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- M&A
- Resources
- Real estate
- Energy

Taxation
- Structuring
- International
- Compliance
- Customs
- Controversy

6 countries
Key People on the Ground in Myanmar

Jean Loi is widely recognized as one of the region’s most experienced tax specialists, formerly a tax partner with PricewaterhouseCoopers in Southeast Asia and with DFDL for more than 10 years. Jean is a highly successful tax adviser with a CPA background.

Edwin Vanderbruggen was formerly with Loyens & Loeff and a partner at DFDL. Edwin has 20 years of experience as a tax lawyer and government adviser, and has 5 years experience on Myanmar tax and investment issues. Edwin has advised oil companies, distributors, property funds, and private equity funds on making investments in Myanmar.

Jean holds a bachelor’s degree in Commerce from the Institute of Economics, University of Yangon. She is highly experienced in importation and corporate compliance. Her practice area includes customs duty calculation, advice on importation licensing, tax compliance.

May holds a bachelor’s degree in Commerce from the Institute of Economics, University of Yangon. She is highly experienced in importation and corporate compliance. Her practice area includes customs duty calculation, advice on importation licensing, tax compliance.

Paul is a US attorney with 15 years of experience, and was formerly with Clifford Chance and O’Melveny & Myers. He holds an MBA from Cambridge University and a J.D. from Duke University. He has extensive experience in providing integrated solutions for M&A and private equity transactions, with a particular focus on the financial services, ICT, healthcare and manufacturing industries.

Myo Nyunt is an advocate to the Supreme Court of Myanmar and is one of Myanmar’s most distinguished senior lawyers. A former Director of the Supreme Court and Appellate Judge, he is a member of the Bar Council, member of the board of editors of the Myanmar Law Review.

Adam McBeth is a US attorney admitted to the NY bar, with a J.D. from St. John’s University and an LL.M. from NYU. Adam has experience in assisting clients in Myanmar with the legal structuring of power generation projects, real estate, telecommunication and oil and gas transactions. He lives full-time in Yangon.

Cynthia is a Chartered Accountant and holds a master’s degree in Mechanical Engineering with Business Finance (University College London, UK). During her time at Ernst & Young, London, she worked in audit specializing in the mining, oil & gas and utilities industries.

Kyi Naing is a Myanmar-qualified lawyer with seven years of experience, most recently with DFDL in Myanmar. Experienced in cross-border legal issues, he has assisted international clients with their investment projects in Myanmar, and advised on a wide range of corporate and commercial issues.
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4. How to structure the equity of the joint venture?
5. Which articles of the JVA cause problems under Myanmar law?
6. Onshore or offshore JV Co?
7. Secured loans
8. How to get land rights into the right company?
9. How to separate land into different plots for a real estate development project?
10. Consortia
Update on new developments
Update: Telecom tender process

- It seems the Government strictly followed the objective evaluation calculations
- The winners did it without local partners
- The “G to G” angle did not play as expected
- The names did not leak
- The Government did not allow domestic politics to interfere
Which activities are open to 100% foreign investment?
Joint Venture required for:

- Production of foods, beverages
- Plastics, rubber, ceramics, paper, leather production
- Certain chemical industries
- Certain mining activity
- Most real estate development, except hotels and BOT projects
- Air and sea transport
- Certain medical services
- Fishing, small scale livestock, certain wood-based industries
- Certain media activity
Joint Venture required for:

- Production of foods, beverages
- Plastics, rubber, ceramics, paper, leather
- Certain chemical industries
- Certain mining activity
- Most real estate development, except hotels and BOT projects
- Air and sea transport
- Certain media activity
- Fishing, small scale livestock, certain wood-based industries
- Certain media activity

How about in practice?
Update on FIL Rules

Key Points to Note

- You have to put a proposal forward to find out what you can do (or wait until your competitor does it first)
- 80% foreign ownership even in restricted sectors
- Service activities are mostly 100% foreign owned
- Trading of finished goods: no foreign ownership
- Real estate development 100% foreign owned is still possible (BOT)
- Myanmar will legalize casinos
How to buy shares in an existing Myanmar-owned company?
Acquisition of a majority stake in a Myanmar business

- Foreign Investor
- Local Shareholder
- Old Co
- New JV Co
- MYANMAR INVESTMENT COMMISSION

- 80%
- 20%
- Approval

- Assets
- License
- Land lease

- Transfer
- Production Plant
Acquisition of a majority stake in a Myanmar business

Local Shareholder
Myanmar

Foreign Investor

Myanmar Shareholder
(on behalf of Foreign Investor)

Old Co
Myanmar

Transfer
80%

80%

Old Co
Myanmar

Production Plant
Acquisition of a majority stake in a Myanmar business

Foreign Investor

Myanmar Shareholder (on behalf of Foreign Investor)

Production Plant

Old Co Myanmar

Local Shareholder Myanmar

Myanmar Shareholder

Old Co Myanmar

80%

Transfer

Not Recommended

- Difficult or impossible to secure
- No protection from the FIL
- Not enforceable
- Profit extraction may be impossible
How to structure the equity funding of the joint venture?
Equity Structuring
Options, Warrants, Convertible Loans

What works in practice?

• Call **options** and put options - warrants?
• Different **classes** of shares?
• **Convertible** shareholder **loan**?
Equity Structuring
Options, Warrants, Convertible Loans

**Equity Funding**
- Capital: 10M$
- Loans: 20M$
- Total: 30M$
- 50/50 JV = 5M$ each

**Debt Funding**
- Capital: 1M$
- Loans: 29M$
- Total: 30M$
- 50/50 JV = 0.5M$ each
Equity Structuring
Options, Warrants, Convertible Loans

**Equity Funding**
- Capital: 10M$
- Loans: 20M$
- Total: 30M$

50/50 JV = 5M$ each

**Debt Funding**
- Capital: 1M$
- Loans: 29M$
- Total: 30M$

50/50 JV = 0.5M$ each

- Debt/equity requirements?
- MIC approval?
- Tax implications?
  - Withholding tax
  - CIT deduction
**Equity Structuring**

Options, Warrants, Convertible Loans

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**Automatic drag along in the Myanmar Companies Act**

- There is an offer to acquire shares of the company (the transferor company);
- This offer has been accepted by 75% of the shareholders by value;
- This acceptance took place within 4 months of the initial offer;
- Notice within 2 months
- The terms and conditions for the acquisition of the shares from the dissenting shareholders are the ones provided in the offer.
Which articles of a joint venture agreement cause problems under Myanmar law?
Typical Myanmar corporate law issues

• How flexible is the Myanmar Companies Act? (MCA) (compared to Table A, compared to the provisions of the Act)

• Capitalization

• CP’s and the investment licensing process

• Appointing and removal of directors

• Reserved matters: list of special and extraordinary resolutions
  • *In the MCA: Name, objectives, articles, classes of shares, capital*
  • *Not in the MCA: budget, subco’s, land, loans, dividend*

• Non-compete in the JVA
Non-compete clauses and restraint of trade

The Myanmar Contract Act of 1872, which essentially came into existence as the India Contract Act, provides in Section 27(s.27) for a wide-reaching restriction on the restraint of trade in contracts:

“27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.”

- There must be an agreement or a part of an agreement;
- The agreement provides for a certain obligation consisting of a restraint;
- The restraint relates to exercising a profession, a trade or a business; and
- The exception (below) does not apply.
Non-compete clauses and restraint of trade

Exception:
“Exception 1 - One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.”

Case law:
• Case of the two butchers
• Case of the two millers
• Stevedoring case
• Indian cases
Onshore or offshore JVCo?
Equity structures
Structuring the joint venture

Local Partner
Myanmar

Foreign Investor Overseas

Joint Venture Company
Myanmar

Myanmar Investment Commission

MIC Permit

Project
Equity structures
Structuring the joint venture

Foreign Investor Overseas

Local Partner Myanmar

Joint Venture Company Singapore

100%

Project Company Myanmar

Myanmar Investment Commission

MIC Permit

Project
Equity structures
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Pros and cons?
✓ Required?
✓ DICA, JVA and the Articles of the JV Co
✓ Governance?
✓ Financing and security

Project
Suitable International Structure?
DTA Reductions

Parent Company

Holding Singapore

Subsidiary Myanmar
Suitable International Structure?

DTA Reductions

Parent Company

Holding Singapore

Subsidiary Myanmar

No dividend withholding tax under Myanmar tax law
Suitable International Structure?
DTA Reductions

- Parent Company
- Holding Singapore
- Subsidiary Myanmar

0-10% Myanmar tax on capital gains instead of 40% or more (conditions)
No dividend withholding tax under Myanmar tax law
Suitable International Structure?
DTA Reductions

- Parent Company
- Holding Singapore
- Subsidiary Myanmar

No Income Tax on dividends received from Project Co (conditions)
No Capital Gains Tax
0-10% Myanmar tax on capital gains instead of 40% or more (conditions)
No dividend withholding tax under Myanmar tax law
Suitable International Structure?
DTA Reductions

- Parent Company
  - Holding Singapore
  - Subsidiary Myanmar

- No dividend withholding tax on payments to non-resident shareholders
- No Income Tax on dividends received from Project Co (conditions)
  - No Capital Gains Tax
- 0-10% Myanmar tax on capital gains instead of 40% or more (conditions)
- No dividend withholding tax under Myanmar tax law
Suitable International Structure?

DTA Reductions

**Parent Company**

- **Holding Singapore**
  - No dividend withholding tax on payments to non-resident shareholders
  - No Income Tax on dividends received from Project Co (conditions)
  - No Capital Gains Tax
  - 0-10% Myanmar tax on capital gains instead of 40% or more (conditions)
  - No dividend withholding tax under Myanmar tax law

**Subsidiary Myanmar**

- Financing
  - 10% WHT instead of 15%
Conclusion: which location is better?

1. If your activity is on the restricted list, and the Government insists on a local partner, you have no choice anyway.

2. If timing is important, better use a foreign company as the JV Co.

3. If you need articles that differ from the DICA template (depends on the case), you better use a foreign JV Co with 100% Myanmar subsidiary.

4. Use of a Singapore JV Co is always more tax efficient.

5. For profit extraction through dividend or foreign exchange issues, there is no difference.

6. If you plan to use shares of the JV Co for raising funds, pledge of shares is always much easier with a foreign JV Co.
The new regulatory framework for secured lending in Myanmar
What kind of securities exist?

- Mortgage over land and buildings
- Pledge of Accounts Agreement
- Pledge/Security over all of the contractual rights and interest held by the Borrower
  - LLA/BOT Agreement
  - EPC Agreement
  - Insurance
  - Performance Bonds
- Pledge of Shares Agreement
- Guarantee Agreement
Secured lending

- **Shareholder**
- **Borrower** Myanmar
- **Lender**
  - **Guarantee Agreement**
  - **Pledge of Shares Agreement**

**Myanmar Investment Commission**

- **Pledge of Accounts**
- **Mortgage over the construction**
- **Security over all receivables contractual rights**
To remember:

1. Much of the key elements of a modern security package are untested in Myanmar. But that will change soon.

2. The current framework is attached to the FIL. If you do not resort under the FIL, the picture becomes unclear.

3. You best have your plan for financing and security ready at the time of your MIC application. You need the draft loan agreement and security package as well.

4. If you have the possibility to use an offshore shareholding, this will in practice help with financing.
How to get the land in the right company in a real estate development structure?
How do the land rights get into the right company?
Privately held land

Local Partner
Myanmar

Joint Venture Agreement

Foreign Investor
Offshore

Joint Venture Co
Myanmar

LAND
(Freehold)

LAND RIGHTS
How do the land rights get into the right company?
Privately held land

- Local Partner Myanmar
- Joint Venture Agreement
- Foreign Investor Offshore

LAND (Freehold) ➔ Joint Venture Co Myanmar ➔ LAND RIGHTS

- Lease
- MIC Permit

✓ Transfer of ownership is not possible
✓ Long term lease
How do the land rights get into the right company?
Government land

- Local Partner
  - Myanmar
  - LAND LEASE
- Joint Venture Agreement
- Foreign Investor
  - Offshore
- Joint Venture Co
  - Myanmar
  - LAND RIGHTS

- Government
  - Land Owner
How do the land rights get into the right company?

Government land

- Local Partner
  - Myanmar
- Joint Venture Agreement
- Foreign Investor
  - Offshore

Assign and reissue the lease?
- Long term sub-lease?
- Other rights such as development rights

LAND LEASE

- Government
  - Land Owner
- LAND RIGHTS
- MIC Permit
- Myanmar Investment Commission

Joint Venture Co
- Myanmar
How do the land rights get into the right company?

Government land

- Local Partner Myanmar
- Joint Venture Agreement
- Foreign Investor Offshore

“Development Agreement”

- Rights recognized in the master lease?
- MIC approval?
- Security?

MIC Permit

Myanmar Investment Commission

LAND RIGHTS
How do the land rights get into the right company?

Government land

Local Partner
Myanmar

Joint Venture Agreement

Foreign Investor Offshore

Myanmar Investment Commission

MIC Permit

Joint Venture Co
Myanmar

Agree to assign the land lease

LAND LEASE

LAND RIGHTS

Land premium update?

YCDC, MOC, MHT, ...

VDB Loi
Conclusion: maximizing legal protection

1. The project company needs to be setup under the Foreign Investment Law

2. To maximize legal protection, the project company should have a direct land lease right or a sublease from the official master lessee

3. A land lease or the sublease to JV Co must be approved by the Myanmar Investment Commission

4. Any sublease should have permission of the land owner, e.g. in the master lease agreement

5. The secured interests must be approved by the MIC

6. Transfer of shares in a wholly locally owned company to a foreign shareholder is not practical
How to separate land into different plots for a real estate development project?
Equity structures
Multiple joint ventures, division of plots

Foreign Investor A
Overseas

Joint Venture
Company A
Myanmar

Local Partner
Myanmar

Foreign Investor B
Overseas

Joint Venture
Company B
Myanmar

10 acres

5 acres

Yangon City
Development
Committee

Myanmar
Investment
Commission

5 acres
Equity structures
Multiple joint ventures, division of plots

Foreign Investor A
Overseas

Joint Venture
Company A
Myanmar

Local Partner
Myanmar

Foreign Investor B
Overseas

Joint Venture
Company B
Myanmar

10 acres

5 acres

5 acres

Yangon City
Development
Committee

Myanmar
Investment
Commission
Equity structures
Multiple joint ventures, division of plots

Foreign Investor A
Overseas

Joint Venture
Company A
Myanmar

Local Partner
Myanmar

Foreign Investor B
Overseas

Joint Venture
Company B
Myanmar

5 acres

Yangon City Development Committee

Myanmar Investment Commission

5 acres
Consortia
Oil and gas consortia

Prospective Operator

Prospective Contractor

Subsidiary or Branch Myanmar

PSC
Prospective Operator

Prospective Contractor

Subsidiary or Branch Myanmar

PSC

Prequalification?
Oil and gas consortia

Prospective Operator

Prospective Contractor

Subsidiary or Branch Myanmar

PSC

☑ Contractor only?
☑ 3 block limitation?
Oil and gas consortia

Prospective Operator → Prospective Contractor → Subsidiary or Branch Myanmar → PSC → Farminee
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