

# THE EVOLUTION OF COMPANIES LEGISLATION AND CORPORATE LEGAL LANDSCAPE IN MYANMAR

RÉMI NGUYEN\*

## I. INTRODUCTION

For over 100 years, the Myanmar Companies law did not change significantly even though there were important political events. For decades, Myanmar was marginalized from globalization; foreign investors were not prone to invest due to the political and economic situation in the country. Since 2012, the adoption of several important laws in the economic sphere, such as the New Investment Law of 2016 and the New Companies Law of 2017, radically modified the landscape of foreign investment in Myanmar.

The first part of this article examines how the Companies Act in Myanmar was influenced and may have been created during the British colonisation. It will then detail how the Companies Law had a different purpose after the independence of the country in 1948. Finally, it will focus on the 2017 reform of the Companies Law, which has changed the vision of the country in the international context.

## II. THE CREATION OF THE COMPANIES LAW UNDER BRITISH RULE

During the feudal period,<sup>1</sup> there was no formal legal business framework.<sup>2</sup> The Ancient Burmese Law was a mosaic of different legal instruments such as

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\* Ph.D. in Private Law, Affiliated Researcher at IRASEC; I am now a Legal Consultant in my own law firm, MLR Legal Consultants, in Yangon, Myanmar. I would like to thank Mr. Jean-François Giné (Legal Consultant in Myanmar), Mr. Piero Matosevic, and Mrs. Alizé Bonfils for their contribution to this paper. I also would like to dedicate this paper to my late Professor of Law, Laurence Ravillon; the director of my thesis, Professor Julia Heinich; and my parents and my sister.

<sup>1</sup> G. LUBEIGT, *La Birmanie : l'âge d'or de Pagan*, Guide Belles lettres des civilisations, 2005, p. 125: 'Avant l'occupation britannique, la Birmanie était gouvernée par des rois (*mingyi*) dans un régime de monarchie absolue (*thet oo san pine*). Les rois détenaient le pouvoir exécutif, législatif et judiciaire. Son pouvoir était suprême. Pour le pouvoir exécutif, le roi était donc la plus haute autorité. Il était assisté de ministre (*wonmin*), de maires (*myosar*), de chefs de ville (*thanbyin*), de chefs de village (*kalan, ywarsar*) ainsi que de hauts-fonctionnaires (*luhlin kyaw*). Le pouvoir législatif était détenu par le roi et il était assisté par un Parlement (*hluttaw*). Il était le législateur suprême en dehors des questions religieuses et le garant "des lois ordinaires qui reconnaissent les coutumes locales et régionales."

<sup>2</sup> In the *Dhammathat*, no provisions concern companies. Most of the provisions cover private law, such as criminal law, family law, property law and contract law. See D. Richardson, *The Damathat or the*

Dhammathats, Yazathats or Pyathons.<sup>3</sup> The Dhammathat was the most important legal source and served as a guide for the King and the judges.<sup>4</sup> The real contribution of the Dhammathat has been debated and scholars have disagreed on the use of the Dhammathat as a Civil Code.<sup>5</sup> Even though the Manugye Dhammathat is still known as the most famous Dhammathat,<sup>6</sup> the Court at that time, for some reason, did not accept its authority.<sup>7</sup> Before British colonization, Burma's economy was a village economy and did not have a developed foreign trade as it was self-sufficient as a country.<sup>8</sup>

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*Law of Menoo*, University of Michigan Library Press, 1874; U. Gaung, *A Digest of the Burmese Buddhist Law Concerning Inheritance and Marriage; being a Collection of Texts from Thirty-six Dhammathats*, Office of the Superintendent Government Printing, 1905, Vol. 1-2; E. Forchhammer, *King Wagaru Manu Dhammasattham. Text, Translation, and Notes*, Rangoon: Printed by the Superintendent, Government Printing, Burma, 1892; U. Gaung, *The Attasankhepa Vannana Dhammathat: Chapters on Inheritance, Partition, Marriage, and Divorce*, Office of the Superintendent Government Printing, 1963; J. Jardine, *Notes on Buddhist Law*, Office of the Superintendent Government Printing, Vol. 1-8, 1953; H.M. Lütter, *A Manual of Buddhist Law: Being Sparks' Code of Burmese Law, with Notes of All the Rulings on Points of Buddhist Law*, The Hanthawaddy Press, 1887.

- <sup>3</sup> See R. Okudaira, *Kingship and Law in the Early Konbaung Period of Myanmar (1752-1819)*. A Study of the Manugye Dhammathat – An Eighteenth Century Major Law Book, Mekong Publishing, 2018; Maung Maung, *Law and Custom in Burma and the Burmese Family*, The Hague Martinus Nijhoff, 1963; Maung Maung, *Burma in the Family of Nations*, Djambatan Ltd. International Educational Publishing House, 1956; Than Tun, *The Royal Orders of Burma, A.D. 1598-1885*, The Center for Southeast Asian Studies Kyoto University, 1983; R. Okudaira, *Cases on the Theft in 18th Century Myanmar (Burma) with Special Reference to the Atula Hsayadaw Hpyathton*, art. préc., pp. 44-64.
- <sup>4</sup> R. Okudaira, *The Burmese Dhammathat*, in Introduction: the South-East Asian Law Texts – Materials and Definitions, M.B. HOOKER, Butterworth & Co. (Asia) Pte. Ltd., 1986, Vol. 1, p. 66.
- <sup>5</sup> Than Tun, *History of Buddhism in Burma A.D. 1000-1300*, p. 88; Htun Yee, *Collection of Hpyat-sa (Legal Cases and Court Decisions of Myanmar in the Kon-Baung Period)*, Myanmar Affairs Bureau: Literature Bank, Vol. 1, partie 2, 2006, p. 211; Tin Aung Aye, *Interpretation of Statute Law and Treaty*, 2<sup>ème</sup> éd., 2011, p. 42; A. Huxley, *Burma: It Works, but is it Law?*, art. préc. p. 23-37; Aung Than Tun, *Kinwun Mingyi and Dhammathats*, The Tun Foundtion Bank Literary Committee, 2006, p. 32.
- <sup>6</sup> See D. Richardson, *The Damathat or the Law of Menoo*, University of Michigan Library Press, 1874; R. Okudaira, *Kingship and Law in the Early Konbaung Period of Myanmar (1752-1819)*, A Study of the Manugye Dhammathat – An Eighteenth Century Major Law Nook, Mekong Publishing Co., Ltd., 2018.
- <sup>7</sup> Dr. Tha Mya (Appellant) v. Daw Khin Pu (Respondent), B.L.R. (S.C), (1951), 108. That Buddhist Law within the meaning of s. 13 of the Burma Laws Act means the Dhammathats and collection of precedents. The Manugye Dhammathat is not the paramount authority in the body of Dhammathats as enunciated by the Privy Council in *Ma Hnin Bwin v. U Shwe Gon*, (1914) 8 L.B.R. 1, followed by the High Court of Judicature at Rangoon in *Ma Nyun v. Maung San Thein*, (1927) 5 Ran. 537.
- <sup>8</sup> U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics, University of Rangoon, 1961, p. 95.

In the 19<sup>th</sup> century, the British invaded Burma after three successive wars.<sup>9</sup> Burma was part of “British India” until 1935.<sup>10</sup> The transplantation of the Indian Companies Act, which was derived from Indian statute law, was carried out in 1914.

The Burma Companies Act of 1914 is a vestige of the past. The Act is a reminder of the British colonial era. Indeed, it was modelled on the Indian Companies Act (1913), which was also inspired by the UK Companies Act (1907).<sup>11</sup> Thus, this Act is very familiar for common law countries.

This Burma Companies Act was included in Volume IX of the Burma Code, which was a codification of laws from the period 1841-1954. This Act is divided into eleven parts—Part 1: Preliminary (definitions); Part 2: Constitution and Incorporation; Part 3: Share Capital, Registration of Unlimited Company as Limited, and Unlimited Liability of Directors; Part 4: Management and Administration; Part 5: Winding Up; Part 6: Registration Office and Fees; Part 7: Application of Act to Companies Formed and Registered Under Former Companies Acts; Part 8: Companies Authorized to Register Under this Act; Part 9: Winding Up of Unregistered Companies; Part 10: Companies Established Outside the Union of Burma; Part 11: Supplemental.

In Myanmar, the main type of company that can be established is a private company limited by shares. The Burma Companies Act operated a distinction between

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<sup>9</sup> J.F. Cady, *A History of Modern Burma*, Cornell University Press, 1958; L.F. Burton, *The Future of Burma*, Rangoon: British Burma Press, 3<sup>ème</sup> éd., 1937; J.S. Furnivall, *Colonial Policy and Practice: a Comparative Study of Burma and Netherlands India*, New York University Press, 1956; J. Nisbet, *Burma under British Rule – and before*, Westminster Archibald Constable & Co. Ltd., Vol. 1-2, 1901. There have been three Burmese Wars: First Anglo-Burmese War (1824-1826), Second Anglo-Burmese War (1852 to 1853) and the Third Anglo-Burmese War (1885).

<sup>10</sup> § 3 of the Government of Burma Act of 1935: “The Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under this Act, and such other powers of His Majesty as His Majesty may be pleased to assign to him.”

<sup>11</sup> Tun Zaw Mra, *The Securities Exchanges Law and Prospectus Regulations: Early Sketches of Equity Capital Market Law and Regulation in Myanmar*, in *Law, Society and Transition in Myanmar* (M. Crouch, T. Lindsey, eds.), Oxford: Hart Publishing, 2014; M. Tun, *A Principled Approach to Company Law Reform in Myanmar*, in *Law, Society and Transition in Myanmar* (M. Crouch, T. Lindsey, eds.), Oxford: Hart Publishing, 2014.

a “Burmese company”<sup>12</sup> and a “Foreign Company”.<sup>13</sup> If a Myanmar citizen or a foreign investor wants to carry on business by virtue of a limited company, he could register his company under the Burma Companies Act. However, if the Myanmar company has a single foreign shareholder or director, this company is considered as a foreign company. Created in 1993, the Directorate of Investment and Company Administration (“DICA”) administers the Companies Act and also functions as the registrar.<sup>14</sup> The Act fixes the minimum number of shareholders for a private company at two shareholders and the maximum at 50 members.<sup>15</sup> A private company is supposed to have at least three directors.<sup>16</sup> In the case of a company limited by share, the memorandum of association should indicate the name of the company with “Limited” as the last word of its name, the province in which the registered office of the company is to be situated, the objects of the company, that the liability of its members is limited; the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount. In addition, no subscriber of the memorandum of association should take less than one share. Finally, each subscriber has to write, opposite to his name, the number of shares he would take.<sup>17</sup> However, for a company limited by guarantee,<sup>18</sup> the conditions are different

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<sup>12</sup> § 2 (2A) of Burma Companies Act (1914). “Burmese company” means: (a) in the case of a company having a share capital, a company whose entire share capital is, at all times, owned and controlled by the citizens of the Union of Burma, or (b) in the case of a company limited by guarantee but not having a share capital, a company which is, at all times, owned and controlled by the citizens of the Union of Burma.

<sup>13</sup> § 2 (2B) of Burma Companies Act (1914). “Foreign Company” means: (a) any company other than a Burmese company or a special company formed under the Special Company Act, 1950, or (b) a company incorporated outside the Union of Burma.

<sup>14</sup> Section 21 (1) of Burma Companies Act (1914). The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

<sup>15</sup> § 2 (13) of Burma Companies Act (1914). “Private company” means a company which by its articles (a) restricts the right to transfer the shares, if any; (b) limits the number of its members to fifty not including persons who are in the employment of the company; and (c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company.

<sup>16</sup> § 83 (A) of Burma Companies Act (1914). (1) Every company shall have at least three directors. (2) This section shall not apply to a private company except a private company being a subsidiary company of a public company.

<sup>17</sup> § 6 of the Burma Companies Act (1914).

<sup>18</sup> § 7 of the Burma Companies Act (1914). In the case of company limited by guarantee: (1) the memorandum shall state (i) the name of the company, with “Limited” as the last word in its name; (ii) that the registered office of the company will be situated in the Union of Burma; (iii) the objects of the company; (iv) that the liability of the members is limited; (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or

from an unlimited company.<sup>19</sup> The memorandum should be printed in both Burmese and English.<sup>20</sup> There is also a difference between a private company and a public company<sup>21</sup>—a public company ought to have a minimum of seven persons or more.<sup>22</sup>

In 1932, the Partnership Act was enforced. A “partnership” is described as the relation between persons who agree to share the profits of a business carried on by all or any of them, acting for all. Persons who have entered into partnership with one another are individually called “partners” and collectively a “firm”, and the name under which their business is carried on is called the “firm name”.<sup>23</sup> Partnerships are formed by contract, and not by statute.<sup>24</sup> A partnership does not have separate legal personality. A partnership cannot be enforced against third parties if the contract is not registered.<sup>25</sup> At the time it was passed, partnerships were not very popular in Myanmar, but this Act is still enforceable nowadays.<sup>26</sup>

Section 246 of the Companies Act (1914) provided that “the High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure concerning the mode of proceedings to be had for winding up (both

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within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amounts as may be required not exceeding a specified amount; (2) if the company has a share capital: (i) the memorandum shall also state the amount of share capital with the company proposes to be registered and the division thereof into shares of a fixed amount; (ii) no subscriber of the memorandum shall take less than one share; (iii) each subscriber shall write opposite to his name the number of shares he takes.

<sup>19</sup> § 8 of the Burma Companies Act (1914). In the case of an unlimited company, (1) the memorandum shall state: (i) the name of the company; (ii) that the registered office of the company will be situated in the Union of Burma; (iii) the objects of the company; and (2) if the company has a share capital: (i) no subscriber of the memorandum shall take less than one share; (ii) each subscriber shall write opposite to his name the number of shares he takes.

<sup>20</sup> § 9 (a) of the Burma Companies Act (1914).

<sup>21</sup> § 2 (13A) of the Burma Companies Act (1914). “Public company” means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which is not a private company. The Indian Companies Act, 1866 was repealed by the Indian Companies Act, 1882, which in turn was repealed by the Indian Companies Act, 1913.

<sup>22</sup> § 5 of the Burma Companies Act (1914). Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration form and incorporated company, with or without limited liability.

<sup>23</sup> § 4 of the Partnership Act (1932).

<sup>24</sup> § 5 of the Partnership Act (1932).

<sup>25</sup> § 69 (1) of the Partnership Act (1932).

<sup>26</sup> See the conclusion regarding the reform of the Partnership Act.

members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the subdivisions of the shares of a company, and generally for all applications to be made to the Court under the provisions of this Act, and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed.” These rules were published in 1940.<sup>27</sup>

The question which might be raised is whether this Act was really adapted for Myanmar people at that time. As such, the implementation of the Companies Act derived from British Law was not obvious, mainly due to concepts of law which were different between the British and Burmese population.<sup>28</sup> As a consequence, and probably because of a different organisation of the country, this Act was mainly used by the British and the Indians.<sup>29</sup>

The English, especially in Lower Burma, improved foreign trade after the annexation of the coastline. The settlement on the coastline, also known as the “colonization of the Delta” brought immigrants from India and Upper Burma to Lower Burma.<sup>30</sup> From 1886 until 1926, Burma’s economy was alternatively run by the Kings, and later on, the commercial firms.<sup>31</sup> Foreigners were largely involved in the economic life of the country. The firms for mining, agriculture products processing, and forest removal were owned by Europeans and Indians, whereas the British mainly focused on bringing new technology to Burma.<sup>32</sup>

### III. COMPANIES LAW AFTER INDEPENDENCE

After the independence of the country in 1948, Burma started to experience socialism<sup>33</sup> and adopt complementary laws in the field of business policies.

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<sup>27</sup> Preliminary § 1, Burma Companies Rules 1940. These Rules may be cited as “the Burma Companies Rules, 1940”. They shall come into operation at once.

<sup>28</sup> Hla Aung, *Code versus Custom in the Development of Burmese Law*, JBRS, Vol. 49, 1966, p. 163; Maung Maung, *Law and Custom in Burma and the Burmese Family*, op. cit., p. 25.

<sup>29</sup> A. Huxley, *Is Burmese Law Burmese? John Jardine, Em Forchhammer and Legal Orientalism*, art. préc., pp. 184-201.

<sup>30</sup> U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics University of Rangoon, 1961, p. 95.

<sup>31</sup> U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics University of Rangoon, 1961, p. 98.

<sup>32</sup> *Ibid.*, p. 96.

<sup>33</sup> Ba Maw & Maung Ba Han, *The Planned State*, Rasika Ranjani Press, 1947; Government of the Union of Burma, *Pyidawtha the New Burma*, Hazell Watson and Viney Ltd. Aylesbury and London, 1954.

In 1950, a Special Company Act was enacted.<sup>34</sup> This Act, which is still applicable, governs all companies in which the State has equity share capital. If the company is a State-owned company or the Government is involved in its capital, such company must be incorporated under the Special Companies Act. However, the provisions of the Myanmar Companies Act, which are not excluded by this Act, also remain applicable to such companies.

From the “coup” in 1962, nationalizations of the companies were started, and a socialist country was established with the support of the Constitution of 1974.<sup>35</sup> During this period, the Companies Act of 1914 started to decline.<sup>36</sup>

During the socialist years, the Government came up with The Burma Industries Nationalization Law of 1963. It stated that the Government had the power to nationalize any industry in Burma by merely issuing a notification.<sup>37</sup> Additionally, the Government could form a committee to run and manage the assets of a company.<sup>38</sup>

In 1988, for the first time since their independence, Myanmar encouraged new foreign investors.<sup>39</sup> Nevertheless, structural economic and social reforms were

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<sup>34</sup> Special Company Act, Act No. 54 of 1950.

<sup>35</sup> § 1 of the Constitution of 1974. “Burma is a sovereign independent Socialist State of the working people. The State shall be known as the Socialist Republic of the Union of Burma.”

<sup>36</sup> A. Huxley, *The Last Fifty Years of Burmese Law: E Maung and Maung Maung*, dans Lawasia, 1998, pp. 9-20.

<sup>37</sup> § 3 of the Burma Industries Nationalization Law of 1963. (1) The Government shall have the authority to nationalise any industry by issuing a notification to that effect; (2) When an industry is nationalized by such issuance of notification, such an industry as stipulated in the notification will become state-owned on such a date as stipulated, in accordance with subsection (3); (3) On notification of nationalization, the following shall be specified: (a) all the assets of the said industry, and (b) any of the liabilities of the said industry that the Government should takeover.

<sup>38</sup> § 4 of the Burma Industries Nationalization Law of 1963. (1) The Government shall form an implementation committee by notification, to take over and manage in continuity the assets of the industry, and to run it; and (2) The implementation committee shall carry out in full, instructions given by the Government.

<sup>39</sup> The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88): “The Government of the Union of Myanmar has been striving hard to promote all round development of national economy to improve provisions of food, clothing and shelter for the people so as to ameliorate their living standards. In this connection steps have been taken to ensure mass participation with maximum utilization of the faculties of people and induce foreign investment on the basis of equality and mutual benefit. The Government has also envisaged such policy objectives as exploitation of abundant resources of the country with a view to catering to the needs of the nation in the first instance; exporting whatever surplus available; creation of new employment as the economic activities expand so that especially young people would have great job opportunities and privileges of learning on job training as well as technical training both inland and abroad; economic and social development of various regions of the State along with expansion and improvement of transport and

insufficient and were still a deterrent for foreign investments. A Myanmar Foreign Investment Commission (“MFIC”) was created<sup>40</sup> to promote the interests of the State and to manage the Foreign Investment Law (1988).<sup>41</sup> In 1990, the rise of entrepreneurship started in Myanmar.<sup>42</sup>

After the adoption of the new Constitution in 2008<sup>43</sup> and following the enactment of a Foreign Investment Law in 2012, an important movement started with the progressive and continuous modification of the business legal framework. Many laws were enacted with respect to the economy—the Myanmar Special Economic Zone Law was enacted in January 2014, the Myanmar Competition Law in February 2015, and the new Myanmar Investment Law in October 2016.

The Myanmar Investment Commission<sup>44</sup> (“MIC”) is the agency responsible for reviewing most types of foreign investment and coordinating with concerned

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communications. Foreign investors who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against nationalization of their business in operation. All these rights and privileges would be granted in the interest of the Union of Myanmar and its people. At present, enquiries are being made by foreign companies and persons wishing to make investments in the State in a reasonable manner. Similarly, enquiries and contacts are also being made by citizens. It is desirable that a Commission of a high caliber be formed so as to scrutinize the proposals and to co-ordinate all matters concerning enterprises which may be permitted. As it is necessary to make legal provisions for the above-mentioned matter, the State Law and Order Restoration Council has enacted the Foreign Investment Law.”

<sup>40</sup> Ch. V, § 7 of the Union of Myanmar Foreign Investment Law (1993).

<sup>41</sup> Ch. VI, § 8 of the Union of Myanmar Foreign Investment Law (1993).

<sup>42</sup> *Industrial Development in Myanmar: Prospects and Challenges*, Institute of Developing Economies, Japan External Trade Organization, Toshihiro Kudo (ed.), p. 105.

<sup>43</sup> For instance, § 36 of the Constitution (2008). The Union shall (a) permit all economic forces such as the State, regional organizations, co-operatives, joint-ventures, private individual, so forth, to take part in economic activities for the development of National economy; (b) protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities; (c) strive to improve the living standards of the people and development of investments; (d) not nationalize economic enterprises; and (e) not demonetize the currency legally in circulation.

<sup>44</sup> Ch. VI, § 11 of the Foreign Investment Law (2012). (a) The Union Government shall : (i) in respect of investment business, form the Myanmar Investment Commission with a suitable person from the Union level as Chairman, the experts and suitable persons from the relevant Union Ministries, Government departments, Government organizations, and non-Governmental Organizations as members for enabling to carry out the functions and duties contained in this Law; (ii) in forming the Commission, stipulate and assign duty the Vice-Chairman, the Secretary and the Joint Secretary out of the members; and (b) members of Commission who are not civil service personnel shall have the right to enjoy salary, allowances and recompense allowed by the Ministry of National Planning and Economic Development.



government agencies. MIC moved from Nay Pyi Taw to Yangon on 9 July 2014 in order to improve access for the investors.

For the applicable business, the Foreign Investment Law set up new investments sectors, which were considered as restricted or prohibited for foreign investors.<sup>45</sup> In some certain situations, the investment needed to be explicitly approved by the Union Government.<sup>46</sup> The government tried to develop this law in order to modernize its economy and to converge towards international standards. The Foreign Investment Law (2012) encouraged foreign investment in Myanmar to cater to the needs of the nation,<sup>47</sup> through the basic principles<sup>48</sup> of economy. The investment may be carried

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<sup>45</sup> § 4 of the Foreign Investment Law (2012). The following investments shall be stipulated as restricted or prohibited business: (a) business which can affect the traditional culture and customs of the national races within the Union; (b) business which can affect the public health; (c) business which can cause damage to the natural environment and ecosystem; (d) business which can bring the hazardous or poisonous wastes into the Union; (e) the factory which produce or the business which use hazardous chemicals under international agreements; (f) manufacturing business and services which can be carried out by the citizens by issuing rules; (g) business which can bring the technologies, medicines, instruments which is testing in abroad or not obtaining the approval to use; (h) business for farming agriculture, and short term and long term agriculture which can be carried out by citizens by issuing rules; (i) business of breeding which can be carried out by citizens by issuing rules; (j) business of Myanmar Marine Fisheries which can be carried out by citizens by issuing rules; and (k) business of foreign investment to be carried out within 10 miles from borderline connecting the Union territory and other countries except the areas stipulated as economic zone with the permission of the Union Government.

<sup>46</sup> § 5 of the Foreign Investment Law (2012). The Commission may allow by the approval of the Union Government, the restricted or prohibited investments under section 4 for the interest of the Union and citizens especially people of national races.

<sup>47</sup> § 7 of the Foreign Investment Law (2012). Aimed at the people to enjoy sufficiently and to enable the surplus to export after exploiting abundant resources of the country; causing to open up of more employments for the people as the business develop and expand; causing to develop human resources; causing to develop infrastructures such as banking and financial business, high grade main roads, highways roads connected one country to another, national electric and energy production business, high technology including modern information technology; causing to develop respective area of studies in the entire country including communication networks, transport business such as rail, ship, aircraft which meet the international standard; causing the citizens to carry out together with other countries; causing to rise economic enterprises and investment business in accord with the international norms.

<sup>48</sup> § 8 of the Foreign Investment Law (2012). The investment shall be permitted based on the following principles: (a) supporting the main objectives of the economic development plan, business which cannot be affordable and which are financially and technologically insufficiency by the Union and its citizen; (b) development of employment opportunities; (c) production of Import substituted goods; (e) production of products which require mass investment; (f) acquisition of high technology and development of manufacturing business by high technology; (g) supporting the business of production and services involving large capital; (h) bringing out of business which would save energy consumption; (i) regional development; (j) exploration and extraction of new energy and the emergence of renewable

out in several forms i.e., the carrying out of an investment by a foreigner with full foreign capital is now permitted by the Commission; the carrying out of a joint venture between a foreigner and a Myanmar citizen or the relevant Government department and organization; or the carrying out under any system provided in the contract and which is approved by both parties.<sup>49</sup>

Under the Foreign Investment Law (2012), the government tended to create some incentives on certain activities such as land use. A 50-year initial lease period may be permitted and may be extended twice for another ten years. The length of the lease depends on various sectors, such as the type of business, the industry, and the amount of the investment.<sup>50</sup>

Under the Myanmar Special Economic Zone Law, the investors may secure land leases or may be granted permissions for use with a 50-year initial period. If the investor is desirous to continue operating after the expiry of the permitted term, he may renew it for another period of 25 years.<sup>51</sup> Finally, the Foreign Investment Law (2012) offers a large range of incentives<sup>52</sup> and guarantees<sup>53</sup> to foreign investors.

The Myanmar Investment Law of 2016 combined the Myanmar Citizen's Investment Law (2013) with the Foreign Investment Law (2012). Myanmar was the only ASEAN member with separate investment laws for citizens and foreigners. New approval processes with MIC<sup>54</sup> and tax incentives<sup>55</sup> are the main evolution in comparison with the former Foreign Investment Law. The Myanmar Investment Law of 2016 operates a clear distinction between the investment, which is prohibited, and the investment, which is restricted. Section 41 provides a list of 6 activities that are considered as prohibited investment,<sup>56</sup> whereas Section 42 establishes the list of 4

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energy sources such as bio-basic new energy; (k) development of modern industry; (l) protection and conservation of environment; (m) causing to support for enabling to exchange the information and technology; (n) not affecting the sovereign power and the public security; (o) intellectual enhancement of citizens; (p) development of bank and banking in accordance with the international standards; (q) emergence of the modern series required for the Union and citizens; and (r) causing to be sufficient the local consumption of the energy and resources of the Union in terms of short-term and long terms period.

<sup>49</sup> § 9 of the Foreign Investment Law (2012).

<sup>50</sup> § 31 and § 32 of the Foreign Investment Law (2012).

<sup>51</sup> § 79 of the Myanmar Special Economic Zone Law (2014).

<sup>52</sup> § 27 of the Foreign Investment Law (2012).

<sup>53</sup> §§ 28-30 of the Foreign Investment Law (2012).

<sup>54</sup> § 36 of the Myanmar Investment Law (2016).

<sup>55</sup> §§ 74-81 of the Myanmar Investment Law (2016).

<sup>56</sup> § 41 of the Myanmar Investment Law (2016). The following investments businesses shall be stipulated as the prohibited investment: (a) investment businesses which may bring or cause the hazardous or

activities, which may be considered as restricted.<sup>57</sup> Some possibilities to invest within the restricted range of investment as classified by Section 42 are even left opened by Section 43, under certain conditions. Even though the criteria selected by the government are not clear for anyone,<sup>58</sup> the change in mindset is obvious. The tendency is to open more sectors to investment in order to develop and enhance local economy.

### A. Procedure for Establishing a Company

From 2012 and until the enactment of the new Companies Law, the process for establishing a private company with foreign ownership could take time—up to three months. At the beginning, the DICA would check the proposed company name. Next, registration forms were to be prepared and submitted to DICA—application cover letter; declaration of registration (Form 1); situation of registered office form; declaration of the official (legal) version of the document filed; certificate of translation; directors' details (Form 26); memorandum of association and articles of association with stamp duty; application form for permit to trade (Form A) which differs from an authorization to trade; and a statement of objectives and the undertaking not to conduct trading activities, that is, generally, buying and selling goods. In the meantime, a board resolution for subscription of shares, appointment of corporate representatives, and bank statements and passport copies of directors were to be submitted to the DICA.<sup>59</sup> After paying a registration fee, a temporary certificate of incorporation and permit would be issued by the DICA and the company could eventually start doing business. The company has around one week to inject the capital in the bank account opened with the temporary certificate of incorporation. Half of its

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poisonous wastes into the Union; (b) investment businesses which may bring technologies, medicines, flora and fauna and instruments which are still being tested abroad or which have not been obtained approvals to use, plant and cultivate, except the investments which made for the purpose of research and development; (c) investment businesses which may affect the traditional culture and customs of the ethnic groups within the Union; (d) investment businesses which may affect the public; (e) investment businesses which may cause an enormous impact to the natural environment and ecosystem; and (f) investment businesses which manufacture goods or provide services that are prohibited under the applicable laws.

<sup>57</sup> § 42 of the Myanmar Investment Law (2016). The following types of investment businesses shall be stipulated as restricted investment: (a) investment businesses allowed to carry out only by the Union; (b) investment businesses that are not allowed to carry out by foreign investors; (c) investment businesses allowed only in the form of joint venture with any citizen owned entity or any Myanmar citizen; and (d) investment businesses to be carry out with the approval of the relevant ministries.

<sup>58</sup> § 43 of the Myanmar Investment Law (2016). The Commission shall, with the approval of the Government, issue the notifications to inform the public of investment promoted sectors and restricted investment business under Section 42.

<sup>59</sup> According to my experience, many people with typewriters provide services to draft all the documents. They are close to the DICA.

minimum capital is to be transferred and the credit note of this operation should have been submitted to the DICA (a foreign Myanmar company must remit into Myanmar the minimum capital for each category, as follows: 150,000 USD for an industrial, hotel or construction company, and 50,000 USD for a service company. Thus, the company needs a recommendation from the relevant ward administration office to confirm the company's registered office address; this ward recommendation would also be submitted to the DICA. A copy of the lease agreement for the company's office will be submitted to obtain the recommendation letter. When all the necessary documents are provided to the DICA, the final certificates of registration and the permit to trade takes four to six weeks to be processed and the whole process could take several months (approximately three months). The company's certificate of incorporation is valid for five years and could be renewed.<sup>60</sup>

#### IV. THE NEW COMPANIES LAW OF 2017

The current Companies Law was voted by the Parliament in November 2017 and signed by the President on 6 December of the same year. The entry into force of the text was postponed to August 2018 in order to let the DICA and the MIC be fully operational at that date and have time to train all the staff concerned.<sup>61</sup> The role of such law consists of modernizing the legal framework, which was mainly organised by the Companies Act adopted in 1914, and which needed some adaptation to fit into an international economy.<sup>62</sup> This Law is divided into eight parts—Part 1: Preliminary; Part 2: Constitution, Incorporation and Powers of Companies; Part 3: Shares and Matters Relating to a Company's Capital; Part 4: Management, Administration and Governance; Part 5: Winding Up; Part 6: The Registrar, Registration Office, Registration of Documents, Powers of Inspection and Fees; Removal of Companies

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<sup>60</sup> S. Chapman, C. Hughes, I. Ivory, Tun Zaw Mra, *Establishing a Business in Myanmar*, available at [https://uk.practicallaw.thomsonreuters.com/w-0144363?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1#co\\_anchor\\_a432743](https://uk.practicallaw.thomsonreuters.com/w-0144363?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1#co_anchor_a432743).

<sup>61</sup> Kang Wan Chern, available at <https://www.mmtimes.com/news/delay-companies-law-negative-not-surprising.html>, Dec. 12, 2017. See also *Critics on the Delay in Companies Law*, available at <https://www.mmtimes.com/news/second-law-firm-exits-myanmar-calls-companies-law-delay-mistake.html>.

<sup>62</sup> Aung Naing Oo & W. Wicklein, *Transforming Myanmar's Corporate Landscape*, DICA, Aug. 16, 2016. "Sections of the law no longer in use have not been removed, creating uncertainty for users. The law also lacks proper sanctions and enforcement mechanisms to regulate corporate conduct. The penalties and fines specified in the law were last updated in 1989 and reflect prices from 25 years ago. But change is coming. The Directorate of Investment and Company Administration (DICA), with assistance from the Asian Development Bank (ADB), has prepared a New Myanmar Companies Law. The law will govern the registration, ownership, management and internal affairs of all companies in Myanmar, and reflect tried and tested reforms from the UK, Singapore, Malaysia, New Zealand, and Hong Kong."

from the Registrar; Part 7: Proceedings, Offences, Regulations and Transitional Provisions; and Part 8: Miscellaneous.

### **A. New Procedure for Establishing a Company**

The new text takes into account the modern technologies of communication. The law allows the possibility of using and having access to online services.<sup>63</sup> It is currently possible to check the name of the company via the DICA website. However, although the service is reliable and operational, there are still some issues after launch and therefore, some reviews and checking must still be done physically at the DICA. This new provision will reduce the need to go to the DICA for registration and should decrease the wait with the different services of the DICA. It is an important step toward modernization, but it will only be really effective when the DICA offices will be fully outfitted with the relevant equipment.

The Company Constitution replaces the Memorandum of Association and Articles of Association used under the Companies Act (1914). The existing Memorandum of Association and Articles of Association of a company will be replaced by the Company's Constitution following the implementation of the new law, provided that the Constitution will have no effect if it is inconsistent with the Companies Law of 2017.<sup>64</sup> At the election of the board of directors, the Constitution shall set out the company's corporate purpose. The corporate purpose expressed in the former Memorandum of Association of an existing company will, unless removed by the members voting to amend the constitution in accordance with the requirement of this Law, continue to apply until the end of the transition period. The corporate purpose will be deemed to have been removed after this time, unless a notice in the prescribed form confirming the passing of a special resolution to maintain them is filed with the Registrar.<sup>65</sup> The constitution of a company must be prepared in Myanmar language, but may also be submitted in the English language (in addition to Myanmar version).<sup>66</sup> The DICA provides a model Company's Constitution for a private company limited by share in English<sup>67</sup> and in Burmese, on the website, in Burmese language.

Any company incorporated in Myanmar under the Companies Law, and, after the end of the transition period provided in the law, any company incorporated in

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<sup>63</sup> Available at <https://www.myco.dica.gov.mm/>.

<sup>64</sup> § 12 (d) of the Companies Act (2017).

<sup>65</sup> § 12 (e) of the Companies Act (2017).

<sup>66</sup> § 16 of the Companies Act (2017).

<sup>67</sup> § 462 (a) (ii) of the Companies Act (2017). The Registrar may issue notifications, orders, directives, procedures, tables and forms for the proper and efficient implementation, administration and enforcement of this Law. Notification No. 60/2018 confirmed the validity of such English Template.

Myanmar, will no longer need to have a corporate purpose to describe it; but the shareholders can still elect to set it out in the constitution. A company without corporate purpose will be free to engage in any activity as long as it is in compliance with the law and as long as it has the requisite permits and licenses.<sup>68</sup> There is no minimum capital requirement when registering a company in Myanmar.<sup>69</sup>

The freedom in drafting the Company's Constitution offers more flexibility, but the control will be more complex. The main focus of the administration will be to ensure that such complex Company's Constitution will not be used for any illegal purpose. Under the Companies Act (1914), DICA was the controlling body at the moment of registration of the company. This measure was beneficial and, undoubtedly, increased the transparency of the corporate structures in Myanmar. It was also possible to inspect the Register of company—the companies had the duty to give access to shareholders and the Directors had the duty, according to the new text, to maintain and keep accurate all documentation regarding the corporate documentation.

## **B. Modifications in the New Companies Law (2017)**

Under the new Companies Law, a foreigner who wishes to invest in Myanmar companies can invest in a company without changing the “local company regime” if he owns no more than 35% of the share capital. This measure is supposed to attract foreign investment. The same measure will also apply for companies listed on the Yangon Stock Exchange.<sup>70</sup> This change implies that some foreigner can become a shareholder of a Burmese company. The opening to foreign capital can be a good opportunity for foreigners to invest on low risk level into companies that are already successful in Myanmar, or for an investor who wants to set foot in a new market.

This change regarding the restriction on investment is interesting. Without changing the nationality of company, the list of activities that may be considered as restricted for investment for a foreign company will no longer apply if the investor owns no more than 35% of the shares of a company.<sup>71</sup> This possibility opens some way

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<sup>68</sup> § 12 (b) of the Companies Act (2017).

<sup>69</sup> § 13 (d) of the Companies Act (2017).

<sup>70</sup> In Oct. 2018, only five public companies have been listed at the Yangon Stock Exchange—First Myanmar Investment Co., Ltd. (FMI), Myanmar Thilawa SEZ Holdings Public Ltd. (MTSH), Myanmar Citizens Bank Ltd. (MCB), First Private Bank Ltd. (FPB), and TMH Telecom Public Co., Ltd. (TMH). See the Myanmar Times website [https://www.mmTimes.com/news/myanmars-400m-stock-market-open-foreigners.html?fbclid=IwAR2823HyH8cbzMCBmvh7O6-IFEPzsXhn\\_fk0o2MaJVoyUcut5wE5VNbQNno](https://www.mmTimes.com/news/myanmars-400m-stock-market-open-foreigners.html?fbclid=IwAR2823HyH8cbzMCBmvh7O6-IFEPzsXhn_fk0o2MaJVoyUcut5wE5VNbQNno).

<sup>71</sup> § 1 (xiv) of the Companies Law (2017). “Foreign company” means a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent.

to invest without all the restrictions imposed by the DICA and the MIC.<sup>72</sup> A foreigner investor will be able to operate directly as a minority shareholder without any need to wait for the MIC permit and authorization.<sup>73</sup> The absence of bureaucracy should encourage the investor who wishes to operate quickly in a local economy. For the investors who wish to get more than 35% of the ownership rights of a company, the new Companies Law does not change the process—they will still need to create a joint venture company with a local company.<sup>74</sup> For the moment, it does not seem that a modification of these rules is being planned.

Another change set up by the new Companies Law is with regard to the permit of trade. This permit was a compulsory requirement imposed by the previous Companies Act of 1914. It stated that the company should operate in accordance with the scope as described in the permit of trade. The permit of trade should no longer be necessary; however, its waiving does not have the effect of also waiving the licences given by the different ministries.<sup>75</sup>

The new text allows the possibility of getting a single shareholder, which was not possible under the previous text.<sup>76</sup> This provision is an adaptation of the modern mechanism of corporate shareholding structures, which is particularly relevant for holding companies. These companies are useful as they allow the control of other companies by buying and owning their shares. Although the Companies Act of 1914 required at least two shareholders, this text was stringent with regard to the development of corporate group structures. This was one of the reasons that led the lawmakers to change this rule. This new provision will permit the emergence of important groups of companies with a better structure. This type of company group is very useful when a shareholder wants to provide greater flexibility in the management of the assets of the group. By implementing such measure, the lawmakers provide the single shareholder a better risk management policy. This new rule will offer some important opportunities for the business community. Because of the strict rules under the Companies Act of 1914, this kind of company structure was not possible to create.

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<sup>72</sup> Except activities listed in the MIC Notification No. 15/2017, § 1(B).

<sup>73</sup> MIC Notification No. 15/2017, § 1(D).

<sup>74</sup> Investment activities allowed only in the form of a joint venture with any citizen owned entity or any Myanmar citizen in the MIC Notification No. 15/2017, § 1(C).

<sup>75</sup> See MIC Notification No. 15/2017, § 1(D).

<sup>76</sup> § 4 (a) of the Companies Act (2017). A company registered under this Law must have: (i) a name; (ii) a constitution; (iii) at least one share in issue (provided that a company limited by guarantee need not have a share capital); (iv) at least one member; (v) subject to sub-section (vi), at least one director who must be ordinarily resident in the Union; (vi) 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 (vii) a registered office address in the Union.

In a private company, another important change also concerns the possibility of having only one director present on the territory—he only needs to be a local resident<sup>77</sup> since the criterion of nationality is not relevant under the new Companies Law. Therefore, the director can be a foreigner even though the other directors live abroad. The only requirement for the private company is to have at least one resident director. Regarding public companies, the requirement is to have a minimum of three directors with at least one citizen resident.<sup>78</sup> Regarding overseas companies, the text is currently being drafted in order to modify the current situation where this kind of company must have an authorised officer. This potential modification seems to be encouraging for investors in Myanmar.

The text codifies the duties of directors,<sup>79</sup> i.e., they must disclose any potential conflict of interest.<sup>80</sup> In such a situation, the director concerned by the conflict shall not take part in the vote or decision. Although the text opens this possibility, it is unfortunate that it does not clearly define the notion of conflict of interest under Myanmar Law. Is a conflict of interest characterized by a certain amount of ownership in the company or by family members with close ties that work in the company? The sanction contained in the text is strictly interpreted. If there is no evidence, no sanction can be pronounced. In such a situation, and according to the draft of the current Companies Law, directors' family members are not concerned by what the text defines as “material personal interest.”

Before 2011, foreigners and foreign companies were not allowed to own land in Myanmar or lease land for a term exceeding one year, unless specifically permitted by the Government, according to the Transfer of Immovable Property Restriction Law of 1987.<sup>81</sup> Exemptions were allowed for a foreign government to use its diplomatic

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<sup>77</sup> § 1 (c) (xix) of Part I of the Companies Act (2017). “Ordinarily resident” means a person who is permanent resident of the Union under an applicable law or is resident in the Union for at least 183 days in each 12 month period commencing from: (A) in the case of an existing company or a body corporate registered under a repealed law, the date of commencement of this Law; and (B) in the case of any company or body corporate registered under this Law, the date of registration of the company or body corporate. *See also* § 4 (a) (v) of the Companies Act (2017).

<sup>78</sup> § 4 (a) (iv) of the Companies Act. 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.

<sup>79</sup> §§ 165-172 of the Companies Act (2017). 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 New Companies Law and constitution; duty to avoid reckless trading; duty in relation to obligations (of a company); and duty to disclose certain interests.

<sup>80</sup> § 172 of the Companies Act (2017).

<sup>81</sup> § 3 of the Transfer of Immoveable Property Restriction Act of 1987. No person shall sell, buy, give away, pawn, exchange or transfer by any means immovable property with a foreigner or foreigner owned company. § 4 of the Transfer of Immoveable Property Restriction Act of 1987. No foreigner or foreign



mission accredited to the Union of Burma, United Nations organizations, or to any other organizations of individuals.<sup>82</sup> This Act does not apply to companies or organizations that have relevant beneficial contracts with the State.<sup>83</sup> However, under Section 464 of the Companies Law, the provisions of this Law relating to foreign companies shall not affect the operation of any provision of the Transfer of Immovable Property Restriction Law of 1987.<sup>84</sup> Consequently, a Myanmar-registered company with more than 35% foreign shareholders needs to fully comply with the Transfer of Immovable Property Restriction Act.

## V. CONCLUSION

The new Companies Law (2017) improves corporate governance and enhances the transparency and accountability of public administration.<sup>85</sup> However, the transitional period is a time of uncertainty due to the lack of clear guidance. Myanmar is ranked 171 among 190 economies in ease of doing business, according to the latest World Bank annual ratings. The rank of Myanmar remained unchanged at 171 in 2018 from 171 in 2017.<sup>86</sup>

Moreover, the business environment is doing better, but further changes must be done: for example, a more transparent, clearer, and codified property law in Myanmar. Nowadays, the DICA is revising the Partnership Act (1932) and seeks comments from the public on the Burmese draft of the Act<sup>87</sup> which can be uploaded.

In the near future, it may be possible to consider that other fields of law will be overruled, such as contract law and land law. Thus, it could be an opportunity for Myanmar to adopt a Civil Code according to the written legal tradition of codification.<sup>88</sup>

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owned company shall acquire immovable property by way of purchase, gift, pawn, exchange or transfer.

§ 5 of the Transfer of Immoveable Property Restriction Act of 1987.

<sup>82</sup> § 14 of the Transfer of Immoveable Property Restriction Act of 1987.

<sup>83</sup> § 15 of the Transfer of Immoveable Property Restriction Act of 1987.

<sup>84</sup> § 464 of the Companies Act (2017).

<sup>85</sup> Aung Naing Oo & W. Wicklein, *Transforming Myanmar's Corporate Landscape*.

<sup>86</sup> Available at <http://www.doingbusiness.org/content/dam/doingBusiness/country/m/myanmar/MMR.pdf>.

<sup>87</sup> Draft of the Partnership Act (May 2018).

<sup>88</sup> R. Nguyen, *Réflexion sur la codification du droit civil en Birmanie*, Université de Bourgogne-Franche Comté, 2018.