

Sanctions update



“They are proactive, never fail to update you with the latest development on a matter, or in relation to the law.”

Chambers

After 50 years of military rule Myanmar is opening up its borders to foreign companies. EU sanctions against the country were partially suspended in January 2012 for a 12 month period (except for the arms embargo which remains in force) while US sanctions were relaxed in September 2012. Already companies in countries bordering Myanmar are actively trading there, and, with the rules on foreign direct investment due to change imminently¹ it is expected that Australian, US and European companies will soon join them.

To facilitate debate around the issues and obstacles foreign investment in Myanmar presents and to give some perspectives from those who have advised on other emerging market situations, Clyde & Co's global commodities team hosted a seminar in London on 9 October 2012, attended by around 50 commodity producers, intermediaries and bankers.

Panellists at the debate included Clyde & Co Trade Finance Partner Phillip Prowse, Sapna Jhangiani, Counsel at Clasis LLC, a Singapore law firm that Clyde & Co has an association with in Singapore, Bruce Goslin, Managing Director at K2 Intelligence, Beany McLean, Director of Communications and Public Affairs specialist at Luther Pendragon and Nick Williams, Head of Corporate Sales, Trade and Supply Chain Europe at ANZ Bank.

This newsletter provides a brief summary of the discussion and the issues raised. We are delighted to provide further advice and insight on request.

¹ The Myanmar government is prioritising amendment of its 1988 Foreign Investment Law which imposes various restrictions on foreign investment, including the requirement for foreign investors to enter into joint ventures with local companies.

How do the US and UK governments currently view Myanmar?

Is there genuine political will to get things moving in Myanmar? Both the UK Prime Minister and the US President seem supportive and encouraging of Myanmar's move towards democracy. David Cameron was the first UK Prime Minister to visit Myanmar since it gained independence in 1948, meeting with pro-democracy leader Aung San Suu Kyi in April. During his visit, Cameron announced at a joint press conference that sanctions should be suspended sending "a signal that we want to help see the changes that can bring the growth of freedom of human rights and democracy in your country", a clear indication of the UK's commitment to help Myanmar escape the shackles of military rule. President Obama welcomed Ms. Suu Kyi to the Oval Office in September, the strongest indication yet that US sanctions may be eased further.

Can foreign companies do business in Myanmar ahead of the lifting of sanctions?

"Countries along Myanmar's long land borders – including India, China, Laos and Thailand - have been doing business in Myanmar for some time, so there is a strong established history of cross border trading. Western companies currently invest in Myanmar via entities in the ASEAN region that have bi - or multi-lateral trading agreements, ensuring tax efficiency via double taxation treaties", said Sapna Jhangiani, Counsel at Glasis LLC.

The debate commenced with Philip Prowse highlighting some of the incentives to business investment in Myanmar, including its natural resources, its strategically attractive and centrally placed location and an available labour force. These factors make investment increasingly attractive in light of the recent change in the sanctions position.

Whilst interest is undoubtedly growing and EU countries will potentially have more freedom of action from April next year (should sanctions be lifted), the situation is more complicated for US businesses. The US Treasury Department's Office of Foreign Assets Control (OFAC) issued two new General Licences to the Burmese Sanctions Regulations in July this year, authorising the provision of previously prohibited financial services to Myanmar and new investment in Myanmar by US Persons. However, sanctions remain in place for those on the list of Specially Designated Nationals (SDNs) – comprising entities and individuals mainly linked to the Myanmar military. Additionally, those investing more than US\$500,000 are compelled to file regular reports with the US

Administration. However by lifting the ban on dollar-based transactions and announcing its intention to ease the ban on imports from Myanmar, the US has taken its first steps towards investing in a democratic Myanmar.

The introduction of new laws on foreign investment in Myanmar are intended to put an end to the minimum equity and joint venture requirements for foreign companies and are likely to further heighten foreign interest – particularly in the energy, minerals, steel, precious metals and agricultural sectors.

Philip Prowse, Partner, Clyde & Co said: "Myanmar is opening up in some sectors but others are still off-limits. Most companies will want to wait and see what the new law paves the way for".

Once the new law is introduced, it is anticipated that foreign companies will be able to participate more directly in Myanmar by owning or leasing land. As the financial services sector opens up, trade credit insurance is becoming more readily available, particularly where companies are working with local commercial partners.

Historically, inadequate legal protection for investors in those sectors open to them has been a significant issue. For example, Myanmar is not party to the 1958 Convention on the Recognition and Enforcement of International Arbitration Awards (New York Convention) nor to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). Now the government has announced that it intends to sign and ratify the New York Convention and to introduce modern arbitration legislation based on the UNCITRAL Model Law, thus opening up the possibility of pursuing international arbitration in the event of a dispute. Improved recognition of external laws and jurisdictions as part of Myanmar's proposed new legal framework will make a significant contribution towards raising comfort levels for foreign investors. Investors are also expected to enjoy greater protection against the expropriation of assets under revised local legislation.

"Doing business in Myanmar is becoming easier, but most companies will want to go in with someone who has political clout-like a local bank or local insurance companies", said Mr Prowse.

Infrastructure and other potential obstacles to investment

However, there was broad agreement amongst the panellists that there remain many additional issues in Myanmar which may be offputting to companies considering investment. Sapna Jhangiani outlined infrastructure issues in Myanmar, including regular power outages, poor transportation networks and problems with communication (including a patchy mobile network and limited internet connection).

Another serious concern is that of complicity in human rights abuses – in assessing business and commercial opportunities, entities must conduct a thorough risk assessment in order to be comfortable pursuing such opportunities would not infringe on human rights and to ensure they will not become embroiled in allegations of, for example, forced labour and other abuses. It is of course to be hoped that the Myanmar government's proposed reform of local labour laws will come to pass and that the human rights situation will improve quickly.

The banking sector is developing

The Myanmar government is considering significant economic reforms, including allowing foreign banks to invest in Myanmar through joint ventures with local banks or through opening their own branches.

Nick Williams at ANZ gave a cautiously optimistic outlook, noting that there are two significant state banks and some local private banks operating in Myanmar, but none currently has a particularly strong external profile. A number of representative offices have been set up by institutions from countries unaffected by current sanctions legislation and it is expected that the US, European and Australian banks will follow suit when sanctions are lifted. Nick's view is that these representative branches on the ground will greatly assist in facilitating associations with local banks as the regime continues to open up.

“Typically, the path to establishment in new territories such as Myanmar would be the establishment of an office, followed by relationship building with local banks to facilitate initial trading and cash transfers. If all goes well”, commented Mr Williams “institutions may then start to invest more heavily before going the last step and seeking a full banking licence – a step which no international institution has yet taken”.

Risk management in emerging markets

The panellists spent considerable time discussing the management of risk in view of Myanmar's reputation in particular for corruption, cronyism and human rights abuses.

Reputational risk specialist Beany McLean observed that non-governmental organisations (NGOs) are already active on the ground and often represent the first wave of interest and practical support for a country such as Myanmar, emerging from years of military dictatorship.

“However, some international NGOs often operating outside the country are prone to using high profile brand name companies as a lightning rod when things go wrong or when they wish to draw attention to a particular issue.”

Ms McLean advised companies considering investment to observe a few basic rules to ensure they minimise their risk, suggesting that companies operate openly and transparently, that they are cautious in their risk assessments, that they bear in mind the experience of other investors and that they recognise that the local media is controlled and therefore acts as a mouthpiece for the state.

“Although many companies can find their first months and years in a new territory somewhat bruising, if companies can operate with clarity, consistency and transparency then the rewards are there for the taking” Beany said.

She concluded that, although reputational risks exist for those looking to invest, the potential benefits of investment were significant.

“Practical risk management involves understanding the conditions on the ground – how developed are roads, ports and railways? Is there a functioning medical system? How successful is the rule of law? What does local culture dictate is the length of the working day? In territories like Myanmar which have been under military rule for 50 years, nothing can be taken for granted.”

Bruce Goslin stressed the difficulties that Myanmar, being a closed military dictatorship, has faced in the past, pointing out its history of violence, repression and exile of its people. Myanmar is still tribal with control centrally based and much stronger than in the regions – meaning there is scope for insurgents and freedom fighters to cause unrest as the military loosens its grip. In Bruce's view this will remain a concern for investors.

In such an environment, many companies are likely to see joint ventures as a way of reducing risk – but Bruce stressed that businesses must take care to understand their local business partner. Finding the right people and making things happen is more complex in a country where the usual rules do not apply and where facilitation payments and consultancy arrangements are for some foreign investors the norm, and for others, anathema. Finding the right balance of risk is important and joint ventures with state entities may have particular considerations of which investors should be aware. The provisions of the US Foreign and Corrupt Practices Act and the UK's Bribery Act apply in Myanmar as in other territories, irrespective of established local business practice (currently Myanmar is ranked third from bottom of Transparency International's 2011 Corruption Perception Index). It is therefore crucial that entities maintain business standards and do not incentivise local advisers in a way that might be compromising.

“Companies need to be sure that they employ the right policies and procedures from the outset and secure all the appropriate legal sign-offs. Companies also need to take care that they are compliant with local laws and that a detailed record is kept of all transactions”, commented Mr. Goslin.

Opportunities are significant but proceed with caution

Andy Wragg, Senior Manager, International Regulatory Affairs at Lloyd's, attended the seminar and commented from an insurance perspective that Lloyd's is “naturally cautious” although a number of enquiries about doing business in Myanmar from the Market have been received. However, whilst there might be some appetite for limited trading, businesses (particularly those that are US-backed) are notably cautious because of the concerns that exist of a return to the previous sanctions situation.

Conclusion

Summing up the debate, the Chair, Partner Ben Knowles of Clyde & Co, commented:

“While the legal lacuna makes significant commitment difficult and presents particular challenges around long-term projects such as infrastructure investment, there is clearly a ground-swell of political goodwill towards Myanmar and considerable foreign interest.

As in all new markets, caution is the watchword, but we believe that in 2013, post the relaxation of EU and US sanctions, business will want to move rapidly to establish a local presence and exploit the many opportunities.”

Should you require any further information or advice regarding sanctions please contact any of the partners listed below or your usual Clyde & Co contact.

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