presentation of the appropriate documents.

## Employees

### Consultation and transfer

#### How are employees involved in the process?

There are no specific laws governing employees in a company acquisition. It is not a statutory obligation to obtain written consent from employees before implementing an acquisition. In Myanmar, employees are not involved in the acquisition process.

#### What rules govern the transfer of employees to a buyer?

There are no specific laws governing this. In an acquisition of assets by purchase, buyers and sellers typically agree in the primary sales agreement as to which employees will be transferred to the buyer's designated company (with their consent), along with the details of the division of responsibilities of the parties for salary and benefits of the employees being transferred.

For acquisition by transfer of shares, there are not typically any specific agreements between the parties beyond the acknowledgement that the company's employees will continue after the acquisition. If the buyer wants to reduce or change the work force, it normally would do so after completing the acquisition (ie, without the involvement of the seller).

### Pensions

#### What are the rules in relation to company pension rights in the event of an acquisition?

There are no specific laws governing this. Normally, responsibility for pension rights will remain with the company, but the amount of accrued pension rights will be factored into the valuation of the company for the purposes of establishing the price of the shares or assets.

## Other relevant considerations

### Competition

#### What legislation governs competition issues relating to M&A?

Competition issues relating to M&A are governed by the Myanmar Competition Law 2015 and the Myanmar Competition Regulations 2017. For the telecoms sector, the Competition Rules for the Telecommunications Sector 2013 apply.

#### Anti-bribery

### Are any anti-bribery provisions in force?

Anti-bribery and corruption matters are principally governed under the Penal Code 1860 and the Anti-corruption Law 2013. They contain standard anti-bribery provisions generally similar to the US Foreign Corrupt Practices Act and other modern anti-corruption laws in western nations.

#### Receivership/bankruptcy

### What happens if the company being bought is in receivership or bankrupt?

Pursuing acquisition of a company involved in bankruptcy proceedings is a risky endeavour. If the acquisition is through share purchase, the purchaser will 'stand in the shoes' of the seller while the company is subject to the control of a receiver, which is responsible for disposition of assets for the benefit of creditors.

For an acquisition by purchase of assets, the purchaser must tread very carefully and determine the status of the desired assets in the bankruptcy proceeding and their availability for purchase. Under Myanmar bankruptcy law, all assets of the alleged insolvent company at the time of filing for bankruptcy become the property of the court if the company is adjudicated to be insolvent.

To keep the company alive, the buyer must negotiate and settle with company members, shareholders, the receiver and the liquidator to reach a final settlement. Then the receiver, liquidator and company members must apply to the bankruptcy court and company registrar at the Directorate for Investment and Company Administration for settlement of debts and reconstruction of the company.

#### Law stated date

##### Correct as of

**Please state the date as of which the law stated here is accurate.**

30 May 2018.