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RODYK

# Myanmar Investment Guide

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# Myanmar Investment Guide

## 1 Introduction

Myanmar is the largest country in mainland South East Asia and home to about 55 million people. Its largest city is Yangon with a population of approximately 6.5 Million. Nay Pyi Taw, specifically constructed as the political capital, was completed in 2012.

Myanmar currently has one of the fastest growing economies in South East Asia. According to ADB figures, the gross domestic product (“GDP”) growth in 2017 was about 6.8% with foreign investments totalling a value of about USD 6.6 billion.<sup>1</sup>

China and Singapore stand out for levels of foreign direct investments (“FDI”) into Myanmar, with Singapore being the largest investor in the past five years. Other countries that top the list of FDI in Myanmar are Hong Kong, Thailand, UK, South Korea and Vietnam, although the UK investment has declined dramatically in the past two years.<sup>2</sup> Oil & Gas and Energy have attracted the largest value of FDI, although in recent years Infrastructure, Real Estate and Manufacturing have been strong sectors.

In an effort to create an even playing ground for investors from different countries, Myanmar has also ratified 12 bilateral investment treaties that aim to ensure that there is no targeted discrimination of unfair treatment of investors and investors are fairly compensated in case of an expropriation. Myanmar is currently in the process of negotiating an investment treaty with the European Union.

If the government continues to prioritise an agenda of pursuing peace, macroeconomic stability, and accelerated inclusive growth, Myanmar, the last frontier market in South East Asia, has a huge potential to succeed in the next few years in attracting foreign investors to the country.

### Recent Legislative Developments

Myanmar is considered to be a common law jurisdiction. Key laws such as the Myanmar Companies Act 1914 (“MCA”) and the Contract Act 1872 trace their roots back to the British colonial period, which ended in 1948. The country has commenced a process of modernisation of its laws designed to provide investors with a more secure and incentivised investment environment.

Most notably, the Myanmar Investment Law 2016 (“MIL”) – which replaced and repealed the previous Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013 – and the Myanmar Companies Law 2017 (“MCL”) – which will substitute the MCA from the date it enters into force (scheduled for 1 August 2018) - were passed in late 2016 and 2017, symbolising a realisation of the government’s pledge to facilitate market liberalisation and to encourage investment.

Other recent key legislative developments include the Arbitration Law 2016, the Anti-Corruption Law 2013, a set of laws regulating standard employment contract and minimum wages, the Myanmar Competition Law 2015, Intellectual Property Laws, and trade liberalisation for foreigners.

An important part of a common law system is court judgements, which in Myanmar have been not made available to the public during the period in which the country was closed to foreign investments. Against the backdrop of an opaque court and case law system, the Arbitration Law 2016 is a pivotal piece of legislation that provides for a more impartial environment for the resolution of commercial disputes involving foreign investors, aligns Myanmar with internationally accepted standards of arbitration, and places enforcement of foreign arbitral awards in Myanmar in line with the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration.<sup>3</sup>

In a country where perceptions of corruption are among the highest in the world, the introduction of the Anti-Corruption Law 2013 and the President’s Office Guidelines on Accepting Gifts 2016 provides reassurance to investors that Myanmar is trying to proactively tackle problems of corruption within its administration. The Anti-Corruption Law 2013 provides a definition of “corruption” and establishes the

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<sup>1</sup> Myanmar Economic Monitor, October 2017, World Bank

<sup>2</sup> MIC Yearly approved amount of foreign investment (by Country)

<sup>3</sup> At this point in time, foreign investors commonly elect to hold arbitration proceedings in a neutral third-party jurisdiction that has a fully developed legal system and experience in complex commercial arbitration proceedings, thereby limiting the role of Myanmar courts’ involvement to simply enforcing a foreign arbitrated award. In the future, however, arbitration in Myanmar will become more common as the commercial environment and Myanmar courts gain experience in the use and implementation of the Arbitration Law 2016 and more generally with arbitration proceedings.

Anti-Corruption Commission, which is the authority that can investigate corruption cases in Myanmar. The President's Office Guidelines on Accepting Gifts 2016 applies to all members of the Government and public servants and explicitly prohibits these persons from receive gifts.<sup>4</sup>

In an important development in the labour sector, the Ministry of Labour issued Notification 140/2017 in relation to the new standard employment contract template. This new template is more flexible than the previous standard employment contract as it allows parties to amend it with the prior approval of the relevant Township Labour Office. Another important labour reform is the establishment of a new minimum wage of MMK 4,800/day for an 8 hour working day (approximately USD 4) in accordance with Notification 2/2018 of the National Committee for Setting the Minimum Wage.

The Myanmar Competition Law 2015 (entered into force on 24 February 2017) and the implementing Competition Rules 2017 introduce internationally recognised anti-trust notions into Myanmar law and aim to create a level playing field between domestic and foreign businesses and minimise market dominance.

In order to better protect investments, the Upper House of the Myanmar Parliament passed four intellectual property laws, namely the Trademark Law, the Patent Law, the Industrial Design Law and the Copyright Law on 15 February 2018, in an effort to bring Myanmar's IP protection more in line with Trade Related Aspects of Intellectual Property Rights. Of these bills, the Draft Trademark Law is highly anticipated as it proposes a transition from the current "first-to-use" to a "first-to-file" system, bringing Myanmar in line with many other ASEAN countries. These laws are yet to be approved by the Lower House of the Myanmar Parliament and the Assembly of the Union of Myanmar. Once approved and signed off by the President, they will become effective from the day of their publication.

There has been an unofficial ban on domestic trade for foreign companies since 2002 when the Ministry of Commerce ("**MOC**") and Ministry of Planning and Finance stopped issuing "permits to trade" to foreign investors intending to carry out trading activities. This ban has been relaxed by a series of recent regulatory changes issued by the MOC between 2015 and 2017 under s 13(b) of the Export and Import Law 2012 and, most recently, by the MOC Notification 25/2018 issued on 9 May 2018, which allows 100% foreign owned and foreign joint venture ("**JV**") companies to engage in retail and wholesale business subject to meeting minimum capital requirements, holding an MIC permit or endorsement, and registering a retail or wholesale permit with the MOC.

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<sup>4</sup> These guidelines provide for certain exceptions such as for single gifts worth up to MMK 25,000 (about USD 20) and a total gift value per year of MMK 100,000 (about USD 85). Furthermore, gifts received from foreign governments with a value up to MMK 400,000 (about USD 350) can be accepted.

## 2 Investing in Myanmar

There are a number of factors that a foreign investor needs to take into account when considering investing in Myanmar.

In the following section we outline investment vehicles available to foreign investors, the foreign investment regime under the MIL and the Myanmar Special Economic Zones Law 2014 (“SEZL”), as well as the most important changes introduced by the MCL and new opportunities for foreigners and foreign companies to engage in import and trade.

### 2.1 Investment Vehicles

Foreign investors may set up a representative office, branch or company.

In deciding on the appropriate form of investment vehicle, relevant considerations are the scope of the business activities, liability exposure, and registration processes required by the Companies Registration Office known as the Directorate of Investment and Company Administration (“DICA”).

Importantly, a foreign company has the option of registering a branch office, representative office, or company. Individual investors only have the option of setting up a company.

#### 2.1.1 Branch Office and Representative Office

Representative offices and branches are not specifically regulated in the MCA, but DICA issues branch registration certificates for both representative offices and branches. Both branch and representative offices are not separate legal entities and have no limited liability, meaning that liabilities incurred by these entities are liabilities of the headquarters.

Key differences between the two investment vehicles are that a branch office is able to act independently and to engage in legitimate profit-making activities (such as services and, in accordance with recent trade liberalisations, trade), whereas a representative office is only allowed to carry out non-profit making activities, such as market observation and promotional and liaison work for the foreign company (non-commercial activities).

The formalities for registering a branch office or representative office with DICA are more cumbersome and complex than those required to incorporate a company limited by shares. Once the MCL comes into effect, foreign companies will no longer register as branch or representative offices, but rather as overseas corporations. Unfortunately the process for registering as an overseas corporation under the MCL will become more burdensome and registered overseas corporations will have more compliance obligations than branch or representative offices currently under the MCA. We provide more information on overseas corporations in the section on the MCL.

#### 2.1.2 Companies

The MCA provides for several types of companies, but most investors wishing to do business in Myanmar on a stable, regular basis usually set up a private company limited by shares.

An important initial consideration is whether the chosen investment activity falls on the restricted investment list under Myanmar Investment Commission (“MIC”) Notification 15/2017. Should that be the case, the investment activity may be restricted to Myanmar citizens and entities or to JVs between foreigners and Myanmar entities or citizens (where the Myanmar partner must hold a minimum 20% shareholding in the JV).<sup>5</sup>

All other investment activities which are not on the restricted investment list may be carried out by 100% foreign invested companies provide that the necessary licences and ministerial approvals have been obtained.

Private limited liability companies can be divided into three categories, depending on the applicable law:

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<sup>5</sup> MIC Notification 15/2017 lists activities restricted for foreigners. These include prospecting, exploration, feasibility study, production, and refinement of minerals for small and medium scale businesses; tour guide services; and activities that must be carried on in JV with a Myanmar partner such as manufacturing and domestic marketing of plastic products, development, sales and lease of residential apartments and condominiums, dry port services relevant to rail transport, postal services, and all electrical businesses to be connected to the electric power system. Upon the entry into force of the MCL, foreign investors will be able to participate in the shareholding of locally owned Myanmar companies (up to 35%) and thus able to invest in sectors that are currently prohibited to foreign investors.

- 1) Companies that do not carry on activities referred to under section 36 of the MIL which require an Myanmar Investment Commission Permit (“**MIC Permit**”) and have not applied for an endorsement from the Myanmar Investment Commission (“**MIC Endorsement**”) under the MIL;
- 2) Companies which require an MIC Permit as their activities are listed in section 36 of the MIL and companies that have applied for an MIC Endorsement in order to enjoy benefits under the MIL;
- 3) Companies that are registered under the SEZL.

All companies must be registered with DICA and are subject to the MCA (soon to be replaced by the MCL) and the MIL.

## 2.2 Myanmar Investment Law

The MIL applies to both local and foreign investors in Myanmar and came into force on 18 October 2016, with the implementing Myanmar Investment Rules (the “**MIR**”) coming into force on 1 April 2017. The MIL replaces the previous Foreign Investment Law 2012 (“**FIL**”) and the Myanmar Citizens Investment Law 2013.

### 2.2.1 Institutions and Roles

#### The Myanmar Investment Commission

The Myanmar Investment Commission (“**MIC**”), currently comprised of 13 members, is formed by the Government of Myanmar. The MIC is a One Stop Service to assist investors in Myanmar.

According to the MIL, the MIC scrutinizes investors’ applications and issues or decline applications for MIC Permits and MIC Endorsements, grants exemptions and reliefs, and stipulates, with the approval of the Myanmar government, the types of activities strategic Myanmar, capital intensive projects, and projects that have a large impact on the environment and local communities.<sup>6</sup> The MIC also delegates its authority to the State and Regional government to issue MIC Endorsements in their respective States and Regions.

The MIC has announced that it will prioritise the following areas when the investors submit their proposals:<sup>7</sup>

Agriculture and its related services, value-added production of agricultural products	Livestock production, breeding and production of fishery products
Export promotion industries	Import substitution industries
Power sector	Logistic industries
Education services	Health care industry
Construction of affordable housing	Establishment of industrial estate

#### Investment Assistance Committee

The Investment Assistance Committee (“**IAC**”) is formed by the MIC and can be applied to by investors if they believe in good faith that the government made an incorrect decision in respect of their investment; incorrectly refused their permit, licence, registration or approval application; or any right, protection or approval available to them under the law has been frustrated.<sup>8</sup>

In carrying on its activities, the IAC can consult with the relevant government departments and organisations.

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<sup>6</sup> Section 25, MIL.

<sup>7</sup> MIC Notification 7/2018 opened up the education sector to 100% foreign investment in basic education schools (kindergartens, primary, middle and high schools), technical, vocational and training schools, higher education schools (universities and colleges) and “subject-based schools” (preparatory classes for entrance exams, on-the-job training, language schools and schools teaching specific subjects).

<sup>8</sup> Section 170, MIR.

## 2.2.2 MIC Permits and Endorsements

The MIL maintained MIC Permit requirement for selected investments and introduced the concept of MIC Endorsements, which enable an investor to enjoy certain benefits under the MIL by submitting to a less onerous application and assessment process.

Investors whose projects fall into one of the below categories need to apply for an MIC Permit under the MIL:

- 1) businesses essential to the strategy of Myanmar, which includes projects:
  - a) based on an agreement or concession with the government that have an investment amount of more than USD20 million;
  - b) in one of the following sectors that have an investment amount of more than USD20 million: technology, transport infrastructure, energy infrastructure, building urban development infrastructure and new cities, extractive/natural resources, or media sector;
  - c) by foreign investors in a border region or conflict area or, in the case of a Myanmar investor, has an investment value of more than USD1 million;
  - d) that will be conducted across states and regions;
  - e) made for primarily agriculture related purposes and includes rights to occupy or use more than 1000 acres of land; or
  - f) made for primarily non-agricultural related purposes and includes rights to occupy or use more than 100 acres of land.
- 2) capital intensive investments where value exceeds USD100 million;
- 3) projects likely to cause a large impact on the environment and the local community;
- 4) investments using state-owned land and buildings; and
- 5) other designated investments.

Investors whose projects fall outside the above categories can apply for an MIC Endorsement if they wish to enjoy benefits under the MIL.

A prospective investor may submit an “investment screening application” to the MIC for a nominal fee of MMK15,000 to obtain a non-binding guidance on whether the investment requires an MIC Permit, is a restricted investment, is in a promoted sector or is prohibited.<sup>9</sup> The MIC has 10 business days to review the application and, in case no further documentation for the assessment is needed, issue its non-binding advice.<sup>10</sup>

## 2.2.3 Benefits Available to MIC Permit and MIC Endorsement Holders

Benefits under the MIL are available to all MIC Permit holders and MIC Endorsement holders (together, “**MIC Authorised Investors**”) who meet the requirements of the individual benefit class as set out below. These benefits are not available to businesses operating in a Special Economic Zone under the SEZL.<sup>11</sup>

### Tax Incentives

In order for MIC Authorised Investors to enjoy tax incentives, they must propose a *new* investment of more than USD300,000 in value.<sup>12</sup>

#### *Income Tax Holidays*

The MIL introduces an income tax holiday scheme that is available to all MIC Authorised Investors who are operating in a promoted sector.<sup>13</sup> The length of the income tax holiday depends on whether

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<sup>9</sup> Section 28, Ministry of Planning and Finance Notification 35/2017.

<sup>11</sup> Section 81, MIL.

<sup>12</sup> The requirement of a new investment of more than USD300,000 in value is intended to prevent the practice of avoiding tax obligations via mergers and acquisitions which create value but do not involve the introduction of new investment into the country.

the geographical area in which the investment is carried out is classified as less, moderately, or adequately developed.<sup>14</sup> The longest tax holidays are awarded to investments in less developed regions (7 years), followed by those in moderately developed regions (5 years), and in adequately developed regions (3 years).<sup>15</sup>

Exemption or relief from income tax is also available on the profit generated by reinvesting profits within a year in a similar type of business.<sup>16</sup>

#### *Custom Duty and Other Internal Tax Exemptions*

In addition to the above income tax holiday, MIC Authorised Investors can apply to the MIC for exemption and relief from customs duty and internal taxes for the following imported items:

- 1) machinery, equipment and tools, components of machinery, spare parts, construction materials and other materials required during the construction period or preparatory period;<sup>17</sup>
- 2) raw material or partly finished goods which will be used by an export-oriented business for the purpose of manufacturing products for export.<sup>18</sup> Alternatively, taxes on material or partly finished goods which are used in manufacturing products for export will be refunded on a pro rata basis;<sup>19</sup> and/or
- 3) machinery, equipment and tools, components of machinery, spare parts, construction materials and other materials used for an MIC approved project expansion.<sup>20</sup>

The MIC may also grant MIC Authorised Investors the right to:

- 1) depreciate assets at a rate equal to 1.5 times the normally permitted depreciation rate; and/or
- 2) deduct research and development expenses from its assessable income up to a maximum amount that is equal to 10% of the investment income.

#### **Land Rights Authorisation**

All MIC Authorised Investors can apply for a Land Rights Authorisation under which they can enjoy long term lease entitlements of 50 years with the possibility of two 10 year extensions.<sup>21</sup> An investor who subleases land or a building from another investor who has already obtained a Land Rights Authorisation does not require a further Land Rights Authorisation as the sublease is already deemed to be approved.

If an MIC Authorised Investor holds a Land Rights Authorisation for land that requires a change of use, the MIL requires the relevant authorities to effect the required change of use procedure in accordance with the law. Furthermore, every authority is required to give effect to the rights granted under a Land Rights Authorisation, which should assist investors that are having difficulty registering long term leases with the Office of Registration of Deeds.

Where a desired new use of land has already been designated or approved as appropriate by the State or Region, the MIC may approve a Land Rights Authorisation even though the desired use is not consistent with the current status of the type of land.<sup>22</sup> This grant does not exempt the investor from the obligation to obtain a change of use under the relevant laws but will hopefully assist the

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<sup>13</sup> Section 75(a) of the MIL states that the business activities of the investment shall fall under the promoted business activities, which are notified by the MIC Notification 13/2017. There are 192 business activities which can enjoy the income tax holidays under the MIC Notification 13/2017.

<sup>14</sup> The MIC issued Notification 10/2017 in which it established which regions are considered less developed, moderate developed and adequate developed.

<sup>15</sup> Section 75(a), MIL.

<sup>16</sup> Section 78 (a), MIL.

<sup>17</sup> Section 77 (a), MIL

<sup>18</sup> Section 77(b), MIL

<sup>19</sup> Section 77 (c), MIL

<sup>20</sup> Section 77 (d), MIL

<sup>21</sup> Section 50, MIL creates an exception to the Transfer of the Property Restriction Act 1987, which prohibits foreigner or foreign owned companies to lease any immovable properties for a period longer than one year at a time.

<sup>22</sup> Section 132, Ministry of Planning and Finance Notification no. 35/2017.

investor in overcoming the discretionary elements of change of use applications, as the MIC would already have approved the desired land use in advance.

Importantly, the MIC may accept an investment even if the current owner of the land where the investment is to be carried out is not the registered owner of the same land. In this case, the land owner has the right to submit all the documents proving the ownership of the land.<sup>23</sup> This creates important flexibility in a context where land title documentation is often missing (due to deficiencies in the land title registration system and the common practice of non-registration in an effort to avoid tax obligations) despite the land being genuinely owned by the investor or the current owner.

#### **2.2.4 Other Rights Afforded to Investors under the MIL and MIR**

There are a number of important rights that are afforded to investors under the MIL and MIR, irrespective of whether the investor is an MIC Authorised Investor. These rights include the right to:

- to an investor guarantee from the government to not nationalise or expropriate investments, including to not indirectly expropriate an investment.
- to bring an investor grievance before the IAC if the investor believes in good faith that the government made an incorrect decision in respect of their investment; incorrectly refused their permit, licence, registration or approval application; or any right, protection or approval available to them under the law has been frustrated.<sup>24</sup>
- for foreign investors to remit funds offshore via a bank with an authorised foreign exchange dealer licence, subject to any requirements of the Central Bank of Myanmar and the payment of all tax obligations in Myanmar.<sup>25</sup>
- to import any equipment, goods or materials relevant to the investment without requiring any specific approval from the MIC; the right to apply to the relevant authority for an import licence or approval required under applicable law; and the right to have the licence or approval granted if the relevant legal requirements have been met.<sup>26</sup>

#### **2.2.5 Continuing Obligations Post Receipt of an Investment Endorsement or Permit**

The MIL sets out certain obligations for MIC Authorised Investors who, among other obligations, for the duration of the MIC Permit or the MIC Endorsement shall:

- Keep proper records of the accounting books and the financial statements and all the financial data required under the MIC Permit or the MIC Endorsement;
- Comply with all the relevant labour laws and regulations set out for that type of investment in Myanmar;
- Carry out the environmental impact assessment and social impact assessment procedures according to the type of business and the relevant laws and regulations;
- Submit to the MIC any sublease agreement, mortgage, transfer of shares or transfer of business to any third parties;
- Submit business reports quarterly to the MIC in the form prescribed (applicable only to MIC Permit holders);
- Appoint only Myanmar citizens for unskilled work, with the appointment of foreigners only allowed for skill work. MIC Authorised Investors must submit a work permit application for a foreign skilled worker within one week of the worker's arrival in Myanmar. If a foreign skilled worker resigns, their employment contract expires, or the employer wishes to replace a foreign skilled worker, the employer must submit evidence to the MIC that the former foreign skilled worker left the country.<sup>27</sup>

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<sup>23</sup> Section 133, Ministry of Planning and Finance Notification no. 35/2017.

<sup>24</sup> Section 170, MIR.

<sup>25</sup> Where a foreign investor has any outstanding tax obligations, or any contingent or disputed obligations, it must seek approval of the MIC to transfer proceeds from the total or partial sale or liquidation of the investment, payments from a settlement of investment disputes, or compensation received for an expropriation of an investment (rule 209, MIR).

<sup>26</sup> Rules 230 and 231, MIR.

<sup>27</sup> MIC Announcement dated 3 October 2017.

- Arrange for the following insurance cover (where relevant): property and business interruption insurance, engineering insurance, professional liability insurance, bodily injury insurance, marine insurance, or workmen compensation insurance.<sup>28</sup>

Furthermore, the MIC has the right to inspect any places where the business is carried on by giving prior notice to the investor.

### 2.3 Special Economic Zones

The SEZL was introduced with the aim of fostering foreign investment in Myanmar through the provision of industrial zones with tax, financial and trading benefits.

The Special Economic Zones (“SEZ”) in Myanmar are linked to major infrastructure projects, including the construction of deep sea ports, power grids and pipelines to neighbouring countries. Thilawa in Yangon Region is the only SEZ in operation at the moment, whereas Dawei in the Thanintharyi Region, and Kyauk Phyu in Rakhine State are still in the planning phase. While the Thilawa SEZ benefits from its proximity to Yangon's urban and population centre, both the Dawei and Kyaukphyu SEZs boast the advantage of having international deep sea ports on-site. The Dawei SEZ is intended to serve as a base for cross-border trade with Thailand, while its deep sea port will also open a new gateway to the Malacca Strait from western Myanmar.

Each SEZ is divided into a free zone and promotion zone, with free zones deemed to be exempt from customs duty and other internal taxes on goods, material and equipment imported into the SEZ.<sup>29</sup> Activities in a free zone are mostly export-oriented businesses and include wholesale areas, transportation, and manufacturing.<sup>30</sup> Promotion zones are subject to internal domestic taxes<sup>31</sup> and are suitable for companies active on the domestic market in activities such as banking, insurance, schools, housing, hospitals, recreational places, departmental stores, and manufacturing.

Investors can set up 100% Myanmar companies, 100% foreign owned companies or JV companies between a foreigner and a Myanmar citizen/entity both in the free zone and in the promotion zone. Companies intending to set up business in one of the SEZs have to register under the SEZL. Companies registered under the SEZL are not eligible to apply for benefits under the MIL.

#### Investment in Thilawa SEZ

Subject to certain conditions, investors in the Thilawa SEZ generally have the right to engage in any business which is not prohibited under the law, including manufacturing and provision of services, as well as wholesale trading activities.

The conditions which need to be met by different types of investment are set out in Notification 81/2014 to the Special Economic Zone Law (2014) for the Thilawa Special Economic Zone and Instruction on the Scope of “Trading Activities Permitted for Investors in the Thilawa Special Economic Zone” (Instruction 2/2015). Most investments types must meet only minimum capital requirements. Additional investment requirements, however, apply for wholesale trading companies.<sup>32</sup>

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<sup>28</sup> Section 212, MIR

<sup>29</sup> Section 3 (i), SEZL

<sup>30</sup> A company is considered export-oriented if the exports amount to a minimum of 75% of the production in value.

<sup>31</sup> Section 3 (j), SEZL

<sup>32</sup> Wholesale includes the direct sale to end-users in the case of industrial material in bulk as well as the direct sale of industrial machinery and equipment with a sales price over USD 500,000: Instruction on the Scope of “Trading Activities Permitted for Investors in the Thilawa Special Economic Zone” (Instruction 2/2015).

The minimum requirements for different types of investment are set out in the table below:

Free zone investments		Promotion zone investments
Export-oriented manufacturing business in a free zone	Minimum investment of USD 750,000	Minimum investment of USD 300,000
Export-related service business in a free zone	Minimum investment of USD 500,000;	
Supporting business in a free zone	Minimum investment of USD 300,000;	

Instruction 2/2015 permitted foreign investors operating in the Thilawa SEZ to carry out import and wholesale trading activities throughout the country,<sup>33</sup> provided that they meet the following additional investment requirements for wholesale trading companies:<sup>34</sup>

Additional requirements for Foreign Wholesale Trading companies	
Intending to trade their own products produced overseas	<ul style="list-style-type: none"> <li>- Minimum investment of USD 2 Million (excluding leasing costs for the land);</li> <li>- Establishment of a warehouse at the company's lot in the Special Economic Zone; and</li> <li>- The provision of value adding services or activities.<sup>35</sup></li> </ul>
Intending to act as distributors of third-party manufacturers	<ul style="list-style-type: none"> <li>- Minimum investment of USD 3 Million (excluding leasing costs for the land);</li> <li>- The parent company or a group company must have a minimum of ten years' experience in international trading, an established place of business in at least five countries, minimum three years' average annual consolidated sales of at least USD 500 Million and a paid up capital of at least USD 25 Million;</li> <li>- The Myanmar company must be appointed as official agent or distributor by the overseas manufacturer;</li> <li>- Establishment of a warehouse at the company's lot in the Special Economic Zone; and</li> <li>- The provision of value adding services or activities.</li> </ul>

The following incentives are available to investments in both the free and promotion zones in the Thilawa SEZ:

- Tax relief of 50% for additional five years on the income tax rate for the second five years;
- Tax relief of 50% for the third five years on the profit which is reserved from the business as a reserve fund if it is reinvested within one year in the business;
- Permission to carry forward losses for five consecutive years after the year in which the losses were incurred;
- General exemption from commercial tax may be given;

<sup>33</sup> Some restrictions remain however: retail sale outside of the Thilawa SEZ is excluded from the trade permission, as is the sale of "four-wheel vehicles" and motorcycles, for which special regulations by the MOC apply.

<sup>34</sup> Instruction on the Scope of "Trading Activities Permitted for Investors in the Thilawa Special Economic Zone" (Instruction 2/2015).

<sup>35</sup> The term "adding value" is defined widely and includes: Repacking, labelling and any other form of processing of own imported products; and/or Quality control, laboratory testing, maintenance and other technical services: 2.1 (i) of Instruction on the Scope of "Trading Activities Permitted for Investors in the Thilawa Special Economic Zone" (Instruction 2/2015).

- Exemption of income tax for the dividends distributed to each shareholder based on the profits accrued locally for which tax has been paid (note: Myanmar currently does not levy any withholding tax on dividends); tax deductions for training, research and development related to the investment project;
- Possibility to enter into long term lease agreements (50 years with an option to renew for a further term of 25 years);
- Possibility to sublease, sell, mortgage, lease, exchange or assign land lease, land use and buildings to third parties; and
- No restriction or control of prices on the products, services or exported goods manufactured in the free or promotion zone.

Export-oriented investors in the free zone and investors serving primarily the domestic market in the promotion zone may also apply for the following benefits, depending on which zone they are established in:

Free zone	Promotion zone
<ul style="list-style-type: none"> <li>- Income tax holidays for the first seven years from the commencement of the commercial operation;</li> <li>- Import exemption from customs duties and other taxation paid at the time of importation on raw materials for production, machinery, instruments and necessary spare parts for production; motor vehicles and construction of the factory, warehouse and office;</li> <li>- Import exemption from customs duties and other taxation paid at the time of importation on trading goods, motor vehicles and other materials which are essential for the business for duty free wholesale trading, export trading as well as services and logistics;</li> <li>- Exemption from commercial tax may be given for manufactured goods which will be exported; and</li> <li>- Exemption from commercial tax may be given for goods imported from the domestic market or the promotion zone into the free zone.</li> </ul>	<ul style="list-style-type: none"> <li>- Income tax holidays for the first five years from the commencement of the commercial operation;</li> <li>- Import relief from customs duties and other relevant taxation for five years from the commencement of business on the import of equipment and instruments not for trading as well as spare parts, the construction materials for factory, warehouse and office, motor vehicles and other materials which are essential for the business; and</li> <li>- Import refund of customs duties and other taxation paid at the time of importation on raw materials and other goods for production if the finished or semi-finished goods produced from those materials are exported abroad or into the free zone.</li> </ul>

## 3 Company Law

The MCL, scheduled to enter into force on 1 August 2018<sup>36</sup>, introduces a modern legal framework for foreign investment in Myanmar. The Draft Companies Regulations 2018 (“DCR”) was published by DICA on 2 May 2018.

In the interim period until the commencement date of the MCL, the MCA remains in effect.

The MCL introduces a number of key changes to the regulation of companies of Myanmar that existing and future foreign investors need to be aware of in order to avoid harsh penalties for non-compliance. Below is an outline of the most important changes introduced by the MCL.

### 3.1 Establishing a Company

#### 3.1.1 Forms of Business Entity under MCL

The following types of body corporate may be incorporated and registered under the MCL<sup>37</sup>:

- (a) a company limited by shares, which may be either:
  - (i) a private company which may have no more than 50 members (not including persons who are in the employment of the company); or
  - (ii) a public company which may have any number of members;
- (b) a company limited by guarantee which may have any number of members; and
- (c) an unlimited company which may have any number of members.

Other corporations that may be registered under the MCL<sup>38</sup> include:

- a business association;
- an overseas corporation;
- any other corporation which is entitled to register as a company by the MCL or any other applicable law; and
- such other entities as may be prescribed by the Union Minister from time to time.

#### 3.1.2 Establishment Requirements

A company registered under the MCL must have<sup>39</sup>:

- (a) a name;
- (b) a constitution;
- (c) at least one share in issue (provided that a company limited by guarantee need not have a share capital);
- (d) at least one member;
- (e) subject to sub-section (vi), at least one director who must be ordinarily resident in the Union;
- (f) if the company is a public company, at least three directors, at least one of whom must be a Myanmar citizen who is ordinarily resident in the Union; and
- (g) a registered office address in the Union.

A company may appoint a company secretary and have a common seal.<sup>40</sup>

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<sup>36</sup> The law will commence on the date of notification to be determined by the President of the Union. At the time of publication, the entry into force of the MCL has been announced by DICA as 1 August 2018.

<sup>37</sup> Section 2, MCL

<sup>38</sup> Section 3, MCL

<sup>39</sup> Section 4(a), MCL

<sup>40</sup> Section 4(b), MCL

### 3.2 Constitution

Each Company must have a constitution, which may:

- 1) Adopt the model constitution (a draft model constitution was published by DICA in January 2018) by special resolution of members: or
- 2) Draft an individualised company constitution that caters to its needs and adopt this by special resolution of members.<sup>41</sup>

The Memorandum and Articles of Association (“**M&AA**”) used by existing companies under the MCA will be replaced by a company constitution.<sup>42</sup> In this regard, already existing companies may decide to:

- 1) Have the existing M&AA of a company take effect as its constitution following the commencement of the MCL, although provisions of the existing M&AA will have no effect to the extent that they are inconsistent with the MCL;
- 2) Adopt the model constitution (a draft model constitution was published by DICA in January 2018) by special resolution of members: or
- 3) Draft an individualised company constitution that caters to its needs and adopt this by special resolution of members.<sup>43</sup> This option is particularly attractive for JV companies who will now have the opportunity to bring the company constitution in line with the JV or shareholders’ agreement.

The constitution must be prepared in the Myanmar language, with an English language version also being permissible as an addition.<sup>44</sup> According to the DCR, existing companies will have six months from the commencement of the MCL to re-register their companies – which requires the filing of a company constitution or a statement that the company adopts the model constitution - on the electronic registry system.<sup>45</sup>

### 3.3 Business Objectives

A company will be a legal entity in its own right separate from its members having full rights, powers, and privileges and continuing in existence until it is removed from the Register.<sup>46</sup>

The MCL removes the requirement of including the business objectives of a company in its constitution (referred to under the MCA as the M&AA). This means a duly established company, which has the required permits or licences, is free to engage in any activities permitted by law.<sup>47</sup>

The business objectives of an existing company will be automatically removed after the end of the 12 month transition period following the commencement of the MCL. A company has the option of removing its business objectives before the end of the transition period by way of special resolution passed by its members. A company can also decide to keep its business objectives after the end of the transition period by filing a special resolution with DICA along with a notice in the prescribed form. This option may be attractive to companies which require licences to operate in particular sectors as specific objects e.g. telecommunications services and microfinance services are required in order to obtain licences for these sectors.

In the interests of avoiding unnecessarily compromising the validity of contracts concluded by the company by virtue of the activity potentially being ultra vires, it would be beneficial for most companies engaged in commercial activities to remove objectives from their constitutions at the earliest opportunity.

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<sup>41</sup> Section 6 (c) (iii), MCL.

<sup>42</sup> Section 11 (a), MCL.

<sup>43</sup> Section 6 (c) (iii), MCL.

<sup>44</sup> Section 16, MCL.

<sup>45</sup> Rule 5(b), DCR.

<sup>46</sup> Section 5, MCL

<sup>47</sup> Restrictions apply in specific sectors according to the ministerial practice as well as the MIL and its relevant Notifications.

### 3.3.1 Electronic Registration System and Re-Registration of Existing Companies

Upon the entry into force of the MCL, a new online electronic registration system called Myanmar Companies Online Registration (“MyCR”) will also be launched. Currently all filings are made in person at the DICA and DICA maintains only hard copies of all the filings. MyCR will speed up the process for filing documentation and also provide an online register where all the information of companies established in Myanmar will be held. According to the DICA, some general information will be available to the public.<sup>48</sup>

Existing companies have to re-register on MyCR within six months from the entry into force of the MCL (so called “re-registration period”). DICA will communicate in writing to all existing companies that are required to re-register. An existing company which does not re-register on the MyCR within the re-registration period will be struck off the companies’ register. Upon publication in the Gazette of the relevant notice by the Registrar, the company will be dissolved.

### 3.3.2 Establishment Application

Applications for companies to be established post the operation of the MCL must be made in the prescribed form and must state<sup>49</sup>:

- the proposed name of the company;
- the proposed type of company;
- the full name and address of each applicant;
- the full name, date of birth, gender, nationality and address of every director and any secretary of the proposed company;
- that each individual named as a director or secretary of the proposed company has given their written consent to act as a director or secretary of the proposed company;
- the address of the registered office of the proposed company, which in the absence of any other notice will be taken to be the address for service of documents to the proposed company;
- the address of the company's principal place of business if different to the registered office; and
- in the case of a private, public or unlimited company:
  - the full name and address of every member of the proposed company;
  - that each member of the proposed company has given their written consent to be a member and subscribe for the shares to be allotted to them;
  - the number and class of shares to be issued to each member;
  - the currency in which the company's share capital is to be denominated;
  - the amount (if any) each member agrees to pay for each share;
  - whether these shares will be fully paid on registration;
  - whether the proposed company has an ultimate holding company;
  - whether the proposed company will, on incorporation, be a foreign company; and
- if the company is to have a share capital:
  - the number and class of shares to be issued;
  - the currency in which the company's share capital is to be denominated;
  - the amount (if any) each member agrees to pay for each share; and

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<sup>48</sup> At time of the publication of this Guide, DICA has not released any official statements specifying the information that will be publicly available.

<sup>49</sup> Section 6, MCL.

- whether these shares will be fully paid on registration.

An application for registration must:

- be signed by each applicant;
- include a declaration by each applicant that all matters stated in the application are true and correct; and
- where the company proposes to use a constitution which differs in any substantive way from the model constitution, be accompanied by a copy of the proposed company's constitution certified by at least one applicant, otherwise a statement that the company proposes to use the model constitution.

The prescribed fee must be paid to DICA when filing the application<sup>50</sup>.

Duplicate originals of the application and all documents accompanying it must be kept by the applicants together with the originals of the consents. On incorporation, these should be passed to the company and then maintained with the company's records.<sup>51</sup>

When DICA receives a completed application which upon any necessary examination meets the requirements of the MCL, DICA must register the application; and issue a certificate of incorporation.<sup>52</sup>

### 3.3.3 Effect of Incorporation

A certificate of incorporation given by DICA is conclusive evidence that all the requirements of the MCL in respect of registration have been complied with, and that from the date of incorporation stated in the certificate, the company is incorporated and duly registered.<sup>53</sup>

From the date of registration mentioned in the certificate of incorporation, the members named in the application become members of the company having a separate legal personality and the name contained in the certificate of incorporation. The company will then be capable of exercising all the functions of an incorporated company, and have perpetual succession.<sup>54</sup>

## 3.4 Directors

### 3.4.1 Minimum Number of Directors

Currently, the MCA requires that private companies have a minimum of two directors (either Myanmar or foreign citizens), neither of which must be resident in Myanmar.

The MCL amends this requirement:

- a private company will be required to have at least one director, and
- a public company will need at least three directors.<sup>55</sup>

### 3.4.2 Resident Director

According to the MCL:

- private companies must have at least one ordinarily resident director in Myanmar (Myanmar or foreign citizen); and
- public companies must have at least one director who is a Myanmar citizen and ordinarily resident of Myanmar.<sup>56</sup>

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<sup>50</sup> Section 6(d), MCL.

<sup>51</sup> Section 6(e), MCL.

<sup>52</sup> Section 8, MCL.

<sup>53</sup> Section 10, MCL.

<sup>54</sup> Section 9, MCL.

<sup>55</sup> Section 4 (a) (v) and (vi), MCL.

<sup>56</sup> Section 4 (v) and (vi), MCL.

Existing companies must appoint a director who is ordinarily resident in Myanmar within 12 months from the entry into force of the MCL (so called “transition period”).<sup>57</sup> As “ordinarily resident” is defined as a person who is a permanent resident of Myanmar or resident in Myanmar for at least 183 days in each 12 month period commencing from the date of the commencement of the MCL (for existing companies) or from the date of registration of the company (for new companies)<sup>58</sup>, if the second option is pursued, the person must already have been resident in Myanmar for at least 183 days at the time of their appointment to the position of resident director.

Companies will have to file relevant forms with DICA to show that the resident director requirement has been met.

Under the DCR if a company carries on business for more than six months without having at least one director who is ordinarily resident in Myanmar, each shareholder who has knowledge of this will be personally liable for the payment of all the debts of the company contracted during the period after the expiration of those six months for which no director was ordinarily resident.

Given the potential liability of shareholders of companies that do not comply with the resident director requirement, existing and new foreign investors need to start preparing for the long term appointment of a resident director as well as consider a contingency plan for a replacement resident director should the availability of the nominated resident director change.

### **3.4.3 Directors’ Duties**

The MCL codifies a set of duties for directors to provide for more accountability of directors to shareholders for their decisions and set higher standards for corporate conduct that are in line with other common law jurisdictions.

The main duties imposed on directors are set out in Sections 165 to 172 of the MCL:

- duty to act with care and diligence;
- duty to act in good faith in the company’s best interest;
- duty regarding use of position;
- duty regarding use of information;
- duty to comply with the MCL and constitution;
- duty to avoid reckless trading;
- duty in relation to (the company’s) obligations; and
- duty to disclose certain interests.

In relation to the duty to act in good faith in the company’s best interest, directors of subsidiary companies or JVs will be able to act in the best interest of their holding company or the JV partner, respectively, rather than the best interests of the company where this is permitted by the constitution.

Directors cannot be exempted from any liability to a company which attaches to him in respect of any negligence, default, breach of directors’ duties or breach of trust under the MCL, which provides that any provision in the constitution or a contract which exempts a director, officer or auditor from these liabilities is void.

In terms of the company indemnifying director for liabilities arising from a breach of their directors’ duties, a company or a related body is prohibited from doing so in relation to: (1) a liability owed to the company or a related body corporate; and (2) liabilities which did not arise out of conduct in good faith.

The company can, however, indemnify directors, officers and auditors for the legal costs associated with defending other liabilities provided that this does not, among other things, involve defending criminal proceedings or proceedings brought by DICA or a liquidator for a court order. The MCL also permits a company or a related body corporate to fund premiums to insure a director, officer or auditor against liabilities other than: (1) wilful breach of duty in relation to a company; or (2) contravention of directors’ duties regarding use of position and information.

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<sup>57</sup> Section 469 (b) and (c), MCL.

<sup>58</sup> Section 1 (c) (xix), MCL.

### 3.4.4 Managing Agents Deemed Directors

The MCL does not accommodate the colonial era system of managing agents that is preserved in the current MCA.<sup>59</sup> Upon the entry into force of the MCL, managing agents of existing companies will automatically lose their positions as managing agents and will be deemed to be directors of the companies.<sup>60</sup>

## 3.5 Shareholders

### 3.5.1 Minimum Shareholders

Under the MCA, Myanmar subsidiaries of overseas companies, as with any companies in Myanmar, must have at least two shareholders.

The MCL, in line with other common law jurisdictions, will allow companies to be incorporated with one shareholder. This will provide the possibility for overseas companies to incorporate wholly-owned subsidiaries in Myanmar.

### 3.5.2 Minority Rights

The MCL introduces significant protection of minority shareholders' rights, not present under the MCA.

Under the MCL, any existing or former member, however small their part in the equity may be, may request the court to make an order if the conduct of the company's affairs or related act is oppressive to, unfairly prejudicial to or unfairly discriminatory against, a member or members.

If the court makes a finding in favour of the shareholder, it may make orders which include:

- Winding up the company;
- Modifying or repealing the constitution;
- Regulating the company's future conduct;
- Purchasing shares by the company or another person;
- Instituting, prosecuting, defending or discontinuing proceedings by or on behalf of the company;
- Restraining a person from doing, or requiring them to do a specific act;
- Granting damages.

Current or former minority shareholders can also act on behalf of the company in judicial proceedings. Furthermore, they may be able to call meetings or put resolutions forward for approval.

In order to avoid frivolous, vexatious or abusive minority shareholder actions, JV and/or shareholder agreements should be drafted to include a detailed description of what can be expected as a minority shareholder as well as details of what is unlikely to constitute "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members". Companies may also choose to provide for additional minority shareholder rights in their constitution (e.g. providing for pre-emption rights on share issue to avoid dilution).

## 3.6 Share Capital

### 3.6.1 Minimum Share Capital

Under the MCL, there must be at least one issued share in any company (except a company limited by guarantee, where there may be no share capital).

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<sup>59</sup> A managing agent is defined under the MCA as "a person, firm or company entitled to the management of the whole affairs of a company, by virtue of an agreement with the company and under the control and direction except to the extent, if any, otherwise provided for in such agreement and includes any person, firm or company occupying such position by whatever name called". The managing agent system is a peculiar type of corporate governance arrangement that emanated in India during the colonial period. Under this system, a managing agent (either an individual, partnership firm or company) would be appointed to manage one or more joint stock companies. The managing agent would also hold shares in the managed companies and control their boards of directors: Varotttil.U, "Corporate Law in Colonial India: Rise and Demise of the Managing Agency System" NUS Working Paper Series, 2015/016, December 2015, <http://law.nus.edu.sg/wps>.

<sup>60</sup> Section 476, MCL.

### 3.6.2 Abolition of Authorised Capital and Nominal or Par Value of Shares

The MCL abolishes the concepts of authorised capital and nominal or par value of shares.

Under the MCA, the authorised capital was a cap inserted in the M&AA which refers to the maximum total value of shares that directors can issue. By abandoning this concept, subject to restrictions in a company's constitution, companies will be able to increase their share capital without needing to pass a special resolution or file an amended M&AA with DICA.

Unlike the preservation of nominal or par values under the MCA, shares will have no nominal or par value pursuant to the MCL.

According to the DCR, all shares issued by existing companies will be converted into shares with no par value and the authorised capital will no longer apply upon re-registration of an existing company. This means that concepts related to par value such as share premium and discounted issue are no longer necessary and are abolished. Companies with share premium accounts or capital redemption reserves will be able to transfer premiums and reserves to the share capital account.

The abolition of authorised capital and nominal or par value of shares will provide a friendlier environment for investors by reducing the burden of managing share capital.

### 3.6.3 Share Capital Management,

Under the MCA, a company has to petition the Court for a reduction in share capital. The MCL introduces new out-of-court procedures that can be used by a company to reduce its share capital, provided certain conditions (such as solvency post share capital reduction, fairness to shareholders, ability to pay creditors and shareholders' approval) are satisfied.

The level of shareholders' approval required – e.g. which shareholders must attend the meeting and whether an ordinary or special resolution of these shareholders must be passed – varies under the MCL depending on the type of capital reduction.

Non-compliance with the share capital reduction requirements under the MCL renders the company and directors liable to a fine of MMK5,000,000 (approx. USD3,700). Directors of the company are also liable to the company's creditors if the company becomes insolvent following the share reduction.

### 3.6.4 Share Classes

Unlike the MCA, the MCL allows companies to issue and determine the terms of different classes of shares and other types of securities. Shares can be of different classes, redeemable, and have special, preferential or restricted rights to distribution of capital and voting rights. Shares with no voting rights can also be issued.<sup>61</sup>

Providing for different classes of shares in the constitution will enable companies to have more flexibility in regulating voting and capital distribution rights and will improve opportunities for venture capital or private equity funds to participate in the shareholding of a company.

It will be interesting to see how DICA and the MIC will deal with share classes with special, preferential or restricted rights to distribution of capital and voting rights that have the potential to circumvent ownership caps designated in relation to Myanmar companies under the MCL and JVs under the MIL. For example, will foreign investors be able to circumvent the:

- Foreign ownership threshold of 35% in a Myanmar company by issuing foreigners with additional non-voting shares in excess of a total share ownership of 35%? and/or
- JV requirement of 20% ownership by Myanmar partner by issuing the foreign partner with additional non-voting shares in excess of 80% of total share ownership or limit the investment return for the Myanmar partner by issuing the Myanmar partner with shares with substantially reduced rights to distribution of capital?

## 3.7 Dividends

The MCL enables dividends to be paid in cash, share issues, option grants or asset transfer<sup>62</sup> and provides that a company cannot pay a dividend unless it meets the following requirements:

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<sup>61</sup> Section 62, MCL.

<sup>62</sup> Section 106 (b), MCL.

- the company will, immediately after the payment of the dividend, satisfy the solvency test;
- the making of the dividend is fair and reasonable to the company's shareholders as a whole; and
- the payment of the dividend does not materially prejudice the company's ability to pay its creditors.<sup>63</sup>

If the company issues dividends without complying with the above requirements, it and each director who voted for the issue of dividends is liable to a fine of MMK500,000 (approx. USD370). Directors will also be liable towards the creditors of the company if they wilfully and knowingly permitted the issue of dividends without the company satisfying the above requirements.<sup>64</sup>

As the payment of dividends is also subject to a company's constitution, companies which adopt the old M&AA as their constitution would need to pay dividends out of the profits of the year or any other undistributed profits. Companies wishing to avoid compliance with this provision should consider adopting either the model or a tailored constitution.

### **3.8 Regulation affecting Foreign Companies**

#### **3.8.1 Abolition of Permit to Trade**

Any foreign investor conducting business in Myanmar is currently required to obtain a "permit to trade" pursuant to s 27A of the MCA.

Under the MCA a foreign company is defined as any company other than a Myanmar company (where 100% shares are owned by Myanmar citizens or Myanmar entities) or JV entered into by foreigners with a Myanmar government entity under the Special Company Act 1950. This means that any branch or representative office, company with one or more shares owned by a foreign investor, subsidiary of a foreign company, as well as any JV between a foreign entity and a Myanmar entity is considered "foreign".

Despite the fact that the required permit is called a "permit to trade", a foreign entity, whether a branch office or a private limited company, is only allowed to carry on trade in accordance with recent regulatory changes issued by the MOC (see section on trade liberalisation).

The MCL abolishes the requirement for foreign owned companies to hold a "permit to trade". As the objects of the company are contained in both the permit to trade and the company constitution under the MCA, the abolition of the requirement for foreign companies to obtain a permit to trade - combined with the removal of objectives from the company constitution - will make it easier for investors to quickly adopt new lines of business without needing to go through the process of first amending the permit and the constitution.

#### **3.8.2 Foreign Shareholding in Myanmar Companies**

As outline above, under the MCA a foreign company is defined as any company other than a Myanmar company (where 100% shares are owned by Myanmar citizens or Myanmar entities) or JV entered into by foreigners with a Myanmar government entity under the Special Company Act 1950. Accordingly a company with one or more shares owned by a foreign investor is deemed to be a foreign company, regardless of whether 99% of other shares are owned by Myanmar citizens or entities.

This definition of a foreign company prevents foreign investment in all sectors which are not allowed to be carried out by foreign investors under paragraph 1(b) of the MIC Notification 15/2017, such as tour guide services, mini market or convenience store investments, fresh water fisheries, and small and medium scale mineral refinement.

The MCL changes the definition of Myanmar company to include any company incorporated in Myanmar where foreign ownership does not exceed 35%.<sup>65</sup> This change will allow foreigners to hold a minority 35% interest in companies that are:

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<sup>63</sup> Section 107, MCL.

<sup>64</sup> Section 108, MCL.

<sup>65</sup> Section 1 (c) (xiv), MCL

- engaged in sectors which are currently closed to foreign investors under paragraph 1(b) of the MIC Notification 15/2017 as well as banking and insurance sectors.
- listed on the Yangon Stock Exchange, which is currently limited to local investors.
- active in a wide range of import, export and trading activities, which were, until recently, largely restricted to Myanmar citizens and entities (see section on liberalisation of trade).
- own land – which is otherwise prohibited for foreigners under the Transfer of Immovable Property Restriction Act 1987 (“**TIPRA**”).

Upon reregistration, existing companies with foreign shareholding up to 35% will be considered Myanmar companies. The draft reregistration forms released by DICA provide existing companies with the option to tick whether they will be a “foreign company” upon reregistration (i.e. if foreign shareholders do not hold more than 35% of shares).

The definition of “ownership interest” is a relevant consideration for the creation of share classes as it may be possible for a company to be classified as a Myanmar company despite foreigners owning more than 35% of shares where the excess shareholding consists of non-voting shares. This opens up significant opportunity for foreign investment into the Yangon Stock Exchange through creation of a non-voting share structure similar to the Thai Stock Exchange.

Under the MCL, “ownership interest” is defined as a legal, equitable or prescribed interest in a company which may arise through means including:

1. A direct shareholding in the company;
2. A direct or indirect shareholding in another company which itself holds a direct shareholding, or an indirect shareholding, in the first company; or
3. Through an agreement which provides the holder with a direct or indirect right to exercise control over the voting rights which may be cast on any resolution of the company.<sup>66</sup>

Commentators are relying on the words in the third limb “over the voting rights which may be cast” to conclude that non-voting shares will not count towards the 35% ownership interest” calculation. At this early stage it is not known how the authorities will interpret this.

### **3.8.3 Mortgages for the Benefit of Foreign Lenders**

TIPRA prohibits the mortgaging of immovable property in favour of foreigners. This restriction acts as an obstacle to secured lending by foreign banks as they are unable to take security over property and property interests without using a local Myanmar bank as an onshore security trustee.

The MCL will enable foreigners to take security over real estate interests owned by Myanmar citizens and entities without the need to have a local bank as an onshore security trustee.<sup>67</sup> This will improve the ease with which Myanmar projects can access secured international financing opportunities.

### **3.8.4 Overseas Corporations**

Overseas corporations are required to obtain a permit to trade if they carry on a business in Myanmar under the MCA.

In order to comply with this requirement, overseas corporations with recurring business interests tend to set up either a branch office, representative office or a private company (and apply for the accompanying permit to trade). Overseas corporations with non-recurring, one-off contract based work in Myanmar generally do not establish a business in Myanmar and simply deliver services as a foreign contractor, with their foreign consultants/contractors entering Myanmar on business visas applied for by the Myanmar based customer.

Once the MCL comes into effect, overseas corporations that carry on business in Myanmar will no longer register as branch offices or representative offices, but rather as overseas corporations or as subsidiary private limited companies incorporated in Myanmar.

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<sup>66</sup> Section 1 (c) (xxii), MCL

<sup>67</sup> Section 228 MCL

If an overseas corporation that is considered to “carry on business” in Myanmar elects to not establish a subsidiary private limited company incorporated in Myanmar, the MCL provides it must register themselves with DICA as an “overseas corporation”.

While the MCL does not define activities which constitute carrying on a business in Myanmar, it states that an overseas corporation is not deemed to be carrying on business in Myanmar merely because it maintains a bank account, conducts an isolated transaction that is completed within a period of 30 days (not being one of a number of similar transactions repeated from time to time), holds property, becomes a party to legal proceedings, or lends money.

Accordingly, overseas corporations that conduct an isolated transaction that is **not** completed within a period of 30 days or conducts an isolated transaction that is completed within 30 days but is **related** to a number of similar transactions repeated from time to time, the overseas corporation will need to consider registering with DICA as an overseas corporation in order to avoid penalties for non-compliance.

Overseas corporations registered with DICA must, among other things, comply with the following obligations under the MCL upon (re)registration:

- appoint an authorised officer who is authorised to accept the service of documents in Myanmar on behalf of the overseas corporation. The authorised officer must be ordinarily resident in Myanmar. “Ordinarily resident” is defined as a person who is a permanent resident of Myanmar or resident in Myanmar for at least 183 days in each 12 month period commencing from the date of the commencement of the MCL (for existing branch or representative offices) or from the date of registration of the overseas corporation (for newly registered overseas corporations).<sup>68</sup>
- submit a Myanmar translation of the incorporation certificate and constitution of the overseas corporation.
- maintain a registered address in Myanmar.
- notify DICA of any changes in the overseas corporation’s:
  - o constitution or directors (including change of residential address) within 28 days.
  - o registered address or principle place of business in Myanmar or overseas before the changes are effected.
  - o authorised officer (including change of residential address) within 7 days.
- annually file financial statements in the form required under the law in its place of origin or, if the company is not required to file financial statements in its country of origin, DICA may require that they be prepared in the form required for public companies under the MCL.
- notify DICA within:
  - o 21 days if the overseas corporation ceases to carry on business in Myanmar.
  - o 28 days if an overseas corporation commences to be wound up, or is dissolved, or deregistered, in its place of origin.

Non-compliance with the requirement to notify DICA of changes or to annually file financial statements renders the company, each director and the authorised officer liable to a fine of MMK250,000 (approx. USD180).

The penalty for making a false statement in the application for registration – including in relation to the authorised officer – is MMK5,000,000 (approx. USD 3,500).

It is important to be aware that the above obligations will create new burdens for existing branch office and representative offices - which will become overseas corporations upon reregistration – and also for overseas corporations with non-recurring, contract based work in Myanmar (that is not completed within 30 days or is completed within 30 days but is related to a number of similar transactions repeated from time to time) that will no longer be able to avoid registering a business presence in Myanmar by operating as foreign contractors.

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<sup>68</sup> Section 1 (c) (xix), MCL.

### 3.9 Transition period

The transition period is the 12 months period accruing from the date of the entry into force of the MCL (currently scheduled for 1 August 2018).<sup>69</sup> DICA has stated that it will notify existing companies of all the necessary actions that they must take to comply with the MCL by the end of 12 months transition period.

### 3.10 Compliance Obligations and Penalties

A company with less than 30 employees and annual revenues of less than MMK50 million (approx. USD37,000) will have a lower regulatory burden as it is exempted from holding annual general meetings and furnishing financial reports to members at general meetings.

The fines under the MCA for non-compliance were only for nominal amounts and only a court could impose them. The MCL, on the other hand, introduces significant penalties for non-compliance that range up to MMK10,000,000 (approx. USD7,400) and can be imposed on the company and each officer and director. DICA will also be able to impose penalties through penalty notices without court intervention.<sup>70</sup>

Given the harsher penalties under the MCL for non-compliance, companies should consider appointing a company secretary who will deal with the company's legal and regulatory compliance matters.<sup>71</sup>

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<sup>69</sup> Section 1 (c) (xlii), MCL.

<sup>70</sup> Section 439, MCL.

<sup>71</sup> Sections 4(b) and 179(a), MCL.

## 4 Liberalisation of import and trade for foreign companies

There has been an unofficial ban on trade for foreign companies since 2002 when the MOC and Ministry of Planning and Finance stopped issuing permits to trade to foreign investors intending to carry out trading activities. New foreign invested companies have been required since then to sign an undertaking to not carry out trade upon incorporation. The business objectives of the foreign company must also contain no reference to trading activities as DICA will otherwise reject the incorporation application.

During this period of trade restriction, foreign companies were, nonetheless, allowed to act a service provider for Myanmar-owned companies involved in distribution and trade.

Due to recent liberalisation of import and trade laws, new opportunities will be available for foreign investment in these sectors.

### 4.1 Import restrictions

The vast majority of imported commodities require a licence in Myanmar. Certain commodities require additional documentation that a product conforms to technical standards or requires permission from certain ministries.

The Directorate of Trade within the MOC also maintains a list of prohibited imports, which can change with little notice. The current list includes counterfeit money and goods, pornographic materials, playing cards, items featuring images of the Buddha or the Myanmar flag.

As outlined above, due to ministerial policy, the import of goods for the purpose of trade was – with few exceptions (e.g. for investors in the Thilawa SEZ) – generally restricted for foreign investors. Foreign owned companies have also been required in the past to sign an undertaking that they would not resell imported commodities in order to be issue with a Certificate of Exporter/Importer Registration. In accordance with recent regulatory changes outlined below in relation to import and trade, foreign companies will now have new possibilities in relation to the import and trade of goods.

Furthermore, an investor making an investment under the MIL may now also import any equipment, goods or materials relevant to the investment without requiring any specific approval from the MIC pursuant to rule 139 of the MIR. This means that machines, goods, equipment and building material required for operating, for example, a factory or in order for a foreign investor to be able to deliver services will now be able to be imported by the foreign investor. Where any licence or other approval is required under an applicable law to proceed with such an import, the investor may apply to the relevant authority for and the relevant authority must give effect to this rule and issue such a licence if the relevant legal requirements are met.

### 4.2 Liberalisation of trade for foreign companies

From 2015 onwards, the primary exception to the unofficial ban on trade for foreign companies was enjoyed by foreign investors operating in the Thilawa SEZ, which were permitted to carry out import and wholesale trading activities throughout the country under Management Committee of Thilawa SEZ Instruction 2/2015.<sup>72</sup>

The unofficial ban on foreign companies trading has since then been further relaxed by a series of recent regulatory changes issued by the MOC between 2015 and 2017 under s 13(b) of the Export and Import Law 2012, which allowed:

- 100% foreign companies and foreign JVs to import and engage in retail and wholesale trade in fertilisers, seeds, pesticides, hospital equipment and construction materials with a specified HS code under MOC Notification No. 36/2017, Notification No. 85/2016, Notification 96/2015.
- Foreign JVs to import and trade agricultural machines with a specified HS code under MOC Notification 55/2017.
- Foreign JVs to import new motor vehicles for sale in motor vehicle showrooms under MOC Notification 16/2017.

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<sup>72</sup> Some restrictions remain however: retail sale outside of the Thilawa SEZ is excluded, as is the sale of “four-wheel vehicles” and motorcycles, for which special regulations by the MOC apply.

Following the introduction of the MIL and the notifications subsequently issued pursuant to this law, foreign investors are permitted to engage in retail and/or wholesale trading activities subject to approval from the MOC.<sup>73</sup> The combined manufacture and distribution (whether retail, wholesale, or both) of certain products is, however, restricted to investment in the form of a JV with a Myanmar partner (minimum shareholding of Myanmar partner is 20%) or requires that relevant Ministry approval be obtained under MIC Notification 15/2017.

On 9 May 2018, the MOC issued its most significant departure from strict foreign restrictions on retail trade in recent years under Notification 25/2018. This notification allows 100% foreign owned and foreign JV companies to engage in retail and wholesale business subject to meeting minimum capital requirements, holding an MIC permit or MIC Endorsement, and registering a retail or wholesale permit with the MOC.

The minimum capital requirements for 100% foreign owned and foreign JV companies engaging in retail and wholesale trade are:

	100% foreign-owned	JV (Myanmar party <20%)	JV (Myanmar party >= 20%)
Retail	USD 3 million plus rent		USD 700,000 plus rent
Wholesale	USD 5 million plus rent		USD 2 million plus rent

Aside from registering as for a retail or wholesale permit, existing foreign companies would need to:

- amend their business objectives in their M&AA to allow for trading activities;
- register for an Importer/Exporter Registration Certificate and/or as a Business Representative;
- register, obtain licences, and/or obtain import recommendations from relevant authorities for specific products e.g. drugs, medical devices, cosmetics, food and beverages need to be registered with or receive a licence from the Myanmar Food and Drug Administration and imported products require an import recommendation.

This is a significant development that is designed to increase price competition, quality and foreign investment in the retail and wholesale sector.

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<sup>73</sup> With the exception of opening minimarts or convenience stores with a floor area of less than 929 square meters, which is restricted to Myanmar citizens and Myanmar owned entities: MIC Notification 15/2017.



