NEW HEALTHCARE RELATED LAWS PAVE WAY FOR FOREIGN INVESTMENT IN MYANMAR HOSPITALS AND CLINICS

A number of newly enacted laws and regulations in Myanmar are meant to upgrade healthcare standards in the country while facilitating foreign direct investment in the health sector. In recent months, Myanmar has enacted an Organ Donation Law, the Myanmar Red Cross Law and the Myanmar Medical Council Law to address a wide range of healthcare regulatory issues. In addition, Myanmar has relaxed restrictions on foreigners distributing medical equipment in Myanmar, and updated the Blood and Blood Products Law, a crucial input to the safe operation of hospitals. The improvement of the regulatory standards covering the necessary logistical chain for foreign invested hospitals and clinics presents foreign investors with an exciting opportunity.

The Myanmar government’s spending on healthcare is reportedly still one of the lowest in the ASEAN region. One of the aims of government’s reforms is to attract foreign investment to develop an accessible healthcare system of quality. The Ministry of Health (“MOH”) is trying to promote specialized clinics such as cancer clinics, and they may issue regulation to support this. A few foreign companies specialised in healthcare activities are already operating in Myanmar and others plan to enter soon.

Highlights of this note

- Licensing of hospitals and clinics in Myanmar
- Foreign ownership restrictions in the healthcare sector
- Buying a participation in an existing hospital
- Providing management services to hospitals and clinics
- Foreign exchange controls
- Land and buildings
- Foreign medical staff
- Taxation of foreign medical staff
- Myanmar’s health insurance system
- Medical equipment
- Distributing drugs and medicine

In this briefing note, some of the salient features of Myanmar law which are important to foreign-invested healthcare projects.

Licensing of hospitals and clinics in Myanmar

The MOH is the principal regulator. Foreign invested healthcare enterprises of a certain size such as hospitals and...
which have an investment permit ("MIC Permit") under the Foreign Investment Law are also regulated by the Myanmar Investment Commission ("MIC").

The MOH reviews compliance with laws and standards, approves equipment importation and site location and issues manufacturing license and product registrations. Ministry of Industry approves construction plans, environmental plans and equipment import.

According to the 2007 Law, private health care services are private clinic service, such as private general clinic service and private specialist clinic service, private hospital service, such as private general hospital service and private specialist hospital service. Furthermore, private maternity home service, private diagnostic service, private nursing home service, private mobile health care service, private health care agency and private general health care service are provided by the law as private health care services.

Private hospitals are allowed to carry out healthcare activities as a private service in accordance with stipulations for out-patient and in-patients. Private clinics are not allowed to accept in-patients. Thus, private hospitals must have arrangement to provide 24-hours healthcare service.

Moreover, private hospitals, such as general and specialist, undertake healthcare provided by medical practitioner. Private clinics provide treatment but it is not allowed to undertake it there.

A person desirous of establishing any private healthcare activities shall apply to the respective Township Supervisory Committee. This person shall enclose the prior approval issued by the State and Divisional Supervisory Committee. Township Supervision Committee shall scrutinize the license application and report with the remarks to the District Supervision Committee. Then, the District Supervision Committee shall report to the Region Supervision Committee subsequently. The State and Region Supervision Committee shall report to the Central Board with the remarks for the application of license for any of the other private healthcare activities apart from the private general practice clinic. The State and Region Supervision Committee may issue or deny the license after scrutinizing the license application for permit of private general practice clinic. The Central Board may issue license or deny for issuing license after scrutinizing the license application submitted by the State and Region Supervision Committee under subsection. The person who obtains a license for any private healthcare services, and wish to continue to conduct their activities after the expiry of the term of license, shall apply before the expiry of the term of license at least 60 days in advance to the Township Supervisory Committee to extend the term of license. The Central Body and Supervision committees extend the term of license. A person who obtains the license for any private healthcare services, if desirous of transferring or leasing the license to another person, shall apply to the Central Body or State and Divisional Supervisory Committee which have the right to issue the license.

Foreign ownership restrictions in the healthcare sector

According to the restrictions on foreign direct investment in the healthcare industry, certain healthcare activities are as a rule forbidden for foreign investors such as health centres for the elderly and indigenous laboratory.

Some other activities have limitations on foreign direct investment, which means that foreigners may own shares in such activity up to a certain percentage, typically 80%. There are differing ownership rules for each relevant sector. To invest in private hospitals, private clinics, private diagnostic activities, private medicines and pharmaceutical production, establishment of private medical institutes and medicine related Institute and training school, a joint venture with a Myanmar Citizen is required. In such case the local partner would as a rule hold a minimum of 20%. However, deviations may be permitted.

A local partner is also required to invest in production research on vaccines and testing kits, trading of traditional medicinal raw material (indigenous
medicine products), cultivation and production of traditional medicinal herbs, and laboratory services, manufacturing of traditional medicines, traditional medicine hospitals. In the above cases, again the local partner should have at least 20% shareholding.

Importation and resale of medicine is only permitted by 100% Myanmar owned businesses. A foreign investor may not hold any shares in such a business at this point in time.

Importation and resale of medical equipment is permitted to foreign investors in joint venture with a Myanmar partner. No minimum percentage is prescribed.

Buying a participation in an existing hospital

Foreigners are, on a case by case basis, allowed to purchase an equity stake in an existing Myanmar owned company. The existing company can issue new shares or a shareholder can transfer existing shares to a foreign investor. An existing company which would actually own land would not be allowed to have any foreign shareholders. As most land is in fact state owned, and mostly Myanmar individuals hold land rights, this is not usually a problem. A foreign owned company may without any problem lease land (but not all types of land), including long term leases of 50 year, extendable with two 10 year periods.

Transactions as a share sale or an asset sale of a hospital or a clinic, require, in practice, the prior approval from the MOH. Share transfers in healthcare enterprises with an MIC Permit require approval from the MIC as well.

Competition approval is not required for transactions at this time in the healthcare industry. The competition regulator is the Competition Commission formed under the Competition Law of 2015.

For the purpose of conducting due diligence, one should note that very little information is publicly available. Company records are not public, nor are financial statements or court records.

In case of a transfer of shares, there is not a right conferred upon existing employees to resign where a company is acquired or disposed. However, in case of a transfer of business, employees have the option to deem they have been terminated and claim notice and severance.

Providing management services to hospitals and clinics

An alternative for a healthcare investor to enter the Myanmar market might be to secure the right to manage an existing or new Myanmar hospital or clinic. The Law does not explicitly refer to any hospital management arrangements, but in our experience the approval from the MOH must be secured in those instances.

Foreign investment limits to the management of a hospital or a clinic are unclear. It is possible that the management company of a hospital can be 100% foreign owned, without a Myanmar shareholding. The regulator decides this on a case by case basis.

In practice, a management company must be locally incorporated to meet various regulatory obligations. Although service providers rarely get an MIC Permit in Myanmar, it is as a principle possible for the management company to apply for an MIC Permit. This would bring extensive tax breaks, work permits and foreign currency rights. However, this has not been tested in practice yet. The MIC has a wide discretion in terms of selecting which projects merit an MIC Permit. It would be very important how the proposal is structured and presented.

The management fee would trigger a 5% Commercial Tax in Myanmar, payable to the authorities by the service provider. In addition, the payment of the fee is subject to a withholding tax of 2% in most cases, which, if properly structured, can be offset by the service provider with his final tax liability.

Foreign exchange controls

There are controls on foreign exchange in Myanmar. Capital account payments (such as loans, principle repayment, dividends, capital repayment) are subject to prior approval by the Central
Bank of the Union of Myanmar. Current account payments (such as purchase of goods and services, service fees, interest payments) do not require such approval. Dividend payments must be substantiated and may require approval by the MIC, but not from the Central Bank.

**Land and buildings**

Foreign corporations and/or natural persons are not allowed to own land. Pursuant to sections 3 and 4 of the Transfer of Immovable Property Restriction Act of 1987 (TIPRA), immovable property cannot be transferred from or to a foreign individual or foreign invested company in Myanmar.

On obtaining a MIC permit, foreign investors can purchase up to 50 years on a land lease, with an option for 2 continuous extensions of 10 years each. The site must be approved by Ministry of Industry and Ministry of Health.

Most of the land is state owned. To verify a land title, it is documented through grant titles, land use permits or land lease agreements. There is no central land title system.

Pursuant to the Law relating to private health care services (5 April, 2007), a person desirous of constructing a new building or renovating the existing building for establishing any private health care services other than private mobile healthcare service and private healthcare agency shall, to obtain prior permission, apply to the relevant Township Supervisory Committee together with the recommendation of the relevant development committee or development body in accordance with stipulations. The relevant Township Supervisory Committee shall, after scrutinizing the application, submit to the District Supervisory Committee, and the District Supervisory Committee shall submit to the State and Divisional Supervisory Committee stage by stage together with remarks. The State and Division Supervisory Committee shall submit to the Central Body together with remarks, may the prior permission together with the stipulated terms and conditions or refuse to issue the prior permission. The Central Body may issue or not the prior permission together with the stipulated terms and conditions.

**Foreign medical staff**

There are restrictions on foreign expatriates working in the healthcare industry. Expatriate healthcare workers may be allowed to work in Myanmar, including doctors, with positive recommendation by the MOH. They have to respect, under the Chapter XII of the Law relating to private healthcare services, duties and obligations of person-in-charge and health care service provider.

Foreign medical staff can obtain a stay permit or visa for the foreign expatriates. The procedures and timetable to obtaining work permits or for foreign expatriates to operate in the healthcare industry usually takes 2 to 4 weeks.

There are no limits published by the MOH on the percentage or number of foreign workers allowed to work in the healthcare industry.

**Taxation of foreign medical staff**

There is no extraordinary regime for the personal income tax of foreign medical staff. No special tax incentives or exemptions exist in this regard. Employers, whether residents or non-residents of Myanmar for tax purposes, are liable to deduct personal income tax (“PIT”) from payments of salaries, wages and other remuneration made to all employees. According to the Myanmar Income Tax Law (1974), foreigners who reside in Myanmar for at least 183 days during an income year (1 April
to following 31 March) are considered as resident foreigners. Foreigners who reside in Myanmar for less than 183 days are considered as non-resident foreigners. Residents of Myanmar (both Myanmar citizens and foreigners) are subject to tax on their worldwide income. Non-resident foreigners are taxed only on their Myanmar-sourced salary income. The PIT rates for resident Myanmar citizens, resident foreigners and non-resident foreigners are now at the same progressive rates ranging from 0% to 25%.

Resident taxpayers are allowed to deduct the prescribed reliefs and allowances before calculation of PIT which include basic allowance of 20% on total annual income (capped at MMK10 million); allowance for taxpayer’s spouse (MMK 1 million allowed for only one spouse per income year); allowance for taxpayer’s children (MMK 0.5 million allowed for each child who is either under 18 or unmarried or still studying if above 18 per income year); allowance for taxpayer’s parents who live together with the taxpayer (MMK 1 million for each parent per income year); Social Security Contributions made to Social Security Board in Myanmar by the employee; premium paid for the life insurance of taxpayer and taxpayer's spouse; contribution towards saving fund as prescribed by the Income Tax Rules; pension and compassionate grant of the government staff when retired. However, non-resident taxpayers are not allowed to deduct any tax reliefs and allowances. Please note that non-resident PIT may be exempted under an applicable DTA with the country of residence of the employee in question and in such case prior approval from Internal Revenue Department ("IRD") is required.

Note that included within the scope of salary is salary, wages, annuity, pension, gratuity, as well as any fees, commission or perquisites received in lieu of or in addition to any salary and wages. The employer is responsible to remit the PIT deducted from the employees and lodge the PIT return on a monthly basis to the IRD. However, there is no penalty imposed on monthly late payment of PIT as long as all PIT due is paid by the financial year end, 31st March. The employer also has the responsibility to lodge annual PIT return to the IRD by 30th June. The penalty 10% of the total payable PIT may be imposed on late payment and late annual filing of PIT.

**Myanmar’s health insurance system**

Myanmar has an obligatory social security scheme. All employers who have 5 employees or more must join up

and pay contributions. Insured persons are entitled to basic healthcare in state designated facilities.

According to the Social Security Law dated (2012), in time of sickness, the insured persons who have paid contribution to health and social care fund have the right to take medical treatment at the permitted hospital or clinic for a period up to 26 weeks starting from the date of treatment. However, for sickness of special importance, it has the right to take medical treatment up to 52 weeks.

The insured has the right to enjoy cash benefit relating to sickness only if he had worked at the establishment for a minimum of six months before sickness and had paid contribution for a minimum of four months during the said six months. The insured has the right to enjoy 60 percent of average wage of the previous four months as cash benefit relating to sickness up to 26 weeks.

Employers have the right but not the obligation to provide for additional, private medical insurance for their employees. Foreign and domestic companies with a promoted investment project by the MIC are encouraged to provide additional welfare for employees. Generally speaking, foreign
insurance companies are not yet allowed to operate in Myanmar, except under arrangement with the state-owned Myanma Insurance. Several privately owned Myanmar insurance companies recently started to offer health insurance.

Medical equipment

Myanmar’s healthcare sector is lacking in the availability of modern medical equipment which were previously unavailable mostly due to economic sanctions. With the lifting of western sanctions, companies are now actively engaging Myanmar by providing imaging systems to both public and private hospitals.

Under a special exemption, foreign invested companies may now import and distribute medical equipment.

An import license, including positive recommendation by the MOH’s Food and Drug Administration, is required for each importation.

Distributing drugs and medicine

As mentioned, only wholly Myanmar-owned companies are allowed to import drugs and medicine in Myanmar for the purpose of resale.

The Food and Drug Administration (FDA) was established in 1995 and is notably responsible for the safety and quality of drugs and medical devices. Activities of the administration includes approval for new products, changes to existing products, quality control laboratory testing, adverse drug reaction monitoring, good manufacturing practice inspection, licensing of manufacturers, wholesalers, enforcement activities, drug promotion and advertisements.

Regulation about import and resale of medical equipment provide a most favoured nation duty rate of 1.5% and an exemption of Commercial Tax. Import licence fee is exempted on 67 kinds of Medicines and Pharmaceutical raw materials used in the manufacture of drugs and medicines for the purpose of supporting the improvement of public health and the welfare of the people in receiving medical treatment.

Edwin’s practical and highly engaged approach makes him uniquely suited to advise foreign investors on their projects and deals in Myanmar. He and his team advise multinationals, strategic and financial investors in a wide range of sectors as well as commercial banks, development financial institutions or non-bank financial institutions.

Edwin’s strongest points are probably his deep understanding of what really works in practice locally and his strong Government relations, having regularly acted for various state-owned enterprises and Government departments. He and his team assist the Government with privatizations and corporatizations in the energy, transportation and telecommunications sectors. He has a wealth of personal experience negotiating with and providing technical assistance to the Myanmar investment Commission.

He has assisted a large number of projects from start to finish, including manufacturers in the Thilawa SEZ, power plants, mobile network operators, global beer brands, oil and gas supermajors, and infrastructure developers.

Edwin Vanderbruggen
Partner, VDB loi
edwin@vdb-loi.com
T: +95 137 1902
+95 137 1635
www.vdb-loi.com

CONTACT

YANGON

Level 8, Centrepoint Towers
No. 65 Sule Pagoda Road & Merchant Street, Kyauktada Township
T: +95 137 1902 / +95 137 1635
F: +95 124 1238

NAY PYI TAW

No. S-204, Tha Pyay Kone Ward
Zabu Thiri Township
T: +95 678 108 091
F: +95 678 108 092