

Luther.

Myanmar News:

Updated drafts of the
Companies Law and
Investment Law

December 2015

Updated Drafts of the Companies Law 2015 and the Myanmar Investment Law 2015

In time for the last parliamentary session before the change of government, the Attorney General's Office has published its latest versions of the draft Companies Law 2015 and the draft Myanmar Investment Law 2015.

I. DRAFT COMPANIES LAW 2015

Considering the previous efforts and consultation rounds invested in the new Companies Law 2015 (refer to our June News Alert), it comes as no surprise that the latest version did not bring any major amendments.

The update focused on editorial changes and does provide few substantial alterations compared to the previous draft. While some changes were implemented to meet the requirements of today's digital world and prepare for more automated procedures, the most notable addition may be the possibility to establish specialist tribunals or commissions for the administration and operation of the law.

II. DRAFT MYANMAR INVESTMENT LAW 2015

In contrast to the minor amendments of the Companies Law 2015, the latest draft of the Myanmar Investment Law 2015 comes as a complete overhaul of the previous drafts, with more than twice the number of provisions.

In order to unify the Myanmar's investment regime, the new Myanmar Investment Law 2015 is meant to merge and replace the Myanmar Foreign Investment Law 2012 and the Myanmar Citizens Investment Law 2013.

Please find below a short summary of the most important proposed amendments.

1. Ambitions for the Draft

By combining the Foreign Investment Law 2012 and the Myanmar Citizen Law 2013, the government makes a step towards unifying the requirements for local and international investments. All investors and their investments shall be treated equally without any kind of discrimination to further attract investments from abroad and ensure consistency with best practices in the ASEAN region. However, while former drafts aimed for significant liberalizations especially of foreign investments, the final draft maintains some differences between Myanmar citizens and foreign investors.

2. Foreign Investors

The final draft of the Myanmar Investment Law 2015 defines a "Foreign Investor" as a person who is neither a citizen nor a permanent resident of the Republic of the Union of Myanmar, as well as business organizations established in accordance with laws enacted by any other country. Companies determined as "Myanmar Companies" under the Myanmar Companies Act are explicitly excluded. According to the rules of the Myanmar Companies Act, a company is currently defined as "foreign" if even one share is held by a foreigner. As the Myanmar Companies Act is presently also under review, a company will in future only be considered "foreign" if a certain percentage of shares is owned by a foreign investor.

3. Access to Special Businesses and Restrictions

In exercising its powers under the Foreign Investment Law 2012, the Myanmar Investment Commission published the Notification Order Number 49/2014 with types of economic activities which are not permitted for foreign investors, types of economic activities which are permitted only under a joint-venture system with Myanmar citizens and types of economic activities which are subject to specifically prescribed conditions.

The final draft of the Myanmar Investment Law 2015 also lists economic sectors in which foreign investments are strictly prohibited (e.g. economic activities which may be detrimental to the peoples' health).

In addition, it distinguishes between restricted economic sectors (i) in which only the government has the right to invest, (ii) in which only foreign investments are prohibited, (iii) in which foreign investments are allowed only under a joint-venture with a citizen or a citizen-owned enterprise and

(iv) in which domestic or foreign investors may invest with the approval of the Myanmar Investment Commission and the relevant ministry.

The Myanmar Investment Commission is further authorized to stipulate economic enterprises and sectors in which investment is allowed, as well as those in which investment is prohibited based on exercising of rules and regulations related to investment or national policy objectives. In all other economic sectors, an investor may generally invest without permission of the Myanmar Investment Commission.

4. Registration Requirements

When incorporating or registering a business in Myanmar, several options exist. Currently, the most relevant are the establishment under the Companies Act only, the establishment with an additional registration under the Foreign Investment Law 2012, or the in a Special Economic Zone.

The registration of a company under the Foreign Investment Law 2012 requires the same steps as for a company registering under the Myanmar Companies Act, but is subject to the additional approval by the Myanmar Investment Commission. While the registration under the Foreign Investment Law 2012 is generally optional for foreign investors, certain activities such as manufacturing and infrastructure projects and investments listed in Notification Order Number 49/2014 can ordinarily only be undertaken by so-called MIC-companies.

Pursuant to the final draft of the Myanmar Investment Law 2015, an additional application with the Myanmar Investment Commission will only be needed for investments in restricted areas or such of strategical importance as well as capital intensive investments and businesses that have an impact on the environment.

5. Incentives for Foreign Investments

The Foreign Investment Law 2012 contains numerous incentives. Investors are allowed to enter into long term lease agreements (i.e. 50 years with the possibility to extend for two additional terms of ten years each) and benefit from significant tax and customs reliefs such as extendable 5-year tax holiday, tax exemption for re-invested profits, tax relief on income tax up to 50 % on profits from export as well as time limited releases from custom duties on capital assets or raw material imported.

The new Investment Law will maintain most of the incentives, but changes the eligibility requirements. The Myanmar Investment Commission may designate regions and states in Myanmar as zones with different income tax exemptions (e.g. up to seven years in less developed zones; up to five years in zones of medium development; and up to three years in developed zones). The draft still provides for additional exemptions or reliefs from income-tax, the right to deduct from profits and assessable income, as well as the exemptions from customs, duties and other relevant levies on the import of machinery and construction/raw materials.

6. Land Use

One of the main advantages of a registration under the Foreign Investment Law 2012 is the possibility to enter into long term lease agreements of up to 50 years with the possibility to extend for two additional terms of ten years each.

The final draft of the Investment Law 2015 provides that any (foreign) investor may enter into long term leases with private landlords, or – in case of state owned land –the relevant government departments or government organizations.

Leases of state owned land may, subject to a permit or confirmation order issued by the Myanmar Investment Commission, be entered into for an initial term of 50 years (again with the possibility to extend for two additional terms of ten years each). Foreign Investors who have not procured such permissions may lease land from any private landlord.

7. Protection from Confiscation

Under the Foreign Investment Law 2012, the government shall neither nationalize nor terminate economic activities without sufficient cause. The term “sufficient cause” is, however, not defined in the law or its rules and notifications and leaves room for interpretation as well uncertainty for foreign investors. While the final draft of the Investment Law 2015 maintains the possibilities of confiscation or nationalization of the property of investors, it describes the conditions under which such official act shall be allowed in further detail: (i) public interest; (ii) non-discrimination; (iii) payment of fair and sufficient compensation; and (iv) acting in accordance with prevailing laws.

8. Employees and Staff

Under the Foreign Investment Law 2012, preference shall be given to Myanmar citizens, and investors are required to

employ local citizens for skilled positions. At least 25 % of the skilled workforce shall be local citizens in the first two years, 50 % within the second two years and at least 75 % within the third two-year period.

The final draft of the Investment Law 2015 does no longer contain such quotation system. While the investor shall employ citizens for unskilled labour, he may appoint Myanmar citizens or foreigners alike at skilled labour, but shall arrange for prevention of discrimination in the remuneration.

9. Jurisdiction and Arbitration

In case of a dispute between the government and an investor, Myanmar courts shall by default have jurisdiction.

The dispute parties may however at any time agree on arbitration or other methods of dispute resolution. Any award made by a foreign arbitral tribunal shall be recognizable and enforceable in the Union of Myanmar in accordance with international law including 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards.

10. Comparison Foreign Investment Law 2012 – Investment Law 2015

Category	Foreign Investment Law 2012	Investment Law 2015
Foreign Investor	<p><u>Sec. 2 (e, j)</u> Foreign Investor means any investor who is not a citizen. In this expression, an investing economic organization formed with foreigners shall also be included by this Law.</p>	<p><u>Sec. 2 (l)</u> Foreign Investor means a person who is neither a citizen nor a permanent resident of the Union of Myanmar. For purposes of this Law, such expression includes business organizations established in accordance with the laws enacted by a country, but excludes companies determined as Myanmar companies under the Myanmar Companies Act.</p>
Restricted and Prohibited Investments	<p><u>Sec. 4</u> The following investments shall be stipulated as the restricted or prohibited business:</p> <ul style="list-style-type: none"> (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 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; (k) Businesses 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. <p><u>Notification 49/2014</u></p>	<p><u>Sec. 45 (b)</u> An Investor who procures specific license and permits (such as environment-related or zone stipulation or labor permits) required for operations by enterprises within the Union, may carry out any [manner of] investment.</p> <p><u>Sec. 53</u> The following investment activities are prohibited:</p> <ul style="list-style-type: none"> (a) activities detrimental to traditional culture and customs of indigenous races within the Union; (b) activities which may be detrimental to the peoples' health; (c) activities which may be detrimental to the natural environment and the eco-system; (d) activities with potential for transportation into the Union or arising in the Union of hazardous or toxic wastes; (e) factories producing or activities utilizing chemicals deemed as hazardous under international conventions; (f) activities with potential for transportation into [the Union] from abroad of technology, pharmaceuticals, species of plants and animals, and related materials still under testing or still without approval for utilization in agriculture or animal husbandry. <p><u>Sec. 55</u> Four sectors in which investment is restricted:</p> <ul style="list-style-type: none"> (a) The sector in which only the Union has the right to carry on enterprises, and in which both Domestic-Investment and Foreign-Investment are prohibited. (b) The sector in which only Foreign-Investment is prohibited. (c) Sectors in which Foreign-Investment is allowed only under joint-venture with a citizen or a citizen-owned enterprise within the Union. (d) Sectors in which Domestic-Investors or Foreign-Investors may invest with the approval of the relevant ministry.

Category	Foreign Investment Law 2012	Investment Law 2015
Investment in Restricted and Prohibited Sectors	<p><u>Sec. 4</u> 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</p> <p><u>Sec. 5</u> The Commission shall, the foreign investment business which can cause great effect on the conditions of security, economic, environmental and social interest of the Union and citizens, submit to the Pyidaungsu Hluttaw through the Union Government.</p>	<p><u>Sec. 47 (a)</u> An Investor, who is desirous of investing in enterprises in sectors restricted under Section (55), or in enterprise of strategic importance to the Union, or in enterprises requiring great capital, or in enterprises which may have great environmental impact, or in enterprises stipulated with the approval of the Union Government Cabinet, as requiring submission of proposal to the Commission, shall proceed only in accordance with a Permit of the Commission.</p>
Necessity for Comprehensive Application	<p><u>Sec. 19</u> Every Business: An investor or a promoter shall, if it is desirous to make foreign investment, submit a proposal to obtain a permit to the Commission in accordance with the stipulations.</p>	<p><u>Sec. 47 (b)</u> No investment proposal need to be submitted to the Commission for enterprises other than those specified in sub-section (a); However, a Confirmation-Order needs to be submitted to the Commission, using the form prescribed by the Rules, in order to enjoy land utilization rights and Exemptions & Reliefs specified in Section (64) and (76) of this Law.</p>
Income Tax – Exemption	<p><u>Sec. 27 (a)</u> For a period of five consecutive years including the year of commencement of business for the production of goods or services.</p>	<p><u>Sec. 77</u> In respect of exemption from income tax, the Commission may by notification designate Region/states with lesser development as Zone-1, Region/states with medium development as Zone-2, and Region/states with development as Zone-3; and grant exemptions as follows to enterprises investing in such zones: <u>Sec 77 (a)</u> Up to seven consecutive years including the year of commencement of commercial operations to investors in Zone-1; up to five consecutive years including the year of commencement of commercial operations to investors in Zone-2; up to three consecutive years including the year of commencement of commercial operations to investors in Zone-3.</p>
Income Tax – Relief	<p><u>Sec. 27 (b)</u> Exemptions or relief from income tax on profits of the business if they are reserved for re-investment in a reserve fund and re-invested therein within one year after the reserve is made.</p> <p><u>Sec. 27 (d)</u> If the goods produced by any manufacturing business are exported, relief from income tax up to 50 percent of the profits accrued from the said.</p>	<p><u>Sec. 82 (a)</u> Exemption or relief from income-tax on profits of the enterprise if they are maintained in a reserve-fund and re-invested in the enterprise within one year after the reserve is made.</p> <p><u>Sec. 82 (c)</u> Relief from income-tax up to 50 percent on the profits accrued from exports of goods produced by a production enterprise.</p>
Income Tax – Deductions from Taxable Income	<p><u>Sec. 27 (c)</u> Right to deduct depreciation from the profit, after computing as the rate of deducting depreciation stipulated by the Union, in respect of machinery, equipment, building or other capital assets used in the business for the purpose of income tax assessment.</p> <p><u>Sec. 27 (f)</u> Right to deduct expenses from the assessable income, such expenses incurred in respect of research and development relating to the business which are actually required and are carried out within the Union.</p>	<p><u>Sec. 82 (b)</u> Right to deduct from profits assessed for income-tax, the depreciation calculated at accelerated rates in respect of machinery, equipment, building or other capital assets used in the enterprise.</p> <p><u>Sec. 82 (d)</u> Right to deduct from the assessable income, such expenses incurred in respect of research and development relating to the enterprise which are actually required and are carried out within the Union.</p>
Income Tax – Foreign Employees	<p><u>Sec. 27 (e)</u> Right to pay income tax at the rates applicable to the citizens residing within the Union, and only on the income derived from Myanmar.</p>	<p><u>Sec. 82 (e)</u> Right to pay income-tax on the income of foreigners at rates applicable to citizens residing within the Union.</p>
Carry Forward of Losses	<p><u>Sec. 27 (g)</u> Right to carry forward and set-off losses for up to three consecutive years from the year in which the loss is incurred within two years following the enjoyment of exemption or relief from income tax.</p>	

Category	Foreign Investment Law 2012	Investment Law 2015
<p>Import – Exemption from Customs, Duties and other relevant Taxation</p>	<p><u>Sec. 27 (h)</u> On machinery, equipment, instruments, machinery components, spare parts and materials used in the business, which have to be imported for use during the period of construction of business.</p> <p><u>Sec. 27 (i)</u> On raw materials imported for production during the first three years after the completion of construction of business.</p> <p><u>Sec. 27 (j)</u> If the volume of investment is increased with the approval of the Commission and the original investment business is expanded during the permitted period, exemption or relief from custom duty or other internal taxes on machinery, equipment, instruments, machinery components, spare parts and materials used in the business which have to be imported as for use in the business expansion.</p>	<p><u>Sec. 81 (a)</u> On machinery, equipment, instruments, machinery components, spare parts, construction materials which cannot be procured domestically, materials used in the business, which are imported as they are actually required for use during the period of construction.</p> <p><u>Sec. 81 (b)</u> On raw materials and semi-finished goods imported for production of export goods.</p> <p><u>Sec. 81 (c)</u> On imports of raw materials and semi-finished goods, based on volume of goods, in case of export of goods produced through from domestic production from such imported raw materials and semi-finished goods.</p> <p><u>Sec. 81 (d)</u> On machinery, equipment, instruments, machinery components, spare parts and materials used in the business, construction materials which cannot be procured within the domestic market, which are imported as they are actually required for use in the expanded enterprise, if the enterprise is expanded with an increase in the investment amount with approval of the Commission within the original permit term of the investment enterprise.</p>
<p>Commercial Tax – Exemption for Goods to be Exported</p>	<p><u>Sec. 27 (k)</u> On the goods produced for export.</p>	
<p>Land Use</p>	<p><u>Sec. 31</u> Up to 50 years depending on the category of the business, industry and the volume of investment.</p> <p><u>Sec. 32</u> Can be extended for two consecutive terms of ten years after the expiry of such period, depending upon the volume of investment and category of business.</p>	<p><u>Sec. 64 (a)</u> An investor may lease land for long term for investment purposes from private landlords, or in case of Union-owned land, from relevant government-departments government-organizations.</p> <p><u>Sec. 64 (b)</u> Foreign-Investors may lease land for an initial term of 50-years from the Union Government or government-organizations with the Permit or Confirmation-Order issued by the Commission.</p> <p><u>Sec. 64 (c)</u> Foreign-Investors who have not procured any Permit or Confirmation-Order may lease from any private landlord based on land-lease agreement executed between them.</p> <p><u>Sec. 64 (d)</u> Extension of term may be made for a contiguous period of 10-years upon expiry of the land-lease or land-utilization period granted under above sub-section (b), and a further extension of 10-years after that.</p>
<p>Protection from Confiscation/ Nationalization</p>	<p><u>Sec. 28</u> The Union Government guarantees that a business formed under the permit shall not be nationalized within the term of the contract or the extended term if such term is extended.</p>	<p><u>Sec. 66 (a)</u> The Union Government shall not, in respect of any investment, carry out confiscation or nationalization of property, or actions similar to confiscation or nationalization of property (in other words, indirect confiscation of property), except under the following circumstances:</p> <ol style="list-style-type: none"> (1) Any need of public interest; (2) Act without discrimination; (3) Speedy payment of fair and sufficient compensation to the enterprise which is confiscated; (4) Acting in accordance with prevailing laws.

Category	Foreign Investment Law 2012	Investment Law 2015
Equal Treatment of Domestic and Foreign Investors		<p><u>Sec. 61 (a)</u> The Union Government shall, other than as prescribed in any manner in this Law, Rules and Notification, treat uniformly without discrimination all investors and their investments in accordance with the provisions of this Law in the same manner as to Domestic-Investors. Treatment shall not be less favorable than those granted to Domestic-Investors, especially in establishment of business, procuring of business, expansion of business, management, operation and sales or other plans concerning direct investment.</p>
Equal Treatment of Foreign Investors		<p><u>Sec. 61 (b)</u> Under equal circumstances, the treatment in respect of establishment of business, procuring of business, expansion of business, management, operation and sales or other plans concerning direct investment provided to any Foreign-Investors and their investments shall not be less favorable than those provided to Foreign-Investors from other countries and their investments.</p>
Employees and Staff	<p><u>Sec. 24 (a)</u> Investor shall employ, when appointing citizen skilled workers, technicians and staff, at least 25 % of citizen within first 2 years from the commencement date, at least 50 % within second two years, at least 75 % within third 2 years however in the academic basis works the time limit may be extended as deemed to be suitable by the commission.</p>	<p><u>Sec. 65 (a)</u> An investor may appoint any citizen at the enterprise in which he has invested as senior management, technical or business professional or consultant. <u>Sec. 65 (b)</u> Investor shall carry out capacity building programs in order to enable citizens to be appointed in the positions of senior management, technical or business professional or consultant as per sub-section <u>Sec. 65 (c)</u> Investor shall for unskilled tasks appoint only citizens. <u>Sec. 65 (e)</u> Investor shall, at skilled professional level, arrange for prevention of discrimination in remuneration between appointments of skilled professionals who are Myanmar citizen in the same way as appointment of skilled professional who are foreigners.</p>
Jurisdiction and Arbitration	<p><u>Sec. 43</u> If a dispute cannot be settled amicably, (1) it shall be complied and carried out in accordance with the existing laws of the Union if the dispute settlement mechanism is not stipulated in the relevant agreement; (2) it shall be complied and carried out in accordance with the dispute settlement mechanism if it is stipulated in the relevant agreement.</p>	<p><u>Sec. 86</u> Law courts of the Union of Myanmar shall have jurisdiction to resolve disputes between the Union Government and investors in respect of disputes related to investment. <u>Sec. 87</u> Investors and the Union Government may agree at any time to arbitration or other methods of resolution. <u>Sec. 88</u> Disputes between investors shall be resolved through arbitration or other methods of dispute resolution. <u>Sec. 89</u> Parties involved in investment disputes shall exert all due diligence towards amicable resolution before referring to arbitral tribunal or court of law. If the parties in dispute cannot achieve resolution within 90-days of written notice of arising of a dispute, such dispute shall be resolved in accordance with Section (86) or Section (87). <u>Sec. 90</u> Any award made by a foreign arbitral tribunal shall be recognizable and enforceable in the Union of Myanmar in accordance with international law including 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards.</p>

Please do not hesitate to contact us for further guidance and information.

Luther Law Firm Limited



Alexander Bohusch

Rechtsanwalt/Attorney-at-law (Germany)

Luther Law Firm Limited

Myanmar

Phone +95 1 230 1609/+95 1 230 1917

alex.bohusch@luther-lawfirm.com

Imprint

Luther Rechtsanwalts-gesellschaft mbH, Anna-Schneider-Steig 22,
50678 Cologne, Phone +49 221 9937 0, Fax +49 221 9937 110,
contact@luther-lawfirm.com

Editor: Alexander Bohusch, Rechtsanwalt/Attorney-at-law (Germany), Luther Law Firm Limited, Luther Corporate Services Limited, Myawaddy Bank Luxury Complex, 4th floor, Apt. 401, Bo Gyoke Road cnr. Wa Dan Street, Lanmadaw Township, Yangon, Myanmar, Phone: +95 1 230 1609/+95 1 230 1917, Fax: +95 1 230 1353, HP (MM): +95 9 425 0136 00, HP (SG): +65 9 829 1829, alexander.bohusch@luther-lawfirm.com

Copyright: These texts are protected by copyright. You may make use of the information contained herein with our written consent, if you do so accurately and cite us as the source. Please contact the editors in this regard
contact@luther-lawfirm.com

Disclaimer

Although every effort has been made to offer current and correct information, this publication has been prepared to provide information on recent regulatory and legal developments in Myanmar only. It is not exhaustive and thus does not cover all topics with which it deals. It will not be updated and cannot substitute individual legal and/or tax advice. This publication is distributed with the understanding that Luther, the editors and authors cannot be held responsible for the results of any actions taken on the basis of information contained herein or omitted, nor for any errors or omissions in this regard.

Luther Rechtsanwaltsgesellschaft mbH advises in all areas of business law. Our clients include medium-sized companies and large corporations, as well as the public sector. Luther is the German member of Taxand, a worldwide organisation of independent tax advisory firms.

Berlin, Brussels, Cologne, Dusseldorf, Essen, Frankfurt a. M., Hamburg, Hanover, Leipzig,
London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

Luther Corporate Services: Delhi-Gurgaon, Kuala Lumpur, Shanghai, Singapore, Yangon

Your local contacts can be found on our websites www.luther-lawfirm.com and www.luther-services.com.

Hits the mark. Luther.



juv | 2014
AWARDS
Kanzlei des Jahres
für Regulierte Industrien

juv | 2014
AWARDS
Kanzlei des Jahres
für Energiewirtschaftsrecht

juv | 2014
AWARDS
Kanzlei des Jahres
für Privates Baurecht

juv | 2015
AWARDS
Kanzlei des Jahres für
Vertrieb/Handel/Logistik