

THE CORPORATE
IMMIGRATION
REVIEW

NINTH EDITION

Editor
Chris Magrath

THE LAWREVIEWS

THE
CORPORATE
IMMIGRATION
REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Chris Magrath

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATORS

Gavin Jordan, Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Simon Tyrie

SUBEDITOR

Rakesh Rajani

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at May 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-027-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOCAAT LAW PRACTICE

AFRIDI & ANGELL

ANDERSEN TAX & LEGAL

ARIAS, FÁBREGA & FÁBREGA

ARTHUR COX

BAYAT LEGAL SERVICES

CHOW KING & ASSOCIATES

ELVINGER HOSS PRUSSEN

ENRIQUE ARELLANO RINCÓN ABOGADOS S DE RL DE CV

GIBNEY, ANTHONY & FLAHERTY LLP

GLOBETROTTERS LEGAL

HARVEY LAW GROUP (HLG)

IBN IMMIGRATION SOLUTIONS

IMMIGRATION SOLUTIONS LAWYERS

KROES ADVOCATEN IMMIGRATION LAWYERS

LENZ & STAEHELIN

MAGRATH SHELDRIK LLP

MALHOTRA & MALHOTRA ASSOCIATES

MCNAMARA & CO, ATTORNEYS AT LAW

MICHELS.PMKS RECHTSANWÄLTE PARTNERSCHAFT MBB

MIFSUD & MIFSUD ADVOCATES

NAKAI IMMIGRATION SERVICES LPC

RODRIGO, ELÍAS & MEDRANO ABOGADOS

SCORNIK GERSTEIN LLP

TILIA LAW

VEIRANO ADVOGADOS

WILKINSON WILKINSON & WILKINSON

WITHERS KHATTARWONG LLP

CONTENTS

PREFACE.....	vii
<i>Chris Magrath and Ben Sheldrick</i>	
Chapter 1	ANTIGUA AND BARBUDA..... 1
<i>Sam M Bayat and Bharth Charath</i>	
Chapter 2	AUSTRALIA..... 5
<i>Anne O'Donoghue, Jenny Nguyen, Taraneh Arianfar and Syera Rehmani</i>	
Chapter 3	BELGIUM 25
<i>Henry Hachez</i>	
Chapter 4	BRAZIL..... 39
<i>Maria Luisa Soter and Gabriela Lessa</i>	
Chapter 5	DOMINICA..... 51
<i>Colleen Felix-Grant and Sam M Bayat</i>	
Chapter 6	GERMANY..... 55
<i>Gunther Mävers</i>	
Chapter 7	GHANA..... 76
<i>Paa Kwesi Hagan</i>	
Chapter 8	GRENADA..... 87
<i>Sam M Bayat and Margaret Wilkinson</i>	
Chapter 9	HONG KONG 97
<i>Eugene Chow</i>	
Chapter 10	INDIA..... 113
<i>Ranjit Malhotra and Anil Malhotra</i>	

Chapter 11	IRELAND.....	135
	<i>Cian Beecher and Rachel Barry</i>	
Chapter 12	JAPAN.....	146
	<i>Masabito Nakai</i>	
Chapter 13	KENYA.....	156
	<i>Andreas Krensel</i>	
Chapter 14	LUXEMBOURG.....	168
	<i>Pierre Elvinger and Philippe Hoffmann</i>	
Chapter 15	MALTA.....	184
	<i>Malcolm Mifsud</i>	
Chapter 16	MEXICO.....	194
	<i>Enrique Arellano Rincón</i>	
Chapter 17	MYANMAR.....	206
	<i>Jean-François Harvey and Bastien Trelocat</i>	
Chapter 18	NETHERLANDS.....	215
	<i>Jelle A Kroes</i>	
Chapter 19	NIGERIA.....	226
	<i>Adekemi Sijuwade</i>	
Chapter 20	PANAMA.....	243
	<i>Vivian Holness and Mónica Mendoza</i>	
Chapter 21	PERU.....	250
	<i>Iván Blume Moore</i>	
Chapter 22	SINGAPORE.....	260
	<i>Leon Kwong Wing and Lim Zhi Qi</i>	
Chapter 23	SOUTH AFRICA.....	273
	<i>Andreas Krensel</i>	
Chapter 24	SPAIN.....	284
	<i>Antonio Arenas López and Beatriz Leiva Baeza</i>	

Contents

Chapter 25	ST KITTS AND NEVIS	293
	<i>Sam M Bayat</i>	
Chapter 26	ST LUCIA.....	298
	<i>Jonathan McNamara and Sam M Bayat</i>	
Chapter 27	SWITZERLAND	301
	<i>Rayan Houdrouge</i>	
Chapter 28	THAILAND	310
	<i>Jean-François Harvey and Bastien Trelcat</i>	
Chapter 29	UNITED ARAB EMIRATES	319
	<i>Charles S Laubach and Zahra Zaidi</i>	
Chapter 30	UNITED KINGDOM	329
	<i>Chris Magrath and Ben Sheldrick</i>	
Chapter 31	UNITED STATES	363
	<i>Stephen J O Maltby, Ellen L Poreda and Michelle C Guardado</i>	
Chapter 32	URUGUAY	379
	<i>Federico Formento</i>	
Chapter 33	VIETNAM.....	390
	<i>Jean-François Harvey and Bastien Trelcat</i>	
Chapter 34	ZAMBIA	401
	<i>Andreas Krensel</i>	
Appendix 1	ABOUT THE AUTHORS.....	413
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	429

PREFACE

As immigration lawyers based in the United Kingdom, it is easy to believe that the world outside our shores no longer exists. Over the past year, the country has become so consumed by the constitutional, political and procedural dramas of the Brexit process that it is difficult to focus on the larger picture of change and development in global mobility or even identify the emergence of a clear long-term strategy for immigration and border control. The Brexit timetable has shifted from 29 March to 12 April to 30 June and finally to 31 October 2019. Who knows what the timetable will look like by the time this ninth edition of *The Corporate Immigration Review* is published.

The points-based system, which is the central framework of UK immigration control for investors, workers and students, remains in place. The only significant change so far in 2019 has been the introduction of new routes for innovators and start-up entrepreneurs, which, at the time of writing, have gained little traction and generated plenty of confusion. Focus and resources at the Home Office have shifted to ensuring the protection of EU citizens' rights under the EU settlement scheme, deal or no-deal – a major task given that there are approximately 3.2 million EU nationals residing in the United Kingdom in exercise of their treaty rights. The protection of citizens' rights is one of the central aims of the Withdrawal Agreement that has been negotiated between the United Kingdom and the European Union and is, at the time of writing, before parliament in Westminster as a 'meaningful vote' pursuant to the European Union (Withdrawal) Act 2018. Despite three such votes there is little indication so far that the legislature will ratify the Withdrawal Agreement.

The EU Settlement Scheme has had a generally successful launch. In excess of 90 per cent of applications have been approved without hitch. So far, it has met its aim of being transparent, easy to navigate, digital and quick to respond. Only 10 per cent of qualifying residents have so far applied, so there is a long way to go. No amount of technology, however, can dispel the disdain that many resident EU citizens have for a process that they do not believe they should have had to engage with. For many, the emotional impact of Brexit has been more significant than the legal consequences, most of which have yet to take effect.

Regardless of whether we enter a transitional phase following ratification of the Withdrawal Agreement in both the British and EU parliaments, or a no-deal 'cliff-edge' Brexit is the outcome, the British government is committed to an orderly transition to a new set of immigration arrangements, likely to be launched in January 2021. Central to these new arrangements will be measures to 'take back control' of the border as the United Kingdom leaves the single market.

With this in mind, in December 2018, following an extensive piece of research by the Migration Advisory Committee (MAC), the government published a White Paper on 'The UK's future skills-based immigration system'. Anticipating the country's departure from the

freedom of movement pillar of the single market, the new post-Brexit policy approach will be based on a 'one world' system with no preferential access for EU citizens. An autonomous immigration policy will also give government the control mechanisms necessary to enable net migration to be reduced to 'sustainable levels' (for many years defined as below 100,000 per annum). This was, after all, one of the central arguments of the leave campaign as well as being a core policy of the incumbent Prime Minister since she entered government as Home Secretary in 2010.

The government proposes to engage with stakeholders over the course of the next 12 months before refining its proposals into a new set of immigration rules. In tandem, the government is working on a simplification project that aims to change the current set of labyrinthine rules into a new user-friendly, transparent scheme.

Although the current intention is to adopt a 'one-world' approach, this position may change as the negotiations on the future relationship get under way. Much will depend on the character of the United Kingdom's future political leadership. Some form of EU preferential scheme may be the price of a close trading relationship.

It will certainly be necessary to expand the ambit of the United Kingdom's youth mobility and temporary worker schemes to maintain a flow of labour into the United Kingdom to take the 'lower skilled' jobs that will not meet the proposed £30,000 salary threshold under the formal sponsorship scheme. Employers in healthcare, hospitality and construction are particularly concerned about the impact the United Kingdom's withdrawal from the single market will have on their ability to recruit key workers.

At the time of writing, it is uncertain whether the United Kingdom will leave the European Union with or without a deal in place, or indeed whether the United Kingdom will leave at all. It is unclear whether the current political leadership has sufficient authority to remain in place for much longer. In this context, individual Member States across EU27 are making their own domestic arrangements for the regularisation of resident British citizens in their countries in the event of a no-deal 'hard' Brexit. This is because, in the absence of a Withdrawal Agreement containing pan-European provisions on citizens' rights, it falls to individual Member States to implement domestic immigration laws for third-country nationals. Fortunately, most Member States appear to be developing a soft approach to protect the British citizens that have chosen to make their homes across the European Union.

In the United States, immigration policy continues to be a lightning rod for the Trump administration and, with the 2020 election in sight, is anticipated to be a primary strand of the president's attempt to reignite the support of his base. The shift in approach to immigration issues that resulted from the new US political settlement and its focus on protectionist policies has impacted the broad sweep of business and investment routes of entry to the United States, and is not limited to illegal or irregular migration trends.

Key to this is the Buy American Hire American (BAHA) Executive Order, which came into force in 2017 and seeks to protect US economic interests and provide greater employment prospects for US workers.

BAHA refers to the body of law and policy concerning how immigration, visa and guest worker programmes are operated to ensure proper protections for American workers. The executive branch is required to 'rigorously enforce and administer the laws governing entry into the United States of workers from abroad'. Specifically, BAHA demands that the Attorney General, the DOS, the US Department of Homeland Security and the Department of Labor 'as soon as practicable, and consistent with applicable law, propose new rules and issue new

guidance if appropriate, to protect the interests of United States workers in the administration of the immigration system, including through the prevention of fraud or abuse’.

As a result, lawyers in the United States have seen a significant shift in the administrative approach to immigration applications, even if the legislative framework itself has not changed substantially. This has distilled into a culture of refusal from the US authorities, notably at the consular level. Practitioners have witnessed an increase in denial rates coupled with ever-growing requests for further evidence, often for indefinable reasons. The application process has become more document- and detail-oriented with additional representations or evidence being the norm rather than the exception. The consequence is that each application now requires substantially more preparation and outcomes are difficult to predict given the lack of consistency in approach to decision-making. Client expectation management is crucial for US immigration practitioners in such an uncertain landscape.

Around the world, national security and border protection continue to be integral issues in the development of immigration policy. Joined-up government (easily sharing data and intelligence across government agencies and public bodies) is a cross-jurisdictional trend. For example, in Australia, a federation of independent security and law enforcement agencies, including the Australian Border Force has been brought together under the Home Affairs Portfolio and the Department of Home Affairs. This whole government approach to security has had an impact on all aspects of immigration with greater scrutiny and monitoring by Australian Border Force Officers. The restrictive reforms that we see in Australia, including an increased focus on the security of systems, use of metadata and a whole-of-government approach are trends that can be seen worldwide.

As ever, immigration practitioners around the world are at the centre of a complex web of political, legal, compliance and regulatory developments. The contributors to this text are leaders in the field.

We would like to thank all of the contributors to this latest edition of *The Corporate Immigration Law Review* for their sterling input.

Chris Magrath and Ben Sheldrick

Magrath Sheldrick LLP

London

May 2019

MYANMAR

Jean-François Harvey and Bastien Trelcat¹

I INTRODUCTION TO THE IMMIGRATION FRAMEWORK

In the past decades, the Republic of the Union of Myanmar (formerly known as the Union of Burma) has been marked by political turmoil. As a result, the Myanmar economy remained closed until 1988, and has only slowly started to open up to foreign direct investment (FDI) in the past 20 years.

Countries such as China, Korea and Thailand have played a significant role in this process, developing several sectors such as oil and gas, power, mining and manufacturing.

At present, Myanmar is a relatively untapped market of 52.8 million people (with over 30 million people constituting the workforce) and the generally positive outlook on the economy is attracting more and more foreign investors. Economic isolation and political instability have been receding over the past 20 years and the country is now embracing a path towards more transparency and more stability. The National Election held on 8 November 2015, along with the announcement of the easing of American economic sanctions on 7 October 2016 are seen as key milestones towards security and stability.

The introduction of the Yangon Stock Exchange, which formally opened in mid December 2015, with actual market trading starting in May 2016, is also a significant step, showing that the country is opening up. As such, Myanmar is well positioned to become an attractive investment destination in the coming years. However, while Myanmar has seen an inflow of US\$11.2 billion in foreign investments in the past two years, the country still faces challenges in terms of development.

i Legislation and policy

The government of Myanmar adopted its first law on immigration, the Foreigners Act, on 12 February 1864. Since then, some 15 acts, excluding amendments, have entered into force over the years, which shows the government's intent to adapt its legal framework to attract foreign investment. In addition to the Constitution of the Republic of the Union of Myanmar, ratified on 29 May 2008, which prescribes the legal and regulatory scheme for entering Myanmar's territory and the right to reside, the principal laws on immigration that should be considered are the Myanmar Immigration Act of 13 June 1947 (Emergency Provisions) and the Myanmar Immigration (Emergency Provisions) (Amendment) Act.

This legislation is supported by additional statutes, enacted by the government of Myanmar, which includes the Burma Citizenship Law published on 15 October 1982 and the Permanent Residence of a Foreigner Rules, which came into force on 18 November 2014.

¹ Jean-François Harvey and Bastien Trelcat are partners at Harvey Law Group (HLG).

Moreover, the Foreign Investment Law (FIL) and the Citizens Investment Law, enacted on 2 November 2012 and 29 July 2013 respectively, played a key role in dictating the processes to be used for corporate immigration. These two laws were combined and then were replaced by the Myanmar Investment Law (MIL), which was released on 18 October 2016 and took effect on 1 April 2017.

On 6 December 2017, President U Htin Kyaw approved the new Myanmar Companies Act 2017, replacing the country's century-old Companies Act of 1914. This act was enforced on 20 June 2018.

ii The immigration authorities

The current legal framework is implemented by several authorities working together to make determinations on entry applications and visas, extensions of stay and leave to remain. The Ministry of Labour, Immigration and Population, established on 15 June 1995, through its Immigration and National Registration Department, administers the immigration system, along with the support of the Ministry of Foreign Affairs.

Depending on the nature of the business-related endeavour, additional permits may be required from other entities to facilitate entry, including the Myanmar Investment Commission (MIC), the Directorate of Investment and Company Administration and the Ministry of Labour, Employment and Social Security.

iii Exemptions and favoured industries

No specific industries have been earmarked by the government to promote the use of foreign nationals working in Myanmar. On the contrary, foreign ownership is actually restricted in several industries: the State-Owned Economic Enterprises Law restricts ownership of industries to Myanmar nationals in the following sectors:

- a* exploration, extraction, production and sale of petroleum and natural gas;
- b* postal and telecommunications services; and
- c* electricity generation services.

While these sectors are restricted to ownership by Myanmar nationals, the country suffers from a lack of skilled local personnel. Consequently, many of the senior level management and key positions in local companies are filled with foreign workers.

II INTERNATIONAL TREATY OBLIGATIONS

International treaties play a significant role in the country's development. Myanmar owes its recent growth mostly to the access to the Association of South-East Asian Nations (ASEAN) and to the conclusion of multiple bilateral investment treaties in Asia. Furthermore, Myanmar has been actively negotiating further treaties and trade agreements, and now has agreements with the European Union, the United States and the adjacent areas of the Bay of Bengal.

Those treaties and trade agreements provide the basis of a legal framework intended to stimulate the economy and encourage a boost in growth in the short term, and to allow fully fledged economic cooperation thereafter.

i ASEAN

ASEAN was formed by the signing of the ASEAN Declaration on 8 August 1967 in Bangkok by five countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand. The

Association will celebrate its 50th birthday at the end of this year and, with aims including creating a single market, it is now, more than ever, seen by stakeholders as the European Union of South East Asia. Various other countries have also joined this single market, namely Brunei, Laos, Cambodia and Vietnam.

Myanmar became a member on 23 July 1997, allowing the country eventually to take advantage of the benefits offered by the ASEAN Economic Community (AEC). Established on 31 December 2015, AEC represents an architecture for integration and economic development. As the seventh-largest economy in the world, the AEC market constitutes the essential vehicle for the growth of its developing states. The Community is based on the elimination and reduction of tariff barriers and the implementation of a free trade area (FTA) in which products and services can circulate, while also facilitating movement of the workforce, thanks to specific recognition and rights to practise in the area for skilled workers.

As a consequence, companies incorporated within ASEAN are able to import or export goods from and among ASEAN states while reducing their costs and increasing their competitiveness.

ii Bilateral investment treaties

Myanmar has entered into several bilateral investment treaties (BITs), stimulating FDI, since 1998. Currently, seven BITs are in force and have been concluded with China, India, Japan, Laos, the Philippines, South Korea and Thailand. Three other BITs have also been agreed, with Israel, Kuwait and Vietnam.

iii US–Myanmar Trade and Investment Framework Agreement

A Trade and Investment Framework Agreement (TIFA) was signed on 21 May 2013 between Myanmar and the United States. The aim of this agreement is to promote an attractive investment climate and to diversify and expand the trade of products and services between the two nations. Under the TIFA, the two governments have worked together to identify initiatives that support Myanmar's ongoing reform process and related development activities. In 2014, the United States launched the Myanmar Initiative to Promote Fundamental Labor Rights and Practices with the Burmese government and international partners. In November 2016, the United States redesignated Myanmar as eligible for preferences under the General System of Preference programme.

iv EU's Generalised System of Preferences

The European Union established the EU's Generalised System of Preferences (EUGSP) to allow developing countries to access the EU market. In essence, the EUGSP entitles companies from selected nations exporting qualifying products to one of the EU Member States to pay reduced customs duties, and in some cases no customs duties at all.

The European Parliament and EU Council repealed the restrictions affecting Myanmar imposed in Council Regulation (EC) No. 552/97² (which had been in force for almost 20 years), thus enabling Myanmar to become part of this preferential system. The Regulation effecting this change was signed on 12 June 2013.³ As a result, Myanmar is now entitled to take advantage of the incentives offered through this system to access the European market.

2 Council Regulation (EC) No. 552/97 of 24 March 1997.

3 Regulation (EU) No. 607/2013 of the European Parliament and of the Council of 12 June 2013.

Further to the above treaties and cooperation agreements, Myanmar, as a member of ASEAN, is participating in all intra-ASEAN agreements, as well as taking active measures in implementing and participating in multilateral FTA agreements with Australia, New Zealand, China, India, Japan and South Korea.

v Bay of Bengal Initiative for Multi-Sector Technical and Economic Cooperation

The Bay of Bengal Initiative for Multi-Sector Technical and Economic Cooperation (BIMSTEC) was established on 6 June 1997 between Bangladesh, Bhutan, India, Nepal, Sri Lanka and Thailand. Myanmar subsequently joined BIMSTEC on 22 December 1997. The whole area represents around 1.5 billion people – around 22 per cent of the world's population – and has a GDP of US\$2.7 trillion.

BIMSTEC is aiming for cooperation in 14 sectors, notably trade and investment, transport and communication, energy and agriculture. Focusing on trade and investment, in February 2004 all members committed to establishing an FTA facilitating the circulation of goods and products within the area at lower and reduced tariffs. This area has a huge potential in terms of growth and developments in the coming years. BIMSTEC members agreed in 2017 to opt for an early conclusion of the FTA agreement and quick implementation.

vi Migrants' mobility

More than having an impact on the countries' economies, international treaties are also seen as the necessary steps and tools towards the improvement of individuals' mobility. The basis of a freedom of movement community can already be witnessed among South East Asian (SEA) countries. Thanks to ASEAN, various mutual recognition agreements (MRAs) have been concluded that allow some workers to consider working and living among the region's territories.

The path towards a single market where people could freely settle, as in the EU single market, remains the sought-after goal. However, a lot of challenges are still pending. In fact, only a few sectors are covered by MRAs and those agreements have done little to overcome other barriers, such as nationality requirements.

Qualifications predominate when it comes to cross-border employment matters. This demonstrates that South East Asia is not yet ready for the implementation of an open-borders system. While establishing a basis for the movement of workers, SEA countries currently act more as gatekeepers than facilitators, which impedes the integration of the different states' workforces, and currently only specific types of jobs are given more flexibility in terms of mobility.

MRAs apply under particular conditions, requiring applicants to have a minimum number of years of experience and practice. Medical practitioners, engineers and architects are some of the highly skilled jobs illustrating this situation. Dental and medical practitioners are required to have been in active practice for no less than five continuous years in the country of origin before being eligible to apply. Engineers have to demonstrate seven years' experience after graduation, two years of which must have involved significant engineering work. Architects must have been in practice for at least 10 years. While it is crucial to enhance workers' mobility, these criteria show that the ASEAN states are considering a slow and step-by-step process when it comes to the free flow of workers.

Indeed, new opportunities are only available to skilled workers, yet 87 per cent of ASEAN manpower is made up of unskilled or low-skilled labourers. This trend might change

in the coming 10 years, particularly since more and more students from the ASEAN region are pursuing their education, especially university degrees, in developed countries such as the United States and Canada or in European countries.

Bilateral labour agreements and memoranda of understanding (MOUs) will also play a role in labour-market access in the coming years. At present, labour mobility remains congested and ASEAN countries still need to find an actual operating model to allow an effective workforce flow. Priority is still given to local resident workers in the first instance, and therefore working throughout the region remains a challenge.

SEA country regulations show significant differences in their policies towards foreign employment. Some states accentuate their mutual cooperation. For instance, the diplomatic relations between Myanmar and Thailand have led to new agreements strengthening the ties between these countries. No fewer than 16 MOUs have been agreed, on or before 2 February 2017, including notably a money transfer services agreement for Myanmar migrants working in Thailand.

III THE YEAR IN REVIEW

In 2018, Myanmar enforced the new Companies Act to ease local investment opportunities. Foreign investors can now hold up to 35 per cent of shares in a local company. In the old Companies Act of 1914, even a company with 1 per cent of its shares owned by a foreign investor was classified as a foreign company. To sustain the ‘local company’ status, companies had to maintain a 100 per cent local ownership, thereby largely restricting foreign investment in Myanmar’s domestic companies.

The new Companies Act allows foreign investors to hold up to 35 per cent of shares in a domestic company without the company losing its classification as a ‘local company’. The change in the foreign company definition unlocks huge business potential in areas that were previously restricted to foreign investors, such as banking and finance. It authorises foreign investors to trade in shares on the Yangon Stock Exchange, which was previously restricted to local companies. This effectively opens up Myanmar’s economy to foreign minority ownership and paves the way for more foreign investments.

Further, it is much easier for companies to transform its legal status from ‘foreign’ to ‘local’ or vice versa, without seeking prior approval from the regulator. The concerned domestic company only need to notify Myanmar’s Directorate of Investment and Company Administration (DICA), if it transforms its legal status to that of a foreign company, that is, if the foreign investors’ share in the company increases beyond the prescribed limit of 35 per cent.

From an economic standpoint, it is another story. According to estimates by the Asian Development Bank released in September 2018, Myanmar’s economy was on track to expand by 6.6 per cent in 2018, accelerating to 7 per cent in 2019. Despite being well above the bank’s regional average of 5.3 per cent, this forecast is somewhat below earlier government estimates. Indeed, Myanmar’s central bank warned that the growth would fall below the forecasted 7.4 per cent in fiscal year 2018–19, citing constraints on spending resulting from a widening deficit, a weaker currency and adverse climatic patterns impacting farm yields.

Inflation began to edge up in the second half of 2018, fuelled in part by the weakening of the kyat, which by early December 2018 had dropped by around 11 per cent year-to-date against the US dollar, and by more than 16 per cent against yearly highs recorded in late September 2018. The fall of the kyat impacted import costs, pushing up the price of

key products such as fuel by as much as 15 per cent, while overseas-sourced foodstuffs, electronics and machinery also became more expensive. These external pressures, along with weather-related crop damage that further impacted food prices, pushed Myanmar's inflation up by 8.9 per cent in October, above the official year-end target of 6 per cent and considerably higher than January's figure of 5.2 per cent. So while the new Companies Act favours foreign investments, the high inflation rates and the kyat's lost of value paradoxically contributed to lower foreign investments.

Furthermore, government officials cited ongoing security and humanitarian issues related to unrest in Rakhine State as a factor hindering investment, particularly from Western countries. In November 2018, the European Union began an assessment process to determine whether to remove Myanmar from the list of countries with Generalised Scheme of Preference status, and potentially impose sanctions over alleged human and labour rights abuses. Incidentally, tourism is a sector that has been affected by this cooling interest from Western countries. According to the Ministry of Hotels and Tourism's figures, there was a sharp decline in the levels of tourists coming from Western Europe and North America in 2018, falling by 25.3 per cent and 13.8 per cent respectively.

With regard to foreign workforce and mobility, 2018 saw changes to employment law to gradually liberalise access to foreign workers. Indeed, the Companies Act was implemented in 2018, the new MIL is also being implemented, and two laws were also enacted during the fourth quarter of 2016: the Foreign Workers Law (FWL) and the Law Concerning Foreigners.

According to the current provisions of the FWL, foreigners are entitled to apply for work permits for up to four years. It shall also ease the issuance of the foreigner registration certificate (FRC). There are 12 categories of multiple-entry visas – including workshop, seminar, meeting and research visas, and business and employment visas – now available, following the notification of the Ministry of Labour, Immigration and Population published on 2 December 2016 giving foreigners the option to apply for longer temporary stays in Myanmar for business purposes.

IV EMPLOYER SPONSORSHIP

i Work permits

The current law in force does not provide a formal work permit system in Myanmar. There are no restrictions with regard to the number of foreign staff that may be employed by a legal entity set up under the Companies Act, and the procedure to be granted the right to work in Myanmar under the MIL is now getting simpler than the system was under the FIL. While companies registered under the FIL wishing to employ foreign staff had to apply for a work permit on behalf of the employee and comply with specific ratios applicable to their staff and hence to their business development on a larger scale, these ratios have been dispensed with in the MIL requirements.

Indeed, the FIL objectives outlined that Myanmar citizens had to make up 25 per cent of the workforce within the first two years of operation of a foreign company, at least 50 per cent within the third and fourth years, and at least 75 per cent during the fifth and sixth years of operation, none of which is required in the MIL.

From a practical standpoint, the complexity of the previous system under the FIL led several foreign workers to operate only under a business visa. The new FWL and the MIL are therefore expected to help establish more straightforward procedures and criteria to facilitate access to foreign workers.

Hence, under the MIL, foreign skilled workers and experts are simply required to be hired according to the requirements of the labour laws and rules in force, namely by signing a valid employment contract with the employer, obtaining a work permit and paying individual income tax.

The MIL remains mute, however, about whether, once granted a work permit, a foreign worker must still obtain a multiple-entry business visa and a stay permit, or whether any foreign individual wishing to stay more than 90 days in Myanmar is still required to hold a FRC.

Finally, as regards intra-company transfers, given that Myanmar does not have an established work permit system, there is no specific immigration category that exists for intra-company transfers within international groups of companies.

ii Labour market regulation

Main employment regulations

With regard to employment, a company employing new staff, whether foreign or local individuals, will have to enter into an employment agreement within 30 days of the date of employment.

A minimum wage has been established with the implementation of the Minimum Wages Law (MWL) in 2013. Since 28 August 2015, the minimum wage for local workers is set at 3,600 kyats per day calculated at an hourly rate of 450 kyats.

Staff turnover remains high in Myanmar, particularly for unskilled positions and office employees, and it is difficult to recruit staff with good English language skills.

Employers are able to terminate an employee who does not comply with their obligations after having formally provided three warnings to the employee.

Severance payments upon termination shall not be due where an employee failed to comply with his or her duties. In other cases, up to five months' salary shall be due depending on the contract's duration.

Myanmar special economic zones

Following the Myanmar Special Economic Zone Law enforced on 23 January 2014, special economic zones (SEZs) for trading activities by foreign investors have been established in Myanmar. These areas are designed to create a favourable investment environment through the significant benefits granted to investors.

The Thilawa SEZ, located 16 miles from South Yangon, allows foreign investors to be granted several incentives. Investing in Thilawa will allow foreign investors to import to Myanmar without customs duties, and to sell products to its domestic markets. Tax reduction and exemptions also apply. No tax shall be due by qualifying investors for five to seven years, and a 50 per cent tax exemption may also apply for another five years after this initial period.

Several companies from China, Europe, Japan and Singapore have already invested in this SEZ.

iii Rights and duties of sponsored employees

Sponsored employees have the same rights and obligations as any other foreign worker in Myanmar.

V INVESTORS, SKILLED MIGRANTS AND ENTREPRENEURS

Myanmar has not established any classic immigration-by-investment routes for investors and entrepreneurs yet, and the government is not ready to consider implementing such schemes in the coming years.

Investors and entrepreneurs have to deal with the general foreign-worker framework offered to foreigners wishing to enter Myanmar's market. Skilled workers are particularly needed in Myanmar. Based on the data of the Ministry of Labour, Employment and Social Security, although Myanmar's workforce is over 30 million strong, there are barely more than 500 skilled workers who meet international standards.

Thanks to ASEAN, skilled migrants can freely operate among the member states. Hence, medical practitioners, engineers, architects from countries that enjoy a higher level of development can operate and set up their activities in Myanmar.

When it comes to investing in the territory, entrepreneurs and investors are required to incorporate a legal entity.

Practically, an investor has two choices: incorporating a company under the Company Act (CA) of 1914 or a legal entity that has received approval from the MIC.

Registering an MIC company will allow the investor to be eligible for investment incentives under the FIL while CA companies are not. Income tax exemptions may be provided for up to five consecutive years, and the right to pay income tax on the income of foreign employees at the rates applicable to Myanmar citizens, as well as exemption from or reduction of income tax on the profits of the business, may be granted to investors.

In terms of entitlement of stay, while a multiple-entry business visa with validity from three months to one year from the date of issue may be considered, such visas are generally only awarded after the applicant has received two single-entry business visas. An applicant may only receive a business visa valid for 70 days, single entry, through the e-visa programme.

i Permanent residency

Following Notification No. 1/2014, obtaining permanent residence is currently allowed for two categories of individuals, namely foreigners and ex-Myanmar citizens. A foreigner can apply as an expert, as an individual who desires to invest and operate a business, or as someone who is under the responsibility of a Myanmar citizen.

An applicant granted permanent residency shall have an initial length of stay of five years, which can be renewed at five-year intervals thereafter. Permanent residents will then be entitled to specific rights, including the right to stay and work in other areas, except the restricted or prohibited area officially declared by the state, to apply for Myanmar citizenship and to purchase an apartment.

Individuals desiring to invest and operate a business must comply with the following conditions. First, they must hold a valid visa (e.g., a business visa) and apply for permanent residence after having resided in Myanmar for at least three years. They must not have left Myanmar during that time for over 90 consecutive days within a year. Second, they have to be financially able to invest, pay tax and submit official documentation proving this financial status according to the laws and regulations in force. Thirdly, applicants cannot be international refugees nor someone who has obtained political asylum in another country, nor can they have a criminal record. Finally, applicants must be in good health and free of contagious diseases.

For those applying for permanent residence as 'experts', proof of experience and qualifications are required in addition to the conditions specified above.

VI OUTLOOK AND CONCLUSIONS

Despite seven years of unabated liberalisation, Myanmar is still in the early stages of opening itself up to the world.

There have already been massive strides, such as the liberalisation of the telecommunications industry in 2014, which resulted in an explosion in the mobile phone penetration rate in the country: from less than 10 per cent in 2012 to 54.6 per cent by June 2015. Many foreign investors took this as an example of the untapped potential of the Myanmar market, and the termination of the Office of Foreign Assets Control of the US Department of the Treasury's Specially Designated Nationals and Blocked Persons List has allowed many previously reticent foreign investors to consider prospects in the country. As such, with the addition to the coming into force of the new Companies Act, we can expect to see continued foreign interest in Myanmar, as long as the kyat's value and Myanmar's inflation stabilise.

The banking sector is increasingly of interest thanks to the rise of internet connectivity in Myanmar, opening the door to foreign banks. It is the same case with the retail sector, particularly e-commerce, which is largely underdeveloped, presenting new opportunities in view of increasing internet penetration. Oil and gas is another sector that should continue to offer opportunities to foreign investors, with the announcement of 31 additional gas and oil blocks opened for bids in early 2019.

However, until the national education system can be effectively overhauled, and because such a process can essentially take a generation to come to fruition, Myanmar will suffer from a dearth of indigenous talent when it comes to fulfilling the skilled roles created by such investment. In the short and medium term, Myanmar will no doubt have to rely on foreign talent while building up its own pool of skilled workers. The Myanmar government is well aware of this and has embarked on the long and arduous process of rationalising its approach to corporate immigration.

This process is marred by the same challenges that are present in other areas of government reform. Despite winning a landslide victory at the end of 2015, the National League for Democracy government finds its democratic mandate hampered by the 25 per cent of the Pyidaungsu Hluttaw (Myanmar's legislature, the Assembly of the Union) that is reserved for serving members of the Tatmadaw (the Myanmar armed forces); this is in addition to the residual presence of Union Solidarity and Development Party ministers in the current cabinet.

Attracting FDI is high on the government's list of priorities. The issue of corporate immigration, while no doubt related, might not fare so well in comparison with more pressing matters of educational reform, investment in infrastructure and the resolution of the various ethnic insurgencies currently affecting the country.

Myanmar has huge potential in terms of development, provided that the focus is set on the market's key sectors; strategic investments remain the communications, transportation, urban development and technology sectors.

Myanmar is slowly laying the groundwork to become one of South East Asia's leading economies, as it was in the early 1960s.

ABOUT THE AUTHORS

JEAN-FRANÇOIS HARVEY

Harvey Law Group (HLG)

Jean-François Harvey founded HLG in Montreal, Quebec in 1992. He completed his Bachelor of Laws degree at the University of Ottawa and was appointed to the Quebec Bar in 1992, and is a member in good standing of both the Quebec and Canadian Bar Associations.

Jean-François is recognised internationally as an expert in immigration law, and he brings a wealth of experience in providing comprehensive immigration law services to corporations and high net worth individuals.

He also brings extensive experience in commercial legal matters, and in particular has advised on many high-value due diligence and merger and acquisition activities for a broad range of international and multinational industries.

BASTIEN TRELCAT

Harvey Law Group (HLG)

Bastien Trelcat obtained his Master of Laws in business law and corporate taxation from the law school of the University of Provence Aix-Marseille I, France in 2002. During his studies, he was ranked among the 10 best business law students by Freshfields Bruckhaus Deringer in 2001 and won the first edition of the Landwell Award (PwC) in 2002. The following year, in 2003, he received his LLM in international business law from City University of Hong Kong. In 2004, Mr Trelcat became a member of the Paris Bar.

In 2004, Bastien Trelcat relocated to Shanghai, where he advised several leading companies throughout China and Europe in their M&A transactions, including structuring and negotiation of joint ventures.

Mr Trelcat is a partner at HLG and acts as the managing partner of HLG Thailand. He also plays an important role in the development of the South East Asia market.

HARVEY LAW GROUP (HLG)

Unit 7, Level 21, Myanmar Centre
Tower 1, No. 192 Kabar Aye Pagoda Road
Bahan Township
Yangon
Myanmar
Tel: +95 09 420 092 776 / 972 607 836

Unit 2904, 29/F, 1 Empire Tower
South Sathorn Road
River Wing East, Yannawa
Sathorn, Bangkok
Thailand
Tel: +66 2 670 1848
Fax: +66 2 670 1848 ext. 107

Unit 4002, 40/F, Bitexco Financial Tower
2 Hai Trieu Street, Ben Nghe Ward
District 1, Ho Chi Minh City
Vietnam
Tel: +848 3910 7055
Fax: +848 3829 2610

jfharvey@harveylawcorporation.com
btrelcat@harveylawcorporation.com
www.harveylawcorporation.com



ISBN 978-1-83862-027-1