Case Study Book on International Transaction

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Message from the Chief Justice of the Union

The Supreme Court of Union is determined to contribute to the economic development of the Union while judicial sector is fully protecting the businesses, and as part of implementing the judiciary strategic goal "Towards Improving Justice for All". As Myanmar has become economically and politically more open, cooperation between Myanmar and foreign enterprises has notably increased. During this period, courts in Myanmar may face increasing number of lawsuits on commercial disputes.

Therefore, the way to resolve such kind of commercial issues require knowledge on business related laws and case resolution, primarily on international business related laws, international commercial dispute resolutions, foreign investments, corporate matters and other related matters.

This book contains various international transactions related matters, local business and commercial related laws, and international commercial disputes resolution practices at international level and the role of Myanmar courts. Case studies on matters related to international transactions and discussion of new issues that may arise in the field of judiciary will be much helpful to the judges who are handling commercial disputes and beneficial for the judiciary sector.

We acknowledge and give special thanks to Business and Commercial Laws Working Group of the Supreme Court of the Union and JICA for their effort in creating this book, and Ministry of Justice, Japan and Nishimura and Asahi Law Firm for providing technical support.

The Hon. Htun Htun Oo
Chief Justice of the Union
Supreme Court of the Union

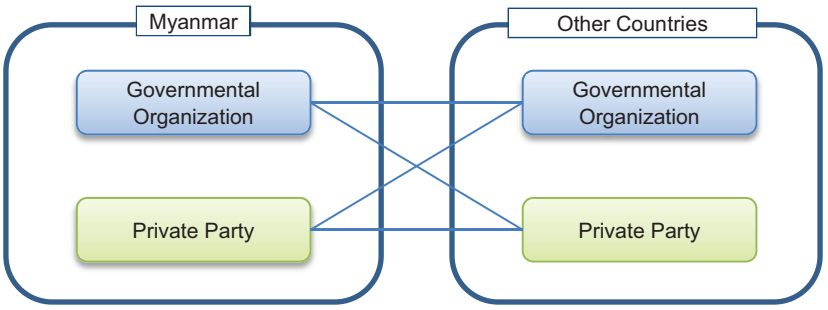
22 March 2019
Nay Pyi Taw

Chapter 1
Introduction

1. **Parties Involved in a Contract for an International Transaction**

(1) **Parties to a contract**

In addition to private parties such as individuals or entities, governmental organizations (such as nation-states, government agencies, regional governments) and international organizations (such as the United Nations, the World Bank, international non-governmental organizations) may be parties to contracts for an international transaction. Contracts between such parties may be between entities established in the same country or different countries.



In contract law, the basic principles of contract interpretation will not be affected if the parties are different in nature; the law will not be construed or applied in favor of a governmental organization or international organization solely because such an organization is a party to the contract.

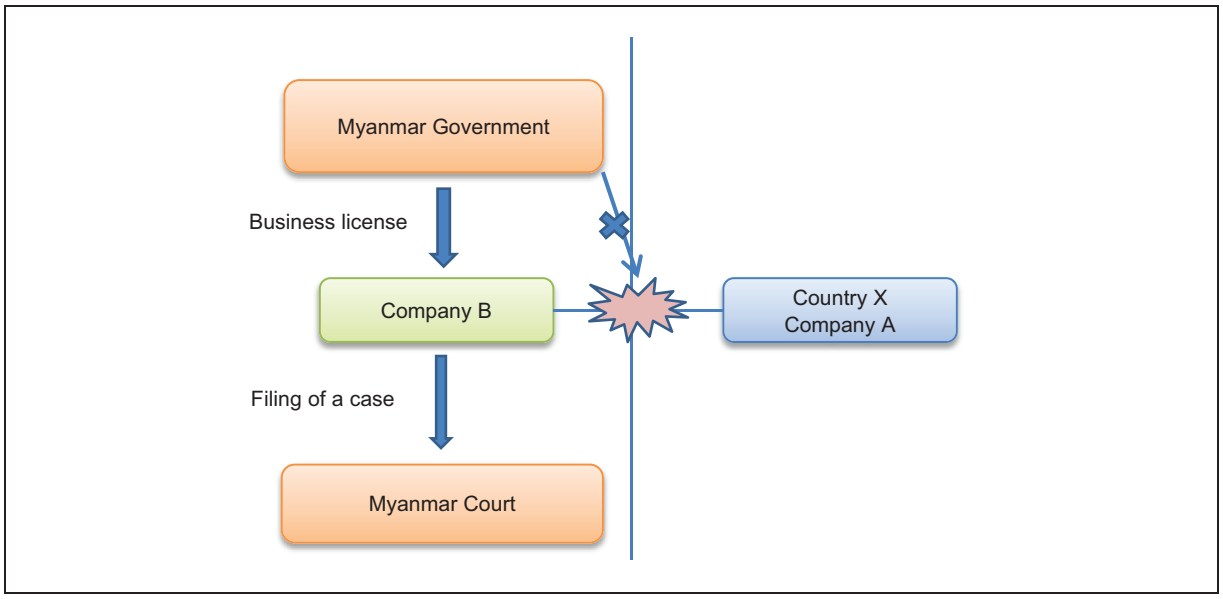
(2) **Other interested parties**

In addition to the parties to the contract discussed in 1.(1), there are also other interested parties which may have a connection to the contract.

Case 1-a

Company A in Country X sold an equipment to Company B in Myanmar, and Company B operated a business using the equipment that it purchased from Company A. The sales contract between Company A and Company B included a provision that stated, "if Company B loses its license for the business inside Myanmar, Company A may terminate the contract."

Company B lost its license to operate its business, and as a result, Company A terminated the contract with Company B. Company B filed a petition in a court in Myanmar for declaratory judgment that the termination was invalid.

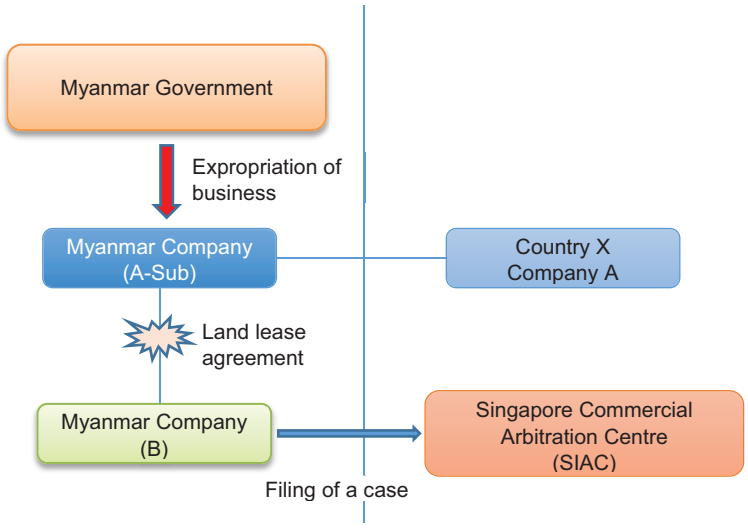


In Case 1-a, Company A and Company B are the parties to the contract, but in addition, the governmental organization and the Myanmar courts had an interest in the contract. However, these governmental organizations and the court system were not in a position to interfere with the dispute between the contractual parties, Company A and Company B, because they were not parties to the contract.

Case 1-b

Company A in Country X established A-Sub as its subsidiary in Myanmar, which conducted business in Myanmar on land leased from Company B. The land lease contract between A-Sub and Company B included a provision that stated, "If A-Sub is not able to conduct its business because of nationalization by the government of Myanmar, A-Sub may terminate the land lease contract even during the lease term."

The government of Myanmar subsequently nationalized A-Sub's business, and A-Sub terminated the agreement with Company B. Company B filed a request for arbitration at the Singapore International Arbitration Centre (SIAC) under the terms of the contract.

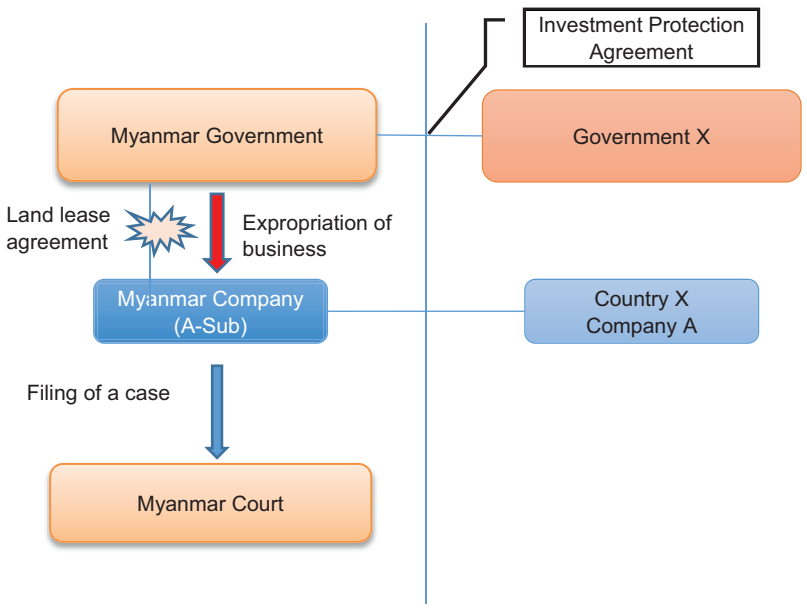


In Case 1-b, A-Sub and Company B were the parties to the agreement, but in addition, the governmental organization (in this case, the government of Myanmar) also had an interest in the terms of the transaction. In this case, a question may arise as to whether the nationalization by the government of Myanmar violated international law, including relevant treaties, and if the nationalization is determined to have been illegal, the dispute between A-Sub and Company B may be affected. However, since the validity of the nationalization is a separate issue from the land lease contract dispute, the government of Myanmar has no right to interfere with the dispute between A-Sub and Company B.

Case 1-c

Company A, a company of Country X, established A-Sub in Myanmar, which operated its business on land leased from the government of Myanmar. The land lease contract between A-Sub and the government of Myanmar included a provision that stated, "If A-Sub is not able to conduct its business due to the nationalization by the government of Myanmar, A-Sub may terminate the land lease contract even during the lease term and may request the return of prepaid rent for the lease term after the termination regardless of whether or not the nationalization is legal."

The government of Myanmar subsequently nationalized A-Sub's business. Although the nationalization may have violated the investment treaty between Country X and Myanmar, A-sub did not file a claim with respect to the legitimacy of the nationalization, but instead used its right to terminate the lease contract under the provision on nationalization in the land lease contract and filed a lawsuit in a Myanmar court for the return of prepaid rent.



In Case 1-c, A-Sub and the government of Myanmar were the parties to the contact, and although the nationalization that caused the termination of the lease contract may have violated a treaty (agreement) with a foreign country, A-Sub did not argue the legitimacy of the nationalization even though A-Sub had the standing to make such an argument, and instead terminated the lease contract and filed a lawsuit for the return of prepaid rent. As a result, the failure by A-Sub to make an argument with respect to the nationalization that caused the termination of the lease contract and the legitimacy termination subsequently remained unquestioned, and the court had no right to determine the legitimacy of the nationalization (in other words, whether the nationalization violated an investment treaty).

Essential Points

- The nature of the parties to a contract does not affect the legal understanding of the contract. Laws and regulations in favor of a governmental organization or an international organization are not separately construed or applied to such organizations.

- Further, interested parties to a contract that are not parties to the relevant contract may not interfere with a dispute between such contracting parties.

2. **Basic Framework of Law for the Resolution of Contract Disputes**

This textbook describes certain issues regarding international transaction disputes. The scope of the items to be discussed is broad, but can be separated into three categories. It is essential not to confuse these three points in an international transaction dispute.

A: Governing law to contracts for international transactions
B: Understanding of the contents of the contracts for international transactions
C: Dispute resolution bodies and methods in contracts for international transactions

(1) Governing law of contracts for international transactions (A)

The parties to a contract for an international transaction generally include a provision in the relevant contract that states their agreement to the law under which the contract will be governed in the contract itself. An example would be an provision in a contract executed between a Myanmar entity and a foreign entity that states, "This contract shall be governed by the laws of Country X".

However, Myanmar law is not completely excluded from application in cases such as those described above. For example, if a Myanmar entity and a foreign entity establish a joint venture company in Myanmar under the Myanmar Companies Law, in principle, the Myanmar Companies Law will regulate the operational matters of the joint venture company.

Example

Company A, a Myanmar entity, and Company B, a Country X entity, jointly invested in and established a joint venture company ("Company C") in Myanmar as a company limited by shares under the Myanmar Companies Law. Company A and Company B executed a joint venture agreement (the "JVA") in order to mutually agree to the internal regulations of Company C's management. The JVA sets forth a provision that "The JVA shall be governed by the laws of Country X." Although the JVA will be governed by the laws of Country X, the establishment process, general meeting process and other similar matters of Company C will generally be regulated by the Myanmar Companies Law. If the Myanmar Companies Law allows related parties to agree to an arrangement different from the default rules provided by the Myanmar Companies Law, such arrangement will have priority.

In addition, if the joint venture company employs workers in Myanmar, as the Myanmar labor laws and regulations set forth certain mandatory provisions that grant workers specific rights, any provision in the JVA depriving the workers of such rights will generally be deemed unenforceable.

If a foreign company and the government of Myanmar execute a contract, the parties may determine the governing law of the contract. However, if there is a (bilateral or multilateral) investment treaty between Myanmar and the country of the foreign company, the question of whether treaty was violated is a different issue from the choice of law issue.

These issues will be discussed in Chapter 2, and the relationship between the investment activities of foreign entities and the local government will be discussed in Chapter 8 and 9.

(2) Understanding the contents of a contract for international transactions (B)

There are some common patterns of agreement in international transactions, which are neither generally determined in local transactions in Myanmar nor provided in the Contract Act or other laws. In contracts for international transactions, since each party has a different background in terms of culture and business practice, in order to avoid misunderstanding and future disputes, the parties generally execute written, detailed contracts that set forth the terms of their agreement.

In addition, the execution processes of contracts for international transactions are not necessarily the same as the execution processes for domestic transactions in Myanmar.

The terms of a contract for an international transaction are construed in accordance with the governing law selected in conformance with the rules of (A) above; however, regardless of the governing law, it is helpful to understand the basic contents and execution process of contracts for international transactions. The content and processes of these contracts should not be denied even if they differ from the culture and business practices in Myanmar.

These matters are discussed in further detail in Chapter 3, 4 and 5.

(3) Dispute resolution bodies and methods in international transaction contracts (C)

If a dispute arises regarding contracts for international transactions, issues may arise with respect to the dispute resolution body and resolution method, the most important of which are the court proceedings in courts and arbitration procedures in arbitral tribunals.

Parties to a contract may set forth their agreement with respect to the dispute resolution body and method in the contract. Courts should respect any legitimate agreement of the parties to the extent possible.

Further, it is essential to understand the distinction between the governing law of a contract and the dispute resolution body. Disputes with respect to the applicable law are regarding the law under which the parties should argue the case, and disputes with respect to the dispute resolution body are regarding the place where the parties should argue the case. In other words, to use one-on-one fighting sports as an example, choice of law issues are with respect to which type of one-on-one fighting will be conducted, whether it be lethwei, muay thai or boxing, while dispute resolution body and method issues are with respect to the question of the location of the ring in which the parties should fight, whether it be in Myanmar, Thailand or the United States of America.

If a dispute is between a private entity and the government of a country, whether the matter in dispute is with respect to a violation against international law or a violation of the contract between the parties, and whether there is an investment treaty

between the country to which the private entity belongs and the country of the government, should be considered.

We will discuss these matters in Chapter 14 and 15.

Essential Points

- The agreement between the parties regarding the law applicable to contracts for international transactions should generally be respected. Public international law is different from the law that will apply to the contract.

- In order to understand contracts for international transactions, it is necessary to obtain a basic understanding of its contents and the execution process. The contents and process should be respected even if they differ from the general practice in Myanmar.

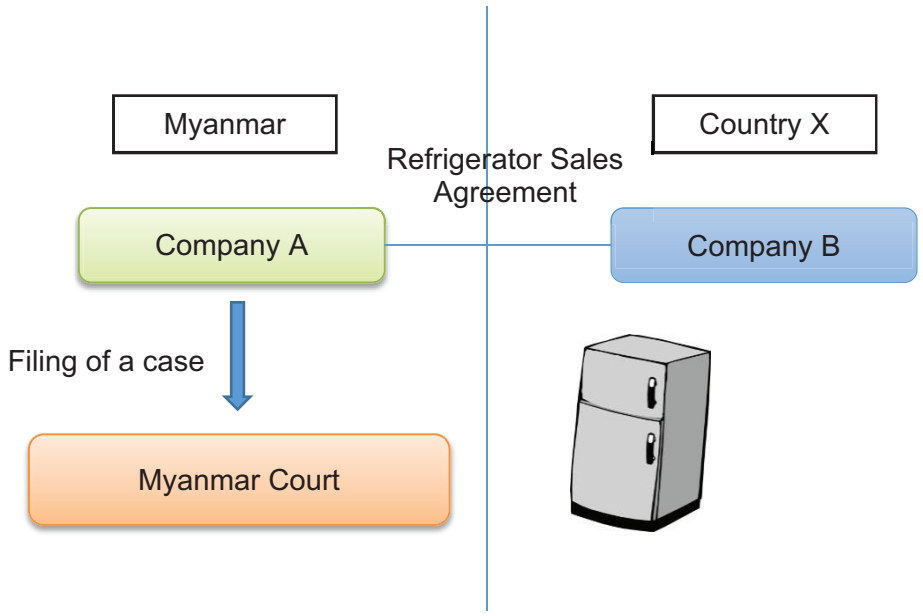
- The agreement between parties to a contract with regard to the dispute resolution body and method should generally be respected to the maximum extent possible. This should be distinguished from the question of choice of law.

Chapter 2
Applicable Law to Contracts for International Transactions

1. Governing Law of Contracts for International Transactions

Case 2-a

Company A, a consumer electronics dealer in Myanmar, purchased refrigerators from Company B in Country X pursuant to a sales contract. Upon receipt of the refrigerators, Company A conducted an inspection and discovered that the refrigerators were defective and useless. Company A filed a petition against Company B in a Myanmar court to terminate the contract and claim damages due to Company B's breach of contract.



How should the court determine case 2-a? Should the court determine the case in accordance with Myanmar contract law (for example, the Contract Act) or Country X's contract law?

In civil matters, the law that governs the relationship of the parties to a contract for an international transaction (such as the sales contract in Case 2-a) is referred to as the "governing law" or the "applicable law". These terms may be used interchangeably. Both terms have the same meaning, but in this textbook, we will use the term "governing law." We can express the question in the preceding paragraph differently through the question: "what is the governing law of this contract?"

The body of laws and regulations that determine the governing law is called "private international law" or "conflict of laws." Such laws are not considered the "governing" law, but rather the law used to determine the governing law. It is essential not to confuse these concepts. The conflict-of-law rule that governs contract does not directly apply to the contract.

Each country has its own conflict-of-law rules in its domestic laws, which differ by country. For example, the member countries of the European Union have a unified system of rules to determine the law that will apply to contractual obligations (REGULATION (EC) No 593/2008

OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I)("Rome I").[1]

In Myanmar, currently there is no statutory law in the field of private international law. This text book explains how to resolve this issue in Myanmar in accordance with internationally accepted views, which are based on Rome I.

Essential Points

- The governing law is the law applied to a legal relationship in civil matters, including contractual obligations.
- Conflict-of-law rules determine the governing law.
- Conflict-of-law rules are not directly applied to relationships between parties in civil.
- In Myanmar, there is no statute law in the field of conflict of laws.

Rome I

- At the time the European Community (predecessor to the European Union) was formed, each member country had its own unique conflict-of-law rules, but certain member countries executed treaties on the law applicable to the contractual obligations of parties. After the European Union was organized and authorized to unify laws in member countries, Rome I was enacted in 2008.
- The concepts in Rome I can also be applied to common law countries; England, a common law country, has complied with the rules of Rome I during its membership in the EU.

2. Outline of the Determination Process of Governing Law

In order to determine the governing law that regulates a specific contract for an international transaction, the parties must identify the contractual obligations and other relevant matters.

(1) Contractual obligations

Parties to a contract may freely agree to the governing law that will govern their contractual obligations.

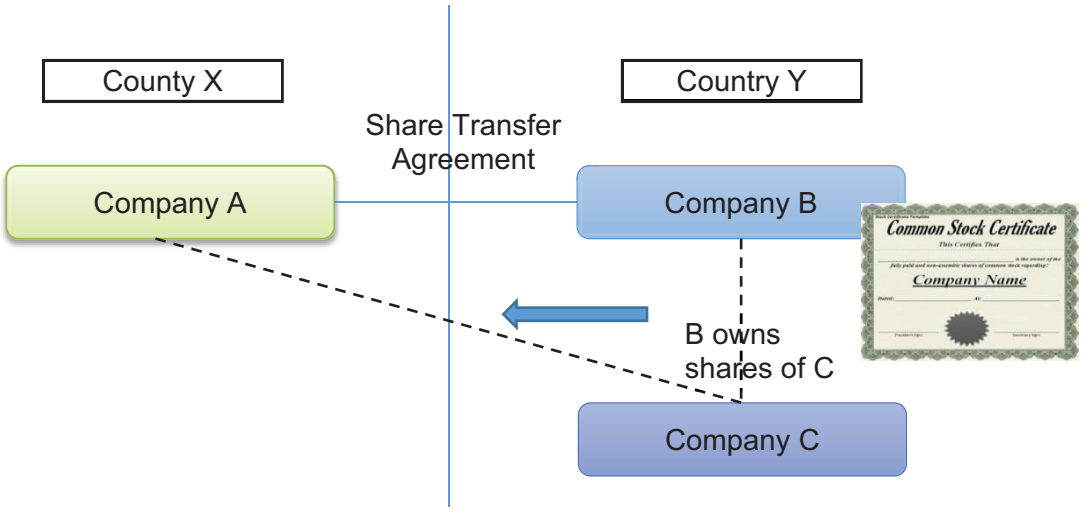
(2) Non-contractual obligations

Torts, property and general corporate matters are examples of matters that are considered non-contractual obligations. These matters will be governed by the law determined by each related conflict-of-law rule.

There may be certain contractual issues for which the parties are not permitted to determine the governing law by agreement. For example, if Company A (a company of Country X) executes a sales contract with Company B (a company of Country Y) to

[1] Various efforts for international unification (including treaties administered by the Hague Conference on Private International Law) have been made, and it appears that many countries currently have substantially similar rules in the field of private international law.

acquire the shares of Company C (a company of Country Y), the terms and conditions of the contract between Company A and Company B are matters regarding the contractual obligations of Company A and Company B and will be determined in conformance with the governing law agreed between the parties. On the other hand, the parties cannot select the law that will apply to the transfer proceedings of Company C's shares required under law (in this case, the company law of Country Y will be the governing law). In this case, two or more different laws can be applied to different issues in one contract.



3. **Contractual Obligations**
The following are examples of matters that fall within the scope of contractual obligations:

- Interpretation of a contract
- Performance of contractual obligations
- Consequences of a contract breach (including assessment of damages)
- Methods to extinguish obligations, limitation of actions
- Consequences of contract nullification

Rome I sets forth the following provision.

Rome I

Article 12 (Scope of the law applicable)
1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

(1) **Cases where the governing law is agreed between the parties**

If the parties to a contract have agreed to the governing law of the contract, such agreed law will be applied to matters regarding contractual obligations. This principle is widely understood to be reasonable from the viewpoint of "Party Autonomy." Conflict-of-law rules in many countries allow the parties of a contract to freely select the governing law of the contract, because this freedom corresponds to the established practice of international transactions and ensures foreseeability for parties entering into a contract. It is common for parties to a contract for an international transaction to have the freedom to select the governing law, as it allows the parties a measure of predictability.

For example, Rome I provides as follows:

Rome I

Preface

(11) The parties' **freedom to choose the applicable law** should be one of the **cornerstones** of the system of conflict-of-law rules in matters of contractual obligations.

Article 3 (Freedom of choice)

1. A contract shall be governed by the law **chosen by the parties**. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Therefore, when a court in Myanmar determines which law will apply to a contract, if the parties of the contract agreed to the governing law, the court must, in principle, adopt the governing law selected by the parties.

(a) **Confirmation of the agreement on the governing law of a contract**

(i) **Express provision**

Parties to a contract for an international transaction generally determine the governing law in the contract (typically at the end of the contract). Therefore, the court must first confirm whether there is a provision that sets forth the governing law in the contract, and confirm its contents.

A typical provision of the agreement to the governing law is set forth below. Please note that this is a sample provision, and other wording may be used to effect a valid agreement.

X Governing law

This Agreement shall be governed by and construed in accordance with the laws of Country X.

Attention!

Separately from the governing law provision, a contract generally includes a provision regarding the body and method for dispute resolution (please see the example provision

below). This section is typically near the governing law provision.

Section X (Dispute Resolution)
All disputes arising out of or in connection with the present contract shall be finally settled by a court of the Republic of the Union of Myanmar.

The contents of the governing law provision and the dispute resolution provision are entirely different, and parties to a contract should be careful not to confuse the purpose of each provision. A dispute resolution provision that designates a Myanmar court as the competent body for dispute resolution does not automatically mean that the contract should be governed by Myanmar law.

(ii) **No provision**
It should not be assumed that the parties have not agreed to the governing law of a contract based only on the fact that there is no provision that expressly states the governing law of the contract. In the case that there is a disagreement between the parties regarding the governing law, the court should not automatically assume that Myanmar law is applicable and instead should inquire whether the parties have separately agreed to the governing law.

(b) **No limitations on the choice of law**
There are no limitations imposed on parties with respect to their choice of law. The parties may choose the law of the country to which one of the parties belongs or the law of a third country.

The governing law that the parties select may not necessarily be the law of the country to which a party belongs. For example, in Case 2-a, the parties had the freedom to select the laws of Country Y, a third party, as the governing law, and were not required to select Myanmar law or the laws of the country to which Company A belonged. This frequently occurs in contracts for international transactions for the reasons below. However, the parties may select the law of a third country even in the absence of one of these circumstances:

- Neither party wants to choose the laws of the country to which the other party belongs;
- The laws of Country Y applies the common law legal system as Myanmar law has;
- Country Y has an internationally recognized legal system in the field of international transactions, which is reliable for Company B; and
- From a geographical point of view, Country Y is located in the middle between Myanmar and Country X, and the laws of County Y is acceptable to both parties.

(2) **When the parties to a contract have not agreed the governing law**
Which law will be applicable in the case that the parties have not executed an oral or written agreement to the governing law of a contract?

As mentioned above, there is no statutory law in the field of private international law in Myanmar. However, it is appropriate to adopt the international standards described below to determine the governing law of a contract.

(a) **How to determine the law governing a contract**

(i) The law governing the contracts that fall under a certain category of contract will be determined in accordance with such category (Article 4.1 of Rome I):[23]

Category of Contract	Governing Law
(a) Contract for the sale of goods	Law of the country where the seller has its habitual residence
(b) Contract for the provision of services	Law of the country where the service provider has its habitual residence
(c) Contract relating to a right in *rem*[4] in immovable property or to a tenancy of immovable property	Law of the country where the property is situated
(d)Tenancy of immovable property executed for temporary private use for a period of no more than six consecutive months (notwithstanding point (c))	Law of the country where the landlord has its habitual residence (provided that the tenant is a natural person and has its habitual residence in the same country)
(e) Franchise contract	Law of the country where the franchisee has its habitual residence
(f) Distribution contract	Law of the country where the distributor has its habitual residence
(g) Contract for the sale of goods by auction	Law of the country where the auction takes place (if such a place can be determined)

(ii) The contract is not covered by any category listed in item (i) above or the elements of the contract are covered by more than one of the categories listed in item (i) above.

>>> The contract will be governed by the laws of the country where the party required to effect the characteristic performance of the contract has its habitual residence (cf. Article 4.2 of Rome I).

(iii) The circumstances of the case clearly indicate that the contract is manifestly more closely connected with a country other than the country indicated by the rules in item (i) or item (ii) above.

>>> The laws of the other country will apply (cf. Article 4.3 of Rome I).

(iv) The applicable law cannot be determined pursuant to the rules in item (i) or item (ii)

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2 We have omitted Article 4.1(h) of Rome I, because it states the rule for contracts that deal with financial instruments in a certain manner as defined by Directive 2004/39/EC and will not be applicable in Myanmar for the time being.

3 In Rome I, there are special provisions regarding contracts of carriage (Article 5) and insurance contracts (Article 7). We have omitted the explanation due to the volume of these provisions. Please refer to those articles for disputes relating to such category.

4 "*in rem*" is a Latin term meaning "against a thing". "Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing" (Black's Law Dictionary, 10th ed.)

>>> The contract will be governed by the law of the country with which it is most closely connected.

Essential Point: "Most closely connected"

As transactions made through the internet have increased, the place where the parties physically execute a contract is no longer significant, and the physical location of the parties at the time of the execution of a contract should not be the basis on which the place is determined, and the courts should adhere to the current international standard, which is to determine the country most closely connected to the parties on an individual, case by case basis.

Provisions in Rome I

Article 4 (Applicable law in the absence of choice)
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Application to Case 2-a

Facts: Company A, a consumer electronics dealer in Myanmar, purchased refrigerators from Company B in Country X under a sales contract.

The law agreed between the parties will be the governing law of the contract.

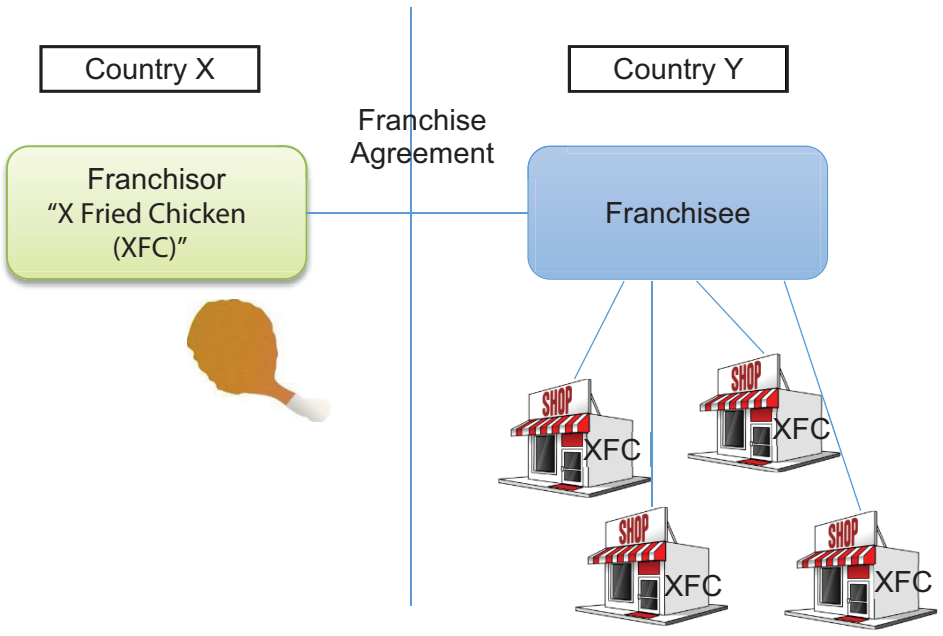
If the parties have not agreed to the governing law of the contract, the law of Country X, where the seller has its habitual residence, will be the governing law.

Franchise contract cases

Facts: The franchisor of a fried chicken chain store in Country X executed a franchise contract with the franchisee in Country Y, and the franchisee developed the fried chicken store business in Country Y.

The law agreed between the parties will be the governing law of the contract.

However, if the parties have not agreed to the governing law of the franchise contract, the law of Country Y, where the franchisee has its habitual residence, will be the governing law.



(b) Habitual residence

The concept of "habitual residence" is used to determine the governing law, and is determined in conformance with the following rules.

- Companies and other entities : place of central administration
- Natural persons acting in the course of their business activities : principal place of business
- Where the contract is executed in the course of the operations of a branch, agency or any other establishment, or if, under the contract, the branch, agency or establishment is responsible for the performance of the contract : location of the branch, agency or any other establishment

Rome I

Article 19 (Habitual Residence)

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
   The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

4. **Exceptions to the Terms and Conditions of a Contract**

As we explained above, under the concept of "Party Autonomy," the parties to a contract generally have the right to determine the governing law of a contract (Freedom of Choice). However, there are certain exceptions where it is in the public interest or required by social policy to disregard the governing law selected by the parties and apply the mandatory provisions of a country.

Specifically, the following laws will apply to a contract regardless of the governing law selected by the parties:

(1) Consumer protection laws that protect consumers;
(2) Employment protection laws that protect employees; and
(3) Overriding mandatory provisions.

(1) **Consumer protection laws that protect consumers**

Case 2-b

Consumer A, a resident of Country X, purchased a smartphone on the internet from Company B, a seller of Country X. Consumer A attempted to use the smartphone delivered by Company B, but the internal mechanism of the smartphone was physically damaged and could not be used. Consumer A filed a lawsuit against Company B in a Country X court in order to terminate the sales contract and claim damages. Which law will govern the validity of the termination and claim? Please note that the terms and conditions of the sales contract shown on the sales website of Company B state that such sales contract will be governed in accordance with the law of Country Y.

Consumers are in a weaker position than sellers due to the imbalance in financial strength and bargaining power. In order to protect these consumers, certain countries have enacted consumer laws that modify the concept of "Party Autonomy" in certain cases. If the parties to a contract were able to avoid the application of these consumer protection laws through an agreement to apply the governing law of a certain country that does not provide similar protections, the weaker consumers would likely be forced to agree to the governing law of such other country, which would render the consumer protection laws meaningless.

When a natural person, for a purpose which may be considered outside his trade of profession, executes a contract with a seller, the natural person and the seller may validly

agree to apply the law of a country other than the country of the natural person's habitual residence to govern the contract. However, the consumer protection laws of the country of the natural person's habitual residence will apply if the parties agree to apply the law of a country that deprives the consumer of the protection afforded to the consumer that may not be derogated through an agreement by the parties.

For example, in Case 2-b, if there is a consumer protection law favorable to Consumer A in Country X, Consumer A will be afforded the protection set forth under such Country X law. To provide you with a clearer understanding, examples of consumer protection law provisions that are favorable to consumer are as follows:

(a) A consumer may, within 8 days of the day on which the consumer purchased goods from the provider, cancel its purchase regardless of whether the seller was negligent.

(b) A consumer contract clause that forces a consumer to waive its right to cancel the contract in the case that the trader defaults on such contract is void.

Limitation to the Application of Protection Under Consumer Protection Laws

The consumer protection laws of the country of the consumers' habitual residence will apply if the parties agree to apply the law of a country that deprives the consumer of the protection afforded to the consumer **that may not be derogated through an agreement by the parties**.

Rome I

Article 6 (Consumer contracts)

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) **shall be governed by the law of the country where the consumer has his habitual residence**,

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. **Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law** which, in the absence of choice, would have been applicable on the basis of paragraph 1.

Preface

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of- law rules that are more favourable to their interests than the general rules.

(2) **Employment protection laws that protect employees**

Case 2-c

Employee A, a resident of Country X, executed an employment contract with Company B2, a Country X subsidiary of Company B1 which operates its business in Country Y.

The employment contract states that Employee A shall work 50 hours per week and the contract shall be governed by the laws of Country Y. According to the laws in Country X, overtime payment must be made for any time worked in excess of 42 hours per week. However, Company B2 failed to pay Employee A for the additional eight hours that Employee A worked during the relevant week. Employee A filed a lawsuit against Company B2 in a court in Country X demanding payment for the overtime.

Employees are in a weaker position than employers due to the imbalance in knowledge and bargaining power. In order to protect these employees, certain countries have enacted employment laws that modify the concept of "Party Autonomy" in certain cases. If the parties to a contract were able to avoid the application of these employment laws through an agreement to apply the governing law of a country that does not provide similar protections, the weaker employees would likely be forced to agree to the governing law of such other country, which would render the employment protection laws meaningless.

When an employee and an employer execute an employment contract, they may validly agree to apply the law of a country other than the country of the employee's habitual residence to govern the contract. In the absence of such employment protection laws, the employee will not be entitled to any protection.

For example, in Case 2-c, even though the parties agreed that the governing law of the employment contract would be the law of Country Y, if there are employment protection laws favorable to Employee A in Country X (for example, a law that requires employers to pay overtime to employees for any working hours exceeding the statutory working hours and prohibits employers and employees from entering into an agreement to amend such statutory working hours and overtime pay), the employment protection laws of Country X will apply.

Limitation to the Application of Protection Under Employment Laws

The employment protection laws of the country of the employee's habitual residence will apply if the parties agree to apply the law of a country that deprives the employee of the protection afforded to the employee **that may not be derogated through an agreement by the parties**.

Rome I

Article 8 (Individual employment contracts)

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. **Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law** that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

(3) **Overriding mandatory provisions**

In all countries, certain overriding laws of mandatory application are enacted for policy reasons. These statutes can be applied regardless of whether the parties to a contract agree to their application. The specific laws that have mandatory application differ by country and are not defined by Rome I.

For example, under the Transfer of Immovable Property Restriction Law of 1987 ("TIPRL") foreign individuals in Myanmar are restricted from owning the immovable property. The TIPRL is based on the land ownership policy of Myanmar. If the parties to a contract were able to circumvent the restrictions imposed under the TIPRL by agreeing that the laws of a foreign country, and not the laws of Myanmar, will apply, the policy of the TIPRL will be nullified. In this example, the provisions of the TIPRL, which are overriding mandatory provisions, will override any agreement between the parties with respect to the governing law.

Please note that such overriding mandatory provisions are unusual. Rome I also states that overriding mandatory provisions should be construed more restrictively.

Rome I

Article 9 (Overriding mandatory provisions)
1. Overriding mandatory provisions are provisions the respect for which is **regarded as crucial by a country for safeguarding its public interests**, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

Preface
(37) The concept of this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum applicable to the contract and **should be construed more restrictively**.

Essential Points

- Although the principle of "Party Autonomy" is generally applicable to parties to a contract, there are exceptions where it is in the public interest or required by social policy to apply certain mandatory laws of a country to a contract regardless of the governing law selected by the parties. Such mandatory laws that may be applied include (1) consumer protection laws that protect consumers, (2) employment protection laws that protect employees, and (3) overriding mandatory provisions.

- Overriding mandatory provisions may be applied to a contract regardless of the governing law selected by the parties. The application of overriding mandatory provisions should be construed restrictively as the scope of such mandatory provisions is vague.

5. **Non-contractual Obligations**

We explained the method to determine the law that governs the contractual obligations of a party in the previous sections. This section will explain the method to determine the law that governs non-contractual obligations.

(1) **Non-contractual obligations**

Each country has its own domestic conflict-of-law rules for non-contractual obligations. For example, the member countries of the European Union have unified rules to determine the law applicable to non-contractual obligations, called "REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II" ("Rome II").

Case 2-d

A, a resident of Country X, drove a car in Country Y, and got into an accident with an employee of Company C, a company incorporated in Country Z, who was driving from Country Z to Country X. A's car was seriously damaged and A was injured. A filed a lawsuit in a court in Country X to recover damages (repair costs and medical expenses) caused by Company C under tort law. Which law governs this claim?

Obligations of a party that arise under tort law are typical examples of non-contractual obligations. Under the Rome II, these obligations are governed by the law of the country in which the damage occurs.

In Case 2-d, the law of Country Y, which is the country in which the traffic accident occurred, will govern the claims related to the tortious acts of Company C. The determination of the governing law will not be affected regardless of whether the repair costs and medical expenses were paid in Country X (please refer Preface (17) of Rome II).

Rome II

Preface (17)
The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur.
Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

However, if Company C has its habitual residence in Country X, rather than Country Z, an exception to the general rule will apply and the law of Country X will be the governing law, even if the traffic accident occurred in Country Y. The reason for this exception is because it is more convenient for both parties to apply the law of the country in which both parties have their habitual residence, which is Country X (please refer to Article 4.2 of Rome II).

Rome II

Article 4 (General rule)
1. Unless otherwise provided for in this Regulation, **the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs** irrespective of the country in which the event giving rise

to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, **where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.**
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

We have explained the principal method to determine the governing law of non-contractual obligations, including under tort law. However, in certain cases, the principle of "Party Autonomy" will apply and the parties will be allowed to select the governing law.

Specifically, the parties of a case may freely select the governing law by express agreement using the following methods (Article 14.1 of Rome II):

(a) enter into an agreement after the event giving rise to the damage occurs; or

(b) enter into an agreement freely negotiated between the parties pursuing a commercial activity before the event giving rise to the damage occurs.

For example, in Case 2-d, Party A and Company C will use the method set forth in (a) if they agree after the traffic accident occurred to apply the law of Country X to determine whether Company C has an obligation to compensate Party A for the damage caused by the traffic accident. The method set forth in (b) above will be applicable in a case where Company A, a retailer in Country X, and Company B, a smartphone manufacturer in Country Y, agree in their distribution agreement that the law of Country Z shall govern all the obligations related to the sales of the smartphones, including non-contractual obligations.

Rome II

Article 14 (Freedom of Choice)
1. The parties may agree to submit non-contractual obligations to the law of their choice:
(a) by an agreement entered into after the event giving rise to the damage occurred;
or
(b) **where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred**.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

(2) **Property law**

Generally, property is separated into two categories, movable property and immovable property. Movable property is further separated into two subcategories, tangible property and intangible property. For example, smartphones and cars are tangible property, while stocks and intellectual property rights are intangible property.

The governing law to determine the validity of the creation, transfer and loss of a right to movable or immovable property is the law of the place where the subject property of the right is situated.

(i) **Immovable Property**
Each country has its own laws on immovable property, and the laws regarding the creation, transfer and loss of a right to immovable property in another country differ by country. In addition, the application of the law of the country in which the subject property of the right is situated may contribute to foreseeability for the parties of the applicable governing law. These factors will also affect the determination of the governing law for movable property.

The question of which law governs the validity of the creation, transfer and loss of a right to immovable property may arise in the following case.

Case 2-e

Company A, a real estate developer in Country X, sold real property rights to a condominium situated in Country X to Party B, a resident of Country Y. If the court in Country X is required to determine the point in time that the right to the condominium was transferred from Company A to Party B, what is the governing law that the court should apply?

In case 2-d, even if Company A and Party B have agreed that the sales contract will be governed by the law of a country other than the country in which the subject property of the right is situated, the governing law of property will be Country X, the law of the place in which the subject property of the right is situated.

(ii) **Movable Property**
On the other hand, in the case of movables, intangible property is treated differently from tangible property, as the governing law will be the law under which a right to intangible property is created and shall govern the creation, transfer and loss of the right.

(3) **Company law**
Matters regarding the internal organization of a company, including the requirements of a company to hold general meetings of shareholders or have a director and the rights of shareholders, are governed by the law of the country in which the company is incorporated. For example, if Company A, a company established in Country X, and Company B, a company established in Country Y, establish a joint-venture company called Company C in Country X, even if the parties select as the law of Country Y or Country Z, a third-party country, as the governing law of the joint venture agreement executed between Company A and Company B, the law of Country X shall govern the legal organization of Company C and the rights of Company A and Company B as the shareholders of Company C.

Essential Points

- Non contractual obligations, such as obligations arising under tort law, shall be governed by the law of the country in which

- Notwithstanding the choice of law in a contract, the law of the country in which the subject property is situated shall govern the validity of the creation, transfer and loss of immovable property and tangible movable property.

- The law of the country in which a right to intangible property is created shall govern the creation, transfer and loss of such right.

- Matters regarding the internal organization of a company shall be governed by the law of the country in which the company is incorporated.

Chapter 3
Basics of International Contracts

1. Executing International Contracts

(1) Executing international contracts

(a) Diversity and complexity of international contracts

In the current market, international businesses are engaged in a variety of businesses , and they use different types of contracts for their businesses. Descriptions of several common types of contracts are set forth below.

- Manufacturing Agreement: A contract between a manufacturer and a customer that sets out the obligations of a manufacturer to use certain factory equipment to manufacture goods for the customer of a certain quality, and of a customer to purchase such goods from the manufacturer. This type of contract is commonly used in the CMP (″cutting, making and packing″) industry, an industry where manufacturers import fiber materials, manufactures clothes and export such clothes to customers.

- Technology License Agreement: A contract between a licensor and a licensee that sets out the obligations of a licensor to provide a licensee with advanced technology, and the obligations and rights of a licensee to produce and sell the goods using such technology and pay to the licensor a license fee as consideration for the license.

- Joint Venture Agreement: A contract between a local company and a foreign company that sets out the obligations of each party with respect to the joint operation of a joint venture company, the shares of which are jointly held by the local company and foreign company.

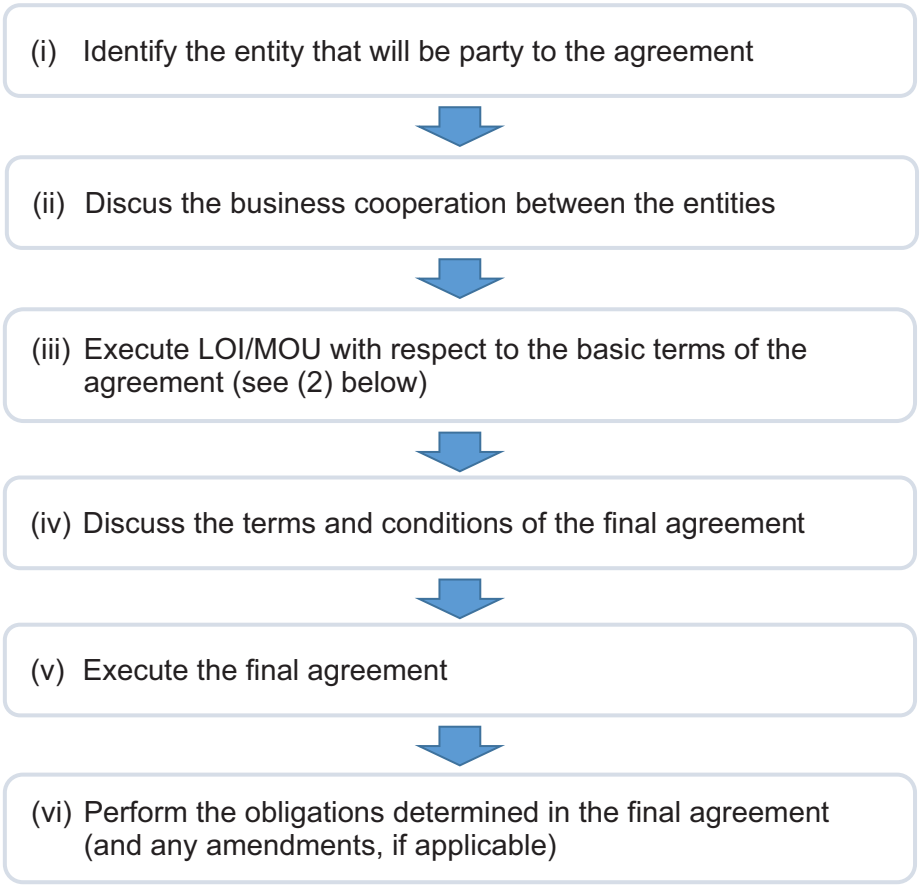
- Share Purchase Agreement: A contract between a foreign investor and a shareholder that sets out the terms under which a foreign investor will purchase a local company′s shares from the shareholder of such local company.

Even the terms of a contract for the sale of goods, which is a very common type of contract, become more complicated when a contract is for an international transaction. For example, as the subject goods must be transported internationally, various matters such as the transportation method, the timing of the transfer of ownership and the handling of any damage to the goods in the transportation process, are all matters that the parties should agree to in advance. A party must make payment of the purchase price for the goods by international remittance . Due to this complexity, the parties must determine the details for these matters in a contract, even in a sales contract. In addition, under the sales contract, the purchaser is sometimes required to resell the goods in a certain area (a distribution contract).

(b) Execution process

The flow chart below is an example of the typical negotiation process of an international contract. The process involves several steps and often requires several weeks, or even several months, to execute. The reasons for this lengthy process include: (i) unlike a contract between natural persons, entities must agree to numerous complicated terms and conditions in contracts with other entities, (ii) a foreign entity is often a large scale organization that requires a long period of time to make a decision, and (iii) the parties to the contract may first confirm the basic economic conditions, and then proceed to, on a step-by-step-basis, consider the

feasibility and risks of the contemplated business in the course of negotiation of the detailed terms and conditions of the contract.



(c) **Failure of negotiations**

Negotiations between parties of different nations sometimes fail, and the parties are unable to execute a definitive contract

For example, it is common for parties to not execute an MOU or LOI, or execute an MOU or LOI but, after engaging in discussions regarding the details of the terms and conditions, determine not to execute a definitive contract.

From a business perspective, although there is a possibility that the negotiations will fail, if a party does not start negotiating, the party will not be able to engage in any business cooperation activities. If a party starts negotiating, there is always the possibility that such negotiations will fail; however, it will not likely harm the party because in international business practice, the reputation of the parties will not be harmed even if the negotiations are unsuccessful. As a result, a party cannot make a valid claim (including those claims arising from tort) by stating that the party has suffered damage to its reputation as a result of such failure; on the contrary, a party that has decided to suspend further negotiation should not be treated in a disadvantageous manner due to such decision.

(d) **Language**

Except in cases where there is a particular legal restriction on the language of contract, the parties to a contract may select the language of the contract. As each party will not be forced to execute a contract in a language which it cannot

understand, once the contract is executed, a party may not deny the validity of the contract on the basis that it does not understand the language of the executed contract. Courts should understand this concept and interpret the terms and conditions of the contract based on the assumption that the validity of a contract will not be determined based on the fact that the contract was executed in a foreign language.

It is a widely accepted in business practice that the most common language of international contracts is English because parties to business contracts with different native languages typically conduct the contract negotiations in English.

In Myanmar, the parties to a contract sometimes execute contracts in both English and Myanmar. The terms of the contract will usually determine the language that will prevail if there is a discrepancy between the English version and the Myanmar version. Courts should respect the agreement between the parties regarding the priority of language.

(2) **MOUs and LOIs**

(a) **Definition**

A memorandum of understanding (MOU) , and a letter of intent (LOI) are types of agreements that outline the basic terms and details of an understanding between two or more parties who are in the early stages of negotiation and aim to execute a definitive contract. These agreements may have titles other than "MOU" or "LOI", such as "Term Sheet". However, the contents of the agreement are more essential than the title of the document. Courts should not determine the treatment of a document based simply on its title.

MOUs and LOIs are commonly used in international transactions because the parties are able to continue their negotiations of the detailed definitive contract by determining the mutually accepted basic terms of the parties described in the MOU or LOI. On the other hand, the parties sometimes decide to terminate negotiations if the parties are unable to agree on the basic terms of the MOU or LOI.

The parties usually agree to the following terms in the MOU or LOI:

General provisions, including a description of the transaction, type of transaction, quantity and price Timeline for the execution of the definitive contract, including the target execution date Non-binding (see (2)(b)) Confidentiality (see (2)(c)) Exclusivity (see (2)(d))

(b) **Legally non-binding**

Case Study

Q: Company X, a foreign company, and Company M, a Myanmar company, executed a non-binding LOI in the process of negotiations to establish a joint-venture company. However, the parties were unable to reach an agreement on the economic terms of the joint venture company, and did not execute a definitive contract. Company M

made a claim that Company X breached the LOI and demanded compensation for damages (including expenses incurred by Company M during the negotiations and compensation for information of Company M disclosed in the negotiation process) caused by Company X's breach of the LOI. Will this claim prevail?

A: As the LOI was not legally binding, Company X was not under a legal obligation to execute a definitive contract, and Company M's claim for damages based on the argument that Company X violated the LOI will not prevail.

As set forth in 1(1)(c) above, even if the parties have executed an MOU or LOI, the parties will execute a definitive contract based on their ability to reach an agreement with respect to the terms and conditions of the transaction after further detailed negotiation. This is common sense in business practice. If parties that executed an MOU or LOI had an obligation to execute a definitive contract pursuant to the execution of an MOU or LOI, they would be unable to record an intermediate agreement in writing; this consequence would be unreasonable in business practice[as the parties would be unable to record any mutually accepted basic terms in writing] . In this sense, it is reasonable that the parties include a provision that they intend that the relevant MOU or LOI be legally non-binding, and it is essential that courts honor that intent and treat the MOU or LOI as such. In the above Case Study, the claim made by Company M would not prevail.

Example Clause

X. Legally Non-Binding
The contents of this letter of intent are not intended to be legally binding on any party.

(i) **Negotiation expenses**
An MOU or LOI generally includes a confirmatory provision that states that each party must bear its own expenses for any costs associated with the MOU or LOI negotiation. However, even without this clause, generally, each party bears its own expenses. Because each party enters into negotiations for the MOU or LOI with the understanding that the negotiations may fail, the party will not be able to make a claim for consideration or compensation for the time and cost such party incurred with respect to such negotiation.

(ii) **Scope**
As we will explain below, MOUs and LOIs are often partially binding and consist of both non-binding and binding provisions. The provisions indicated as binding will be legally binding on the parties, while the other provisions will be legally non-binding.

(c) **Confidentiality**
It is an essential requirement in international business practice that the parties maintain confidentiality of business information disclosed in furtherance of the transaction. For example, in the Case Study in 1(2)(b) above, in the joint venture discussions, Foreign Company X will likely disclose to Myanmar Company M business secrets such as information with respect to its technology or cost calculations in order to encourage Company M to conduct internal discussions with respect to the joint venture under the condition that Company M keep the disclosed information confidential, as Company X will be unable to proceed smoothly with its negotiations with Company M if Company M leaks such confidential information to third parties, especially Company X's competitors.

Based on the reasons stated above, parties to an MOU or LOI generally impose a confidentiality obligation on the other party, and this confidentiality obligation is an exception to the general legally non-binding nature of the MOU or LOI and is typically included in the MOU or LOI as a legally binding provision. In addition to the MOU or LOI, the parties may also execute a contract specifically to determine the confidentiality obligations of each party at the discussion stage. This contract is often referred to as a "Non-Disclosure Agreement" or an "NDA".

Provision of information and failure of negotiations

It is not unusual for negotiations between the parties to fail even after the parties execute an MOU or LOI before the parties execute a definitive contract. If the negotiations fail, the party who disclosed its information (the "Disclosing Party") to the other party (the "Receiving Party") may be concerned that the Receiving Party will use the information for a purpose other than the negotiation of the definitive contract or leak the information to a third party. However, in the international transaction practice, it is generally accepted for a party to disclose its information to the other party before executing the definitive contract, and provide such information without charge. The Receiving Party is unable to determine whether it is in its best interests to enter into the proposed transaction without reviewing such information. For the above reasons, the parties will not be deemed to be under an obligation to execute a definitive contract based on the fact that the parties have disclosed confidential information. Further, neither party will be allowed to obtain compensation for the disclosed information or attempt to restrict the Receiving Party's future business operations.

Example Clause

X Confidentiality

1. The receiving party shall not disclose any of the confidential information to any person other than its affiliates and the receiving party's or its affiliate's directors, officers, employees and advisors, as reasonably necessary.

2. The parties intend that the provisions of paragraph 1 above are legally binding obligations of the parties, and that the remaining provisions are intended only as an expression of interest and are not intended to be legally-binding or enforceable against either party.

(d) **Exclusivity**

In international business practice, many parties prefer to engage in one-on-one negotiations in order to avoid other competing with other entities.

For example, in the Case Study in 1(2)(b) above, Company X may request Company M to refrain from "engaging in simultaneous discussions or negotiations for a business cooperation with any person other than Company X for a certain period (exclusivity)", and the parties may agree in the MOU or LOI that such exclusivity will be a legally binding obligation. The parties may also agree to set the period of exclusivity for a specific period of time (a practical period of time is generally three to six months).

Example Clause

X Exclusivity
During the period of [three (3)] months from the date of this LOI, Company M shall negotiate the contemplated transaction (the "Transaction") exclusively with X, and not engage in any discussions or negotiations with any party other than X and its advisers with respect to any transaction that will or is likely to impair or prevent the Transaction.

(e) **Remedies for violations of confidentiality and exclusivity obligations**
Courts shall provide remedies for a party able to provide evidence that the other party has violated the agreed and legally binding confidentiality or exclusivity provisions of the MOU or LOI.

The remedies shall be granted based on the explicit provisions that specify such obligations in the MOU or LOI. Even without such a clause, the party who committed the violation should compensate for the financial damage that the other party can prove was caused by the violation.

2. **Contract Interpretation**

(1) **Contract Function**
There are two major purposes for a party to execute a contract in an international transaction. These purposes are set forth below.

(a) **Clarification of rights and obligations and dispute prevention**
Entering into a written contract allows the parties to clarify the rights and obligations that arise in a complicated transaction and understand the contents of the agreement. In addition, during the contract drafting process, the parties have the opportunity to carefully confirm the contents of the contract and their rights and obligations thereunder; during this process, the parties often discover undecided points and controversial issues in the transaction. If the parties are able to resolve these points during the drafting process, they can avoid proceeding with a transaction based on different understandings and reduce the number of disputes that may arise due to unexpected events.

(b) **Evidence**
A written contract is a record that the parties have reached an agreement and is expected to serve as evidence if there is a dispute in relation to the agreement. A written contract can serve as objective evidence, as is not influenced by the memories of related parties.

(2) **Literal approach to contract interpretation**
When a party to a contract alleges that the other party has violated the contract and makes a claim that the other party provide a remedy for the violation, the court must interpret the terms of the contract at issue and clarify the rights provided and obligations imposed by the contract.

When interpreting a contract, the court must objectively determine the intent of a reasonable person to such an agreement. In this determination process, the courts may not consider the subjective intent of a party.

Literal Approach

(a) **Definition**

Courts must objectively engage in the literal approach to interpret the meaning of a written contract. This is characterized by the following concepts:

(i) A basic principle of contract interpretation of a written contract is that the intent of the parties must generally be obtained from the document itself.

- If the intent of the parties at the time the contract was executed is clear, the court will not consider the pre-contractual circumstances.
- The court should not review only certain portions of the contract, but read the contract as a whole.

(ii) The terms of the contract should be construed in accordance with their plain and literal meaning.

(b) **Rationale**

There are two rationales for the literal approach:

(i) If a contract is supplemented with terms not included in the written contract, the parties will no longer be able to have the security that they will be bound by the written contract that they executed, and the court may be able to create new terms that are contrary to the agreement made between the parties; and

(ii) A written contract is made after long negotiations and prudent consideration, and is likely to accurately reflect the intent of the parties.

(c) **Major exceptions**

There are two main exceptions to the literal approach:

(i) If the language of a contract is unclear, courts may consider the surrounding circumstances, including the facts in the negotiation process, the market practice, customary or general trade practice of the industry and other external objective circumstances not written in the contract. This exception exists because the court cannot construe the intent of the parties from the unclear language of the contract. Therefore, in the case of such an exception, the court is allowed to consider these circumstances in order to construe the intent of the parties.

(ii) If the literal meaning of a contract is clearly contrary to business common sense, the court may consider the surrounding circumstances not written in the contract. If the interpretation of the literal meaning of a contract is clearly contrary to business common sense, the language is also likely to be contrary to the reasonable intent of the parties. However, because the intent of the parties is usually reflected in the written contract, in **the court should consider such external circumstances only in restricted cases**. It is essential that the court verify the standard of business common sense when a court interprets a contract contrary to the written language.

(3) **Parol evidence rule**

(a) **Definition**

The parol evidence rule is a common law principle that if the parties have set out an agreement in a writing intended to be a complete document, the agreement cannot be modified by extrinsic evidence of earlier or contemporaneous agreements that might add to, change, or contradict the writing. Under this rule, **courts must not admit pre-contractual extrinsic evidence that alters the meaning of the written contract.**

(b) **Rationale**

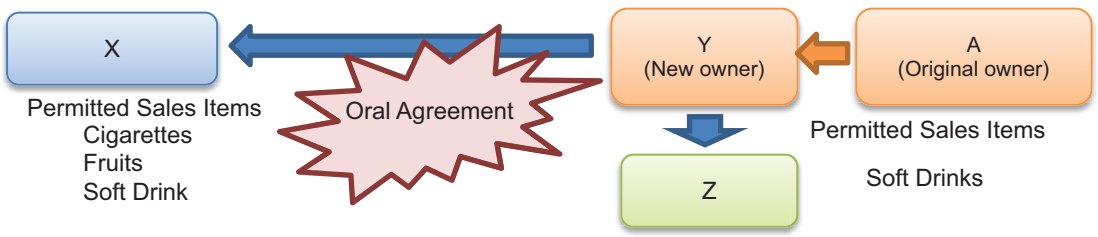
There are two rationales for the parol evidence rule:

(i) Even if the parties to a contract have entered into various agreements, the parties are usually set out their intended agreements in a definitive contract.

(ii) The parol evidence rule principle incentivizes parties to set out all essential items of their agreement in the definitive contract, and encourages the parties to use clear contract language.

Case 3-a

Company X leased part of a building from Company A, the owner of the building, and sold cigarettes, soft drinks and fruits at the leased facilities. Subsequently, Company A transferred the ownership of the building to Company Y, and Company X and Company Y then executed a new lease agreement. The new lease agreement included an additional provision that "Company X is not allowed to sell cigarettes in the building"; and further, **Company X and Company Y orally agreed that Company X will be the only lessee in the building allowed to sell soft drinks**. However, Company Y leased another part of the building to Company Z, and Company Z started selling soft drinks in its leased facilities. The lease agreement between Company Y and Company Z does not prohibit Company Z from selling soft drinks in the building. Company X made a claim for damages against Company Y on the grounds that Company Y violated the contract. If Company X submits to the court evidence of the oral agreement with Company Y, should the court admit this information?



In the case above, under the parol evidence rule, the court may not admit evidence of the oral agreement between X and Y that X is the only lessee allowed to sell soft drinks in the building because the oral agreement would be considered extrinsic evidence that would contradict the purpose of the written agreement.

(4) **Interpretation of a contract in the absence of a statute**

Myanmar is currently in the process of drafting laws in areas related to international transactions, but there are still certain areas that remain unaddressed by the current legal system.

For example, certain countries in the EU, the Middle East and Latin America have a special law that protects sales agencies. These laws were enacted for the purpose of protecting small and medium-sized sales agencies with businesses that rely on the sale of a specific product. However, in Myanmar, these laws do not exist, and without this law, courts in Myanmar may not interpret a contract in favor of sales agencies. Whether these laws exist or not is a social policy issue that should be addressed through legislation by Parliament. Further, if the parties to a contract had the opportunity to decide whether to enter into the contract (in other words, the parties were not forced to enter the contract), it would be contrary to the intent of the

parties and unjust if the contract was interpreted in favor of one party with consideration for statements and facts not included in the written contract.

Essential Points

- A contract will generally be interpreted based solely on the written language included in the contract language. As a general rule, courts will not consider matters not included in the written contract (such as facts in the negotiation process and generally accepted transaction practices in the industry). The courts may consider statements and facts not included in the written contract only in special circumstances, such where the language of the contract is obviously inconsistent with business common sense.

- Courts must not admit pre-contractual extrinsic evidence that alters the meaning of the written contract.

- In the absence of a statute, courts must respect the intent of the parties to a contract.

3. Standard Structure of Contract

(1) Standard structure

(a) Diversity and complexity of international contracts

The structure of an international contract is, in general, as follows:

Agreement	**Title**: The name of a contract is usually stated in order to distinguish it from other contracts.
This agreement is entered into on April 1, 2017 by and between A and B	**Execution Date**: **Parties**: Information to identify the party entities, such as the location of the party's head office and country of incorporation.
WITNESSETH: WHEREAS, […] and WHEREAS, […]; NOW, THEREFORE, in consideration of the foregoing and the obligations hereunder, the parties hereto agree as follows:	**Preamble**: The history and background of the contract and the roles of the parties. Information about other related contracts are also included in this section.
Article 1. Article [ ]	**Operative Provisions**: These provisions determine the rights and obligations of the parties.
IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized representatives as of the day and year first above written	**Closing**: The concluding clause includes standard language such as the language on the left.
A: [Signature] B: [Signature]	**Signature**: The person of each party who is authorized to sign the contract shall be the signing party to the contract. In addition to the parties, witnesses also sometimes sign.

Essential Points – Signature of Witness

- Requirements that an international contract be signed in front of a witness are not customary.
- Under Myanmar contract law, a witness signature is not required to form a legally valid contract unless expressly required by other valid laws.
- The court should not invalidate a contract or use the lack of witness signatures as an evidence to dispute the strength of the contract, unless the governing law of such contract clearly requires such signature to form a valid contract.

(2) **Standard clauses**

An explanation of the standard clauses that can be found in most contracts, regardless of the type of contract, is below:

(a) **Definitions**

Except as otherwise set forth herein, capitalized terms used herein have the following meanings:
(a) "Agreement" has the meaning set forth in the preamble clause.
(b) …

The definitions section defines the terms used in a contract.

(b) **Representations and warranties**

A represents and warrants that, as of the date hereof and the closing date, the statements set forth in this Article are true and correct.
(a) A is duly organized, validly existing and in good standing under the law of its respective jurisdiction of organization.
(b) …

A party makes assertions and promises regarding certain matters to the other party in the representations and warranties clause. In the case the party making such representations and warranties violates them, the other party will be entitled to certain remedies such as compensation and the right to terminate the contract. The parties generally prepare a separate clause that sets out such remedies separately.

The representations and warranties clause has the following functions:

(i) As the party may be required to pay a penalty for breaching any of the representations and warranties, the party is encouraged to make accurate disclosures to the other party.

(ii) The terms in the representations and warranties clause can be used to reasonably allocate risk between the parties with respect to potential violations.

(c) **Conditions precedent**

The obligations of Purchaser to consummate the transactions contemplated by this

> Agreement are subject to the satisfaction, on or before the closing date, of each of the following conditions:
> (a) All of the covenants and obligations that A is required to perform or comply with under this Agreement on or before the closing date must have been duly performed and complied with.
> (b) …

A condition precedent is a condition that must be fulfilled before a party is obliged or required to perform an obligation.

For example, in a sales contract, the parties may agree that the purchaser will be obligated to make payment to the seller (i.e., to pay the sales price) on the condition that the seller deliver the goods to the purchaser.

Parties to a large-scale transaction, such as a merger or acquisition transaction, generally determine the detailed provisions of conditions precedent because the transaction is difficult to undo after it is implemented.

(d) **Indemnity**

> A shall defend, indemnify and hold harmless B, its affiliates, directors, officers, agents, employees and/or customers from and against any and all claims, actions, demands, legal proceedings, liabilities (including product liability), damages, losses, judgments and settlements at A's expense and pay any and all costs, claims, liabilities, expenses and damages (including experts' and attorneys' fees) arising out of:
> (a) any failure by A to perform any applicable obligation of A in this Agreement;
> (b) …

The parties to the contract may include an indemnification clause in order to allocate risk between the parties or provide certainty for the parties to pursue certain rights if the other party violates the contract. For example, an indemnification clause usually sets out that, in addition to the party to the contract, such party's employees or directors are included within the scope of the indemnification, and that damages as well as liability to third parties and attorney's fees also fall within the scope of the indemnification.

(e) **Term**

> This Agreement shall be effective upon the execution hereof and shall continue in force for a period of two (2) years, and thereafter shall be automatically extended for successive periods of one (1) year each, unless either party otherwise notifies the other party in writing at least three (3) months prior to the expiry of this Agreement or any extension thereof.

The parties to a contract generally include in the contract a clause that sets out the length of time that a subject transactions is expected to continue and the terms of renewal for the contract. These types of contracts include, for example, distribution contracts, license agreements and joint venture agreements. The contract will generally complete at the time the term expires.

The parties may decide to renew the contract in the future, generally at the expiration of the term. In contemplation of these situations, the parties often set out an automatic

renewal clause in order to ensure that the parties do not need to execute the same contract again in order to continue the relevant transaction.

(f) **Termination**

> Either party hereto may immediately terminate this Agreement by giving a written notice to the other party under any of the following circumstances:
>
> (a) If the other party fails to perform any of the obligations under this Agreement and such failure is not cured within a reasonable time not exceeding sixty (60) days after its receiving a written notice requesting a remedy thereof.
>
> (b) …

The parties set out the circumstances or conditions that will allow a party to terminate the contract in a termination clause, which include a violation of the contract, and take into consideration the nature of the contract.

(g) **Boilerplate terms**

Boilerplate terms are often included in a variety of contracts and are standard provisions that are at the end of the main body (after the operational provisions). Boilerplate terms usually include the following terms.

(i) **Confidentiality**

> All of the parties hereto agree not to disclose, without prior written consent from the other party, the confidential information it receives from the other party under this Agreement.

This clause prohibits each party from disclosing or leaking to a third party any confidential information related to the contract that a party discloses to the other party, including the fact that the contract has been concluded and the contents of the contract.

(ii) **Governing law**

> This Agreement shall be governed by and construed in accordance with the laws of the Republic of the Union of Myanmar, without regard to its conflict of laws rules.

This clause sets out the law that will apply to the interpretation of the rights and obligations of the parties in the contract (please refer to Chapter 2, "Applicable Law to Contracts for International Transaction").

(iii) **Dispute resolution**

> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be Singapore. The Tribunal shall consist of one (1) arbitrator. The language of the arbitration shall be English. [SIAC MODEL Clause]

The dispute resolution clause sets out the method that a parties will use to resolve any disputes that arise out of the contract. Generally, the parties will resolve disputes through litigation, arbitration or mediation. If the parties select arbitration or mediation, the parties may determine the language, venue and applicable rules for the proceedings in the contract (please refer to Chapter 15, "International Jurisdiction and Agreement on Dispute Resolution").

(iv) **Assignment**

Neither party shall assign this Agreement nor any of its rights, interests or obligations hereunder without the prior written consent of the other party.

This clause prohibits the parties from assigning their contractual rights and obligations to a third party. This clause is included to ensure that a party does not become contractually involved with a third party through the assignment of the contractual rights and obligations by the other party without its prior consent.

(v) **Force majeure**

Neither party shall be liable to the other party for a failure or delay in the performance of any of its obligations under this Agreement for the period and to the extent such failure or delay is caused by riots, wars (declared or undeclared), governmental laws, orders or regulations, actions by the government or any agency thereof, acts of God, storms, fire accidents, strikes, sabotage, explosions, or other contingencies beyond the reasonable control of the respective parties.

This clause expressly sets out the terms that will excuse a party from performing its obligations under the contract for a breach that is caused by an unforeseeable event and beyond the party's reasonable control.

(vi) **Entire agreement**

This Agreement, including all supplements and schedules, constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understanding or representations, oral or written between the parties hereto regarding such matter.

This clause sets out that the relevant contract is the only contract between the parties concerning the transaction, and any agreements made prior to the execution of the relevant contract are not incorporated. This concept is in conformance with the parol evidence rule and confirms the understanding between the parties that the relevant contract will be prioritized over any related agreements.

(vii) **Amendment**

This Agreement may be modified or amended only in writing, signed by duly authorized representatives of both parties.

This clause sets out that an agreement in writing is required to amend or modify the contract. It expressly excludes oral agreements from having an effect on the validity of a contract, regardless of whether the oral agreement is made after the contract is executed.

(viii) **Notice**

Any notice given by either party in accordance with this Agreement shall be made in writing and delivered by fax and by registered mail or by courier, addressed as first set forth, or to other addresses as the parties designate by prior written notice.

This clause sets out the method that the parties must use to provide the other party with notice (such as registered mail, facsimile, E-mail and other methods) under the contract. This clause is included in order to clarify the method of communication for matters that may affect the contract.

(ix) **No waiver**

Failure by either Party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision.

"Estoppel" is a common law principle that prevents a party from asserting a claim or right that contradicts such party's prior statements or actions or a fact that has been legally established as true. According to the principle of estoppel, a party is prohibited from asserting a fact that contradicts such party's prior statements or actions if the opposite party has acted in reliance on that statement or action.

As a result, even if a party has a contractual right, the other party may assert a claim of estoppel if the party continuously failed to exercise the contractual right but later attempted to exercise such contractual right, and the court may determine that the party's failure to exercise such right resulted in the right being waived.

This clause is included to ensure that a party's failure to assert its contractual rights will not be determined to be a waiver of such party's contractual rights.

(x) **Severability**

If any provision of this Agreement is determined to be invalid or unenforceable, the provision shall be deemed to be severable from the remainder of this Agreement and shall not cause the invalidity or unenforceability of the remainder of this Agreement.

This clause sets out that even if part of the contract is unenforceable, the unenforceable provision should be treated as separate from the remainder of the contract, and the remainder of the contract will continue to be treated as valid. The purpose of this clause is to ensure that, to the extent possible, the contract remains valid.

(xi) **Language**

The English language text of this Agreement shall be the only binding version. Any translation hereof shall have no legal effect.

This clause sets out the effective language of the contract. As we have explained before, the parties may select the language of the contract. Courts must respect the parties' choice and interpret the contract based on the language selected by the parties.

Chapter 4
Sales Contracts

1. Standard Terms and Conditions

The seller and the purchaser are the parties to a sales contract. Key obligations in the sales contract include the following:

Seller:	Deliver the subject matter promised in the contract to the purchaser
Purchaser:	Pay the price promised in the contract to the seller

We will explain key terms and conditions in the sections below based on the assumption that the seller and the purchaser are entities established in separate countries. As the terms and conditions described herein are based on examples that are widely recognized in the international sales practice, if a dispute arises with respect to the sales contract, the resolution of such dispute shall be made with due consideration of all terms and conditions in a sales contract that result from negotiations between the parties.

- ✓ Agreement on the subject matter and the price
- ✓ Delivery of the subject matter (II.2)
- ✓ Payment of the price (especially payment by L/C) (II.3)
- ✓ Warranty (II.4)

2. Delivery of the Subject Matter

(1) Risk of loss

In an international sales transaction, there is a gap in the time and distance from the seller sends out the subject matter to the purchaser's receipt, and there is a possibility that the subject matter may be lost or damaged in the course of transportation. There will be an issue of determining which party is responsible for the risk of such loss if there is no clear provision in the contract that specifies the party responsible for such losses or damage.

In the international sales practice, the parties to a contract usually agree as follows: the parties determine a specific a point in time that will determine the point at which the risk of loss will transfer from the seller to the buyer. If the subject matter is lost or damaged after that time, the purchaser must pay the price as originally agreed regardless of whether the purchaser fully receives the subject matter. This passing of the risk of loss "at a certain point in time" is called the "transfer of risk of loss" and agreed between the parties in the contract.

For example, if the parties agree that the risk of loss will transfer from the seller to the buyer at the time the seller completed loading the subject matter onto a cargo ship, if the subject matter is lost for some reason after the seller loads it onto the cargo ship but before the purchaser receives delivery, the purchaser is still required to pay the full price to the seller.

(2) Incoterms

In an international sales transaction, in most cases, the parties negotiate, on a case-by-case basis, the distribution of responsibilities between the seller and the purchaser regarding the delivery of the subject matter (for example, which party is responsible to engage a carrier and execute a contract for the carriage of goods and obtain an insurance policy for such goods) and the point in time at which the risk of

loss is transferred, which we explained in the above 2(1). The parties expressly set forth their agreement in the sales contract.

Today, there are certain pre-determined commercial terms and conditions that are used in practice which have developed as a result of numerous international transactions between various parties conducted over a long period of time. The International Chamber of Commerce ("ICC") organized these as "Incoterms" for the first time in 1936. Incoterms have been revised several times since then, and the most recent version as of September 2018 is the 2010 version. The Incoterms are widely used in international sales transactions.

Incoterms determine the rules for the modes of transport. The terms FOB (Free on Board) and CIF (Cost, Insurance and Freight) are often used in practice for sea and inland waterway transport. The point of delivery for both FOB and CIF is the point in time that the subject matter of a sales contract is delivered onboard the ship for transportation, which is the point in time at which the risk of loss is transferred from the seller to the buyer. However, the responsibilities of each party with respect to the carrier and insurance differ between FOB and CIF. Under FOB, the buyer will bear the burden for the carriage and insurance, but under CIF, the seller will bear the burden. Please refer to the table below.

	Delivery	Risk transfer of loss	Arrangement of carriage	Arrangement of insurance
FOB	On board	On board	**Purchaser**	**Purchaser**
CIF	On board	On board	**Seller**	**Seller**

The parties will consider the business circumstances of the parties in determining the mode of transport; for example, which party can arrange the carriage or insurance at a lower price, or which party wants to control the timing of the loading of the subject matter onto the ship.

3. **Payment (especially payment by Letter of Credit)**

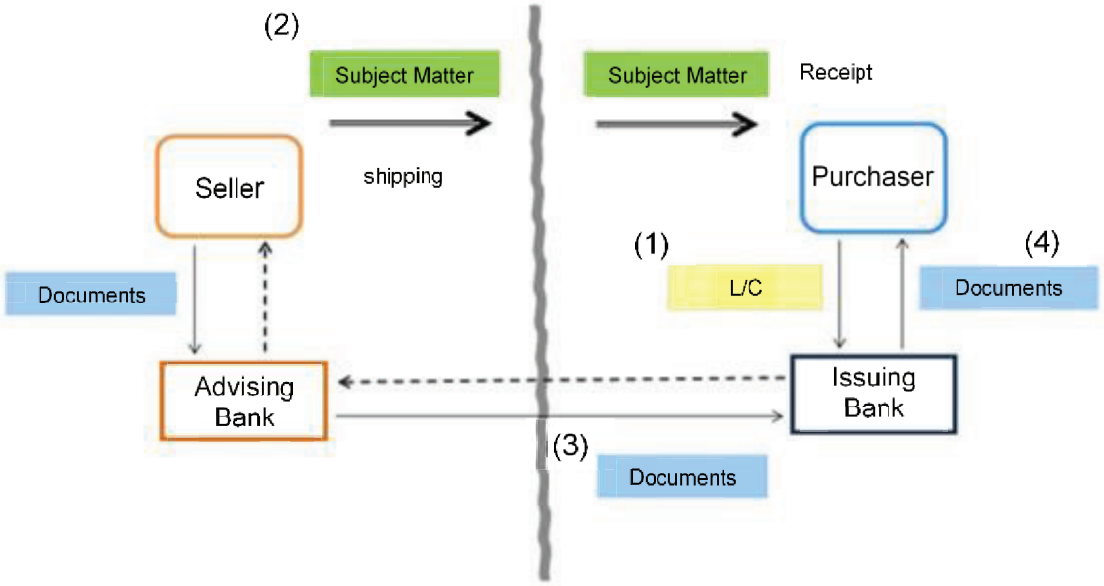
(1) **Payment by a party in a remote location**

The payment of the contract price in an international sales transaction is, in principle, made at the same time as the delivery of the subject matter. However, as we saw in 2(1) above, transportation of the subject matter requires a longer period of time in international transactions, which makes it difficult to execute simultaneous payment.

Purchasers may immediately remit payment to the seller's bank account easily and at a low cost after receiving the subject matter. However, if the parties use this payment method, the seller must send the subject matter to the purchaser in advance without having reassurance that the purchaser will make payment upon receipt of the subject matter.

(2) **Outline of payment by Letter of Credit**

In order to provide reassurance to the seller, which we explained in 3(1) above, parties to international sales transactions may elect to execute payment by having a bank issue a L/C (Letter of Credit). A very rough structure of payment by L/C is as below:



(1) Pursuant to the request by the Purchaser, the Issuing Bank located in the Purchaser's country issues an L/C which lists the Seller as the beneficiary. Under this L/C, the Issuing Bank undertakes to make a certain payment on the condition that the related documents which satisfy the conditions described in the L/C (for example, a documentary bill and a bill of lading) are presented.

(2) When the L/C is issued, the Advising Bank located in the Seller's country notifies the Seller that the L/C was issued. After loading the Subject Matter onto a ship, the Seller presents the relevant documents to the Advising Bank and receives payment of the amount set forth in the L/C from the Advising Bank (after deduction of the bank commission fee).

(3) The Advising Bank presents the relevant documents to the Issuing Bank, and if the related documents are satisfactory, the Issuing Bank makes the payment to the Advising Bank.

(4) The Purchaser, an importer, is required to make payment of the amount paid by the Issuing Bank in item (3) to the Issuing Bank. In exchange for this payment, the Seller receives the relevant documents from the Issuing Bank and is entitled to receive delivery of the Subject Matter.

(3) **Caution in using Letter of Credit**

When making payment by L/C, an advising bank and an issuing bank each automatically make payment after confirming only the submitted documents. For this reason, the documents to be submitted for payment must be clearly set forth in the sales contract, and each party must carefully confirm the documents actually received.

On the other hand, as the seller will likely prefer not to ship the subject matter unless the issuing bank has issued a L/C, the seller must require that the purchaser promise in their sales contract that the purchaser will cause the issuing bank to issue the L/C by a certain deadline.

4. **Warranty**

(1) **Scope and contents of warranty**

It is not uncommon in international transactions for disputes to arise due to the difference between the expectations of the purchaser with respect to the quality and specifications of the subject matter and actual quality and specifications of the subject matter delivered by the seller. In these cases, the laws with respect to warranty of the country specified in the contract as the governing law will apply. For example, if Myanmar law is the governing law, the Sales of Goods Act (1930) will apply to the warranty dispute.

However, the law is often insufficient for parties involved in cases where the warranty issues are unique. For example, a seller may require the buyer to pay a higher price for the subject matter if the purchaser requires a stricter warranty for the quality of the subject matter (as compared to a different purchaser that prefers a cheaper price and is willing to accept the limited warranty of a different seller). As a result, in addition to the laws with respect to warranty of the governing law, the parties often agree to include in the sales contract additional warranty provisions with respect to the quality and specifications of the subject matter. These provisions often state that the laws of the relevant governing law are not applicable; in these cases, the courts must not apply the laws with respect to warranty of the governing law.

If the quality and specifications of the subject matter which the seller actually delivered differ from such quality and specifications agreed by the parties, the parties will generally resolve this matter in conformance with the remedies, such as replacement of the subject matter and liability of the seller to compensate the buyer for damage, in conformance with the terms agreed between the parties in the contract.

(2) **Inspection of the subject matter**

If the purchaser has a right under the contract to make a claim against the seller for violating the warranty provision after a considerable time from the delivery of the subject matter, the seller will be forced to remain in an uncertain position for an indefinite period of time regardless of the fact that the seller received payment of the purchase price and the purchaser received delivery of the subject matter.

In order to provide reassurance to the seller, the parties often agree to include a provision in a sales contract that the purchaser must inspect the subject matter within a certain agreed period of time after receipt, and the purchaser may not make a claim against the seller for violating the warranty provision unless the purchaser notifies the seller, within the agreed period of time, that the subject matter did not meet the standards set forth in the warranty provision.

Chapter 5
Distribution Agreement

1. **Distributor and Agent**

There are two main methods that a foreign seller may use to develop their goods with the cooperation of a local entity in the territory, which are as follows:

(1) **Distributor**

A local distributor purchases goods from a foreign seller and resells the goods to purchasers in the territory.

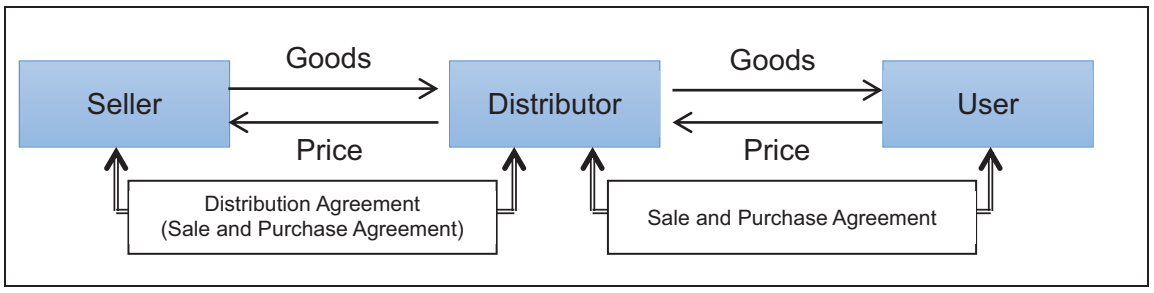
(2) **Agency**

A local agent conducts transactions in the relevant territory on behalf of a foreign seller, and receives a commission from such foreign seller when a sales contract is executed. Unlike a distributor, an agent does not purchase goods from a seller in the agent's name and has no contractual relationship with the local users for the goods.

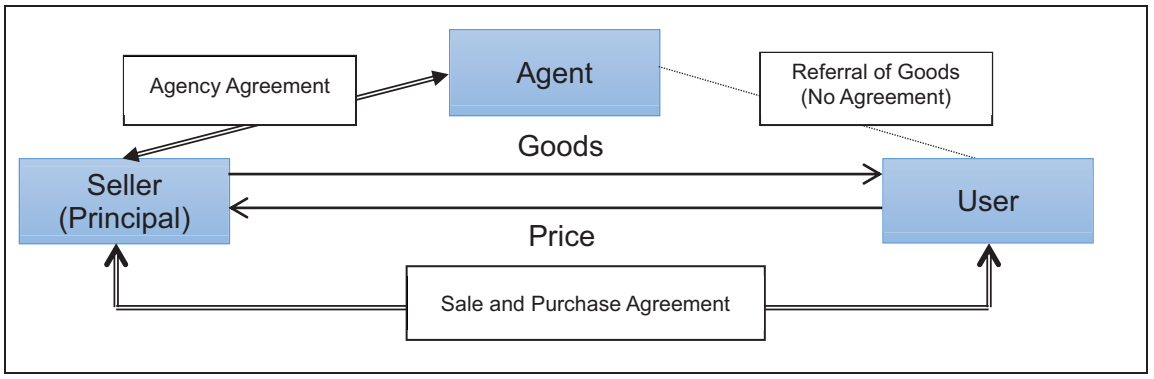
Despite the difference between distributors and agents, a distributor and an agent have a lot in common. Both serve as a intermediaries between a seller and the local user and are responsible for developing the seller's business in the territory. However, in an agency relationship, the foreign seller, not the agent, has a direct legal relationship with the local users, while in a distribution relationship, the end users are the customers of the distributor, not the seller.

We have focused mainly on the terms of a distribution contract in this textbook, as these types of contract are more common in practice.

Distribution Relationship



Agency Relationship



2. **Exclusivity/Non-Exclusivity**

(1) **Definition**

A seller sometimes agrees to grant marketing rights to certain goods to only the distributor within a defined territory, and agrees not to such grant marketing rights to other distributors or sell the goods directly to other customers within the territory. The right of the distributor in this situation is an "exclusive" right. There are benefits and disadvantages for a seller and a distributor in an exclusive distribution arrangement, some of which are set forth below:

	Seller	**Distributor**
Benefits	Reduce the costs for market development by concentrating on one sales channel.	Motivation to promote the seller's goods without concerns of other competing distributors.
Disadvantages	Number of distribution channels is limited to one distributor.	Sellers may prohibit distributor from selling similar goods of other sellers (non-competition), and require distributor to purchase an agreed minimum amount of goods in exchange for exclusivity.

A local distributor that executes a distribution agreement with a foreign seller is not guaranteed exclusivity. The seller and the distributor will determine through negotiations whether to appoint the distributor as the exclusive distributor. Each party will consider, when determining whether to enter into an exclusive or non-exclusive distribution arrangement, the nature of the goods, the benefits and disadvantages set out above and other circumstances, and the parties will determine and agree to enter into an exclusive or a non-exclusive distribution arrangement at their free will. Courts should respect the agreement between the parties regarding the exclusive or non-exclusive nature of the contract. If the terms of the contract do not include any provisions that indicate the parties agreed to an exclusive distribution arrangement, the courts should interpret the contract to mean that there is no exclusive distribution arrangement between the parties.

(2) **Can the seller to sell the goods directly to customers?**

In the case that the seller grants exclusivity to the distributor, there also arises the question as to whether the seller is allowed to directly sell the goods in the territory of the distributor. There are generally two scenarios: (i) the seller is prohibited from selling the goods directly in the territory, or (ii) the seller itself is allowed to sell the goods directly in the territory. The determination as to the agreement made between the parties is a question of contract interpretation.

The use of the term "exclusivity" does not automatically prohibit the seller itself from selling the goods directly in the territory of the distributor. If the seller is prohibited from directly selling goods in the territory, the parties should expressly clarify the terms of the prohibition in the distribution contract. If the distribution contract does not include any express terms, the seller should be considered to be permitted to directly sell the goods itself.

3. **Basic Terms and Conditions**
   (1) **Appointment of distributor/Exclusivity**

> (Appointment)
> The Seller hereby appoints Distributor as [the sole and exclusive/a non-exclusive] distributor for the sake of the Goods under the Trademark in the Territory, and Distributor shall accept such appointment.
>
> (Exclusivity)
> The Seller shall not appoint any person or entity as distributor or agent other than the Distributor in the Territory for distributing or selling the Goods.
>
> (Seller's Restriction (Direct Sale))
> The Seller shall not directly sell any of the Goods to any party other than the Distributor in the Territory.

The "Appointment" clause sets forth the terms of the seller's authorization of the distributor to sell the goods in the territory. The "Exclusivity" clause sets forth the terms of the distributor's exclusive distribution rights, and the "Seller's Restriction (Direct Sale)" clause prohibits the seller from directly selling the goods in the territory itself.

   (2) **Scope of marketing rights**

> (Definitions)
> The "Goods" mean those goods listed in Schedule [ ]
> The "Territory" means the geographical area listed in Schedule [ ]
>
> (Change of Goods)
> The Seller is entitled at any time to add, replace or delete any item of the Goods listed in Schedule [ ] with [ ] months prior notice.
>
> (Territory)
> The Distributor shall sell the Goods only in the Territory and shall neither solicit nor accept any order for the purpose of selling the Goods outside the Territory.
>
> (Trademarks)
> The Seller hereby grants the Distributor a non-exclusive right to use the Trademarks in the Territory with respect to the sale, distribution and servicing of Goods.

The contract should specify the marketing rights of the distributor, specifically the details of, and the territory in which the distributor is authorized to sell, the goods in order to clarify the scope of the marketing rights.

The goods and territory are usually defined in detail in the definition clause of a contract. A distribution contract is usually with respect to a long-term, continuous relationship. For example, there may be events for which the seller must increase or decrease the number of category of goods during the term of the contract, and in order to avoid any confusion or vagueness with respect to their agreement, the parties may include in the contract a clause that expressly allows the seller to increase or reduce the number of categories of the goods.

In addition, the seller will grant a license to the distributor for the use of the trademarks of the goods in a distribution arrangement because the distributor generally will sell the goods

using the seller's trademarks. A seller's trademarks, such as its corporate name and brand name, are the result of the company's efforts over a long period of time to improve the quality of its goods and to obtain the trust of their customers. Entities consider their trademarks as essential property to their business. Based on these circumstances, a distributor is not necessarily granted the right to use the seller's trademarks for the sole reason that the distributor is allowed to sell the goods provided by the seller; the scope of use for the seller's trademarks will be determined by the seller in the contract.

(3) **Non-competition**

> The Distributor shall not manufacture, represent, sell or import other goods that are competitive with the Goods in or into the Territory, or shall not have any direct or indirect interests in such manufacture, representation, sale or importation.

In exchange for the exclusivity granted by the seller, a distributor is often prohibited from dealing with goods that compete with the seller's goods (the clause that sets forth this obligation is called a "non-competition clause.").

The non-competition clause generally restricts or prohibits a distributor from dealing with competing goods during the term of a contract, and also extends even after the termination of the contract in order to maintain confidentiality and to prohibit misappropriation of know-how of the seller's goods.

(4) **Minimum guarantee of quantity to purchase**

If the seller only sells their goods only through the distributor in the agreed territory under an exclusive distribution agreement and the distributor does not effectively develop the sale of the goods in the market, the seller will be unable to develop the market development in the territory unless it changes the distributor. For this reason, in order to stimulate marketing efforts, the distributor is often obliged to guarantee a minimum purchase quantity.

A violation of this obligation (if the distributor does not purchase the guaranteed minimum quantity) may be, in the same way as the violation of other contractual obligations, cause for the seller to terminate the distribution contract or demand compensation for damages.

(5) **Sales promotion**

> (Sales Promotion)
> The Distributor shall at its cost solicit business, promote the sales of the Goods, serve customers in the Territory, and use its best efforts towards obtaining a sales volume favorable to the Seller.
>
> (Sales and Marketing Policy)
> The Distributor shall comply with the general sales and marketing policies of the Seller and the Seller may issue directions from time to time to the Distributor to ensure such compliance. All sales promotional materials or plans of advertisements for the Goods to be used by the Distributor shall be subject to Seller's prior approval.
>
> (Distributor's Restriction)
> The Distributor shall not (i) open a new store or close any of the existing stores, (ii) modify interior or exterior store design, or (iii) procure or store any goods other than the Goods, without the prior written consent of the Seller.

In order for a seller to successfully develop the market of its goods, sales promotions, advertisements and publicity in a certain territory, the distributor is imposed with an obligation to engage in these actions.

As we explained above, trademarks are essential property for the seller's business, and the advertisement and sale methods (including the interior and exterior decoration of shops) have a great impact on consumers. If each distributor is given the freedom to use its own style, the original brand value of a seller may be damaged. In order to maintain their brand value, the distributor is often obliged to comply with detailed terms and conditions on sales promotion that are set forth in the distribution agreement.

(6) **Term**

(Term)
This Agreement shall come into force on the date hereof, and shall remain in force for two (2) years from the date hereof. This Agreement shall automatically expire at the end of the said two (2) years, unless expressly renewed by mutual written consent signed by both parties at least six (6) months prior to the expiration date.

(No Renewal)
Neither the acceptance by the Seller of an order from the Distributor nor the continued sale of any of the Goods by the Seller to the Distributor nor any other acts of the Seller after expiration or termination of this Agreement shall be construed as a renewal or extension of this Agreement for any further term or as a waiver of the expiration nor as a termination.

(Post-Termination Obligation)
Immediately upon the expiration or termination of this Agreement, the right and license granted herein shall be revoked and terminated and shall no longer have any force or effect, and the Distributor shall immediately cease all use of the Trademark, and thereafter, the Distributor shall not use, either directly or indirectly, the Trademarks, or any trademarks, trade names, service marks or other words or design marks which may be similar to any of the Trademarks. The Distributor shall destroy, or return to the Seller, all advertising and promotional materials bearing Trademarks, including, but not limited to, manuals, samples and catalogues.

(Exemption of Compensation)
The Seller shall not be liable to the Distributor due to termination of or refusal of extension of this Agreement, for any compensation, damages on account of present or prospective profits on sales or anticipated sales or on account of expenditures, investment or commitments made in connection with the business of the Distributor in any manner.

The execution of a distribution agreement may, depending on its contents, restrict the number of sales channels available to the seller. As the marketing and sales potential of the distributor will have a significant effect on the seller's business in the local market, if the distributor is unable to achieve an expected result, the seller must terminate the distribution agreement with the distributor and form a new relationship with a distributor that is able to assist the seller reach its goals.

Many distribution agreements usually set forth the term of contract and provide that the contract automatically expires at the end of the term. This clause allows the seller to, at the

termination of the contract, find another better distributor and let the new distributor market and sell the seller's goods.

Upon the termination of the distribution agreement, the distributor is required to stop using the seller's trademarks and return or destroy any sales promotional documents which contain the seller's trademarks.

Unless otherwise determined in a distribution agreement, the distributor generally does not have the right to demand that the seller pay for the costs incurred by the distributor for the sales of seller's goods , as the distributor is solely responsible for any costs that it incurs in order to sell the goods which the distributor purchased from the seller.

The distribution contracts generally expressly state the legal effects of termination or expiration of the distribution agreement in a termination clause, as shown in the examples above.

Chapter 6
Matters Related to Employment Contracts

1. **Employment Contracts**

(1) **Definition**

Employment contracts refer to contracts between employers and employees with respect to the agreed conditions of employment.

In Myanmar, the Employment and Skills Development Law (the "ESDL") regulates employment contracts. After an employer hires an employee, the employer is required to execute an employment contract that includes the following contents:

(1) Title of job	(12) Ferry service and travel
(2) Probation period	(13) Internal rules for employees
(3) Wages/Salary	(14) Period for an employee to work after joining the training arranged by the employer
(4) Place of work	(15) Retirement and dismissal
(5) Duration of contract	(16) Termination (at the convenience of the employer)
(6) Working hours	(17) Contractual obligations
(7) Rest days, holidays and leave	(18) Termination agreed by the employer and the employee
(8) Overtime work	(19) Other items
(9) Meals during working hours	(20) Revision and addition
(10) Accommodation	(21) Miscellaneous
(11) Medical treatment	

(2) **Principle of Party Autonomy**

The ESDL lists only the items to be stipulated in an employment contract, and does not provide a method to concretely determine each item. According to the principle of party autonomy, as long as an employer and an employee agree to the terms of the employment contract and address all of the items set forth above, the employment contract will be deemed to be validly executed.

(3) **Modification by Law**

(a) **Mandatory provisions**

On the other hand, from the viewpoint of protecting employees, who are in a weaker position economically than employers, there are various labor-related laws which restrict the conditions that employees may include in employment contracts. If these restrictions cannot be overridden by the agreement of the parties to an employment contract (these provisions are referred to as "mandatory provisions"), the agreement between an employer and an employee must comply with such restrictions.

Example 1

Employers and employees, in principle, have the right to freely negotiate and agree to the amount of wages/salary for each employee.
On the other hand, the Minimum Wage Law and Minimum Wage Rules set forth the minimum wage (4,800 kyat per day in May 2018).

Even if an employer and an employee agree that the employee will receive wages/salary in an amount that is less than the minimum wage, it is generally understood that they may not execute an employment contract for such wages/salary in an amount

less than the minimum wage (in other words, the statutory provisions on minimum wage are mandatory and must be complied with). This requirement is imposed on employers and employees in conformance with the purpose of the minimum wage statutes, which is to protect the minimum standard of life for employees who would be negatively impacted if employers were allowed to execute employment contracts for wages/salary less than the minimum wage.

Interpretation of the mandatory statutes

As not all restrictive provisions in the law are mandatory provisions, it is important to carefully consider whether the provision should be interpreted as mandatory. For example, even in the model employment contract prepared by the Ministry of Labor, Immigration and Population, there is a statement that an employer and employee may mutually agree to amend the provisions of the model employment contract unless the revision infringes the labor rights of either party provided by labor laws. Consequently, the terms of the model employment contract itself are not mandatory in nature, and employers and employees are not necessarily required to use the model employment contract, but may execute a separate employment contract in an agreed format; provided that the terms of the employment contract do not infringe on the labor rights provided by labor laws.

(b) **Items not determined under law**

The principle of party autonomy applies to employment contracts as explained above, and an employer and an employee may freely agree to include provisions in the employment contract other than the items regulated by laws of mandatory application.

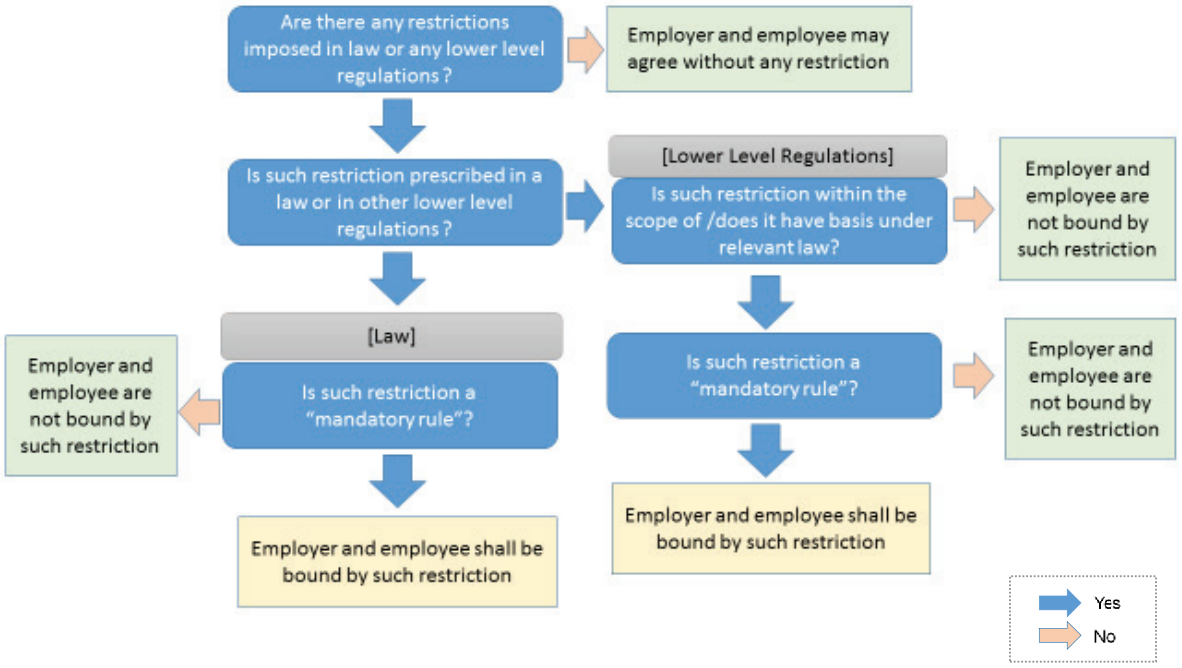
Restrictions not determined under law

If there is no restriction provided in the relevant labor law, if the law allows a labor related authority to formulate subordinate legislation such as regulations, employers and employees may nevertheless be required to comply with these regulations to the extent required under law.

On the other hand, if there are no labor laws that require a labor related authority to formulate subordinate legislation such as regulations, the authority may not formulate regulations that restrict agreements made freely by parties to an employment contract. This appears to be a natural consequence of the “rule of law” and “separation of powers” Principles.

(c) **Summary**

The following items should be considered in the interpretation of an employment contract.



(4) **Case studies on key items**

	Restrictions in labor laws and their regulations	**Restrictions on contractual agreement**
(1) Term of contract	None.	None.
(2) Minimum wages	Minimum Wage Law and Minimum Wage Rule.	Agreement to an amount less than the minimum amount provided by the law or the rule prohibited.
(3) Payment conditions of wages	Payment of Wages Law sets forth the timing for payment and allowable deductions.	Agreement between an employer and an employee must comply with the provisions of the law.
(4) Overtime pay	Factories Act and the Shops and Establishments Act require that employees receive additional payment for working over the statutory working hours. The rates for such additional payment are determined under The Factories Act (two times the ordinary rate) and the Shops and Establishments Act (determined in the law)	Prohibited from entering into an agreement to pay wages less than the statutory overtime payment
(5) Upper limit of working hours	Shops and Establishments Act: Eight hours per day, 48 hours per week. Factories Act: Eight hours per day, 44 hours per week.	Prohibited from entering into an agreement for working hours that exceed the upper limit.

(6) Holidays	Shops and Establishments Act: At least one paid day off a week. Factories Act: Sundays are generally considered non-work days.	Prohibited from agreeing to work seven days a week without a day off.
(7) Leave	Leave and Holidays Act sets forth various types of leave categories	Prohibited from agreeing to leave days in an amount that is less than the amount of leave determined under law.
(8) Dismissal and disciplinary punishment	No particular provisions on dismissal or disciplinary punishment, but reduction of wages is allowed only where set forth in the Payment of Wages Act.	Allowed to freely agree on terms of dismissal or disciplinary punishment; however, reduction of wages is allowed only in cases set forth in the law.

Example 2

The Leave and Holidays Act provides that earned leave "may be carried over" to the following year if agreed between the parties, but casual leave and medical leave may not be carried over to the following year. What kind of agreement may the parties to an employment contract make?

The act simply sets forth that earned leave "may be carried over if agreed." It is understood that earned leave will be carried over if agreed in the employment contract and not carried over if not agreed in the employment contract. The parties may also agree in the employment contract that earned leave will not be carried over.

2. **Resolution of Labor Disputes**

The Settlement of Labor Dispute Law sets forth provisions regarding special treatment of settlements of labor disputes. Prior to filing an action to the court, the parties must first engage in conciliation proceedings

First, the employer and employee must attempt to resolve the dispute through a workplace coordinating committee (an employer with 30 or more employees is required to establish this committee (Article 3)) or by an employer (employers with less than 30 employees that have not established a workplace coordinating committee (Article 6 and 7).

If the dispute is not resolved within the workplace, the dispute must be brought to a conciliation body organized by a state government or a division government (Article 10). Such conciliation body divides disputes into individual disputes and collective disputes, and the proceedings explained below are commenced according to the type of dispute.

Definitions of Individual Dispute and Collective Dispute

An Individual Dispute is a rights dispute between the employer and one or more workers relating to the existing law, rules, regulation and by-laws; collective agreement or employment agreement.

A Collective Dispute is a dispute between one or more employer or employer

organization and one or more labor organization relating to the working conditions, the recognition of their organizations within the workplace, the exercise of a recognized right of their organizations, relations between the employer and workers, and which could jeopardize the operation of the work or social peace. This term also includes a dispute over rights or interests.

Notwithstanding these proceedings, even during the process of conciliation or arbitration, a party is entitled to institute criminal or civil proceedings before a competent court (Article 52).

(1) **Individual disputes**
A conciliation body will preside over the conciliation procedure. If a party is not satisfied with the conciliation resolution of the conciliation body, such party may file a lawsuit before a competent court in person or through a legal representative (Article 23).

(2) **Collective disputes**
A conciliation body will preside over the conciliation procedure. If the parties do not reach reconciliation, the conciliation body shall transfer the case to a dispute settlement arbitration body (Article 25).

If a party is not satisfied with the award made by the dispute settlement arbitration body, except if the case is with respect to essential services such as water supply, electricity, telecommunications and the like, such party may appeal to the Dispute Settlement Arbitration Council or implement a strike or lockout under law (Article 28). If the case is with respect to essential services, the party who is not satisfied with the award must appeal to the Dispute Settlement Arbitration Council. The award made by the Dispute Settlement Arbitration Council is effective from the date of the award, regardless of whether the parties approve the award (Article 35).

Summary

As stated above, pursuant to labor laws, resolution of a labor dispute is, first attempted through a variety of institutions established by law. However, the parties may also file a lawsuit in the court, and the court must carefully confirm whether the necessary steps required by law have been taken when determining whether to hear the complaint.

Chapter 7
Consumer Protection Law

1. **Principle in the Field of Consumer Law**

Even in transactions between entities and consumers, the rule of party autonomy applies and the entity and the consumer generally are free to determine the terms that will govern their arrangements in a contract.

2. **Importance of Consumer Protection and Applicable Law**

(1) Importance of consumer protection

Consumers are not given the opportunity to engage in a negotiation with respect to the contract terms offered by a selling entity. As a result, consumers are in a weaker position and do not have any bargaining power in any arrangements or transactions conducted with such selling entity. Governments have developed consumer protection policies in order to protect consumers against abusive business practices and enacted special laws applicable to certain kinds of consumer transactions to restrict the principle of party autonomy.

(2) **Consumer Protection Law**

The Myanmar government has enacted consumer protection laws to protect consumers. The law defines "consumers" and an "entrepreneurs," determines the rights and obligations of each of the consumer and the entrepreneur (Article 6 and 7), and prohibits the entrepreneur from manufacturing and selling certain products that do not conform to the quality, style and other information stated on their labels (Article 8).If an entrepreneur fails to comply with any of their duties, the law authorizes the Consumer Dispute Settlement Body to issue a warning to the entrepreneur, order the entrepreneur to provide the consumer with certain remedies, prohibit the entrepreneur from selling their products or order the entrepreneur to recall their products (Article 19).

Definition of "consumer" and "entrepreneur"

Consumer: a person who acquires and uses products and services for his or her own personal needs, and not for trading purposes.

Entrepreneur: an individual or an organization who manufactures, distributes, keeps, transports, sells, re-produces, exports, imports, or resells products, or provides services or advertises them.

According to the above definitions, not all individuals fall under the definition of "consumer". For example, individuals who engage in transactions with an entrepreneur for trading purposes do not fall under the definition of a consumer to be protected under law.

The law prohibits entrepreneurs from engaging in any of the following acts:

- Offer, promote or advertise the sale of products at a discounted or fixed special price which is inconsistent with the referred quality, shape, mode, style or specifications with the intention to mislead a purchaser (Article 9),
- Intentionally deceive or mislead a consumer by stating incorrectly that products/services meet a prescribed standard and quality when selling (Article 10),

- Offer, promote or advertise the sale of products or services at a special price for a certain period without arranging to sell the products or services during the designated period (Article 11),
- Offer, promote or advertise to sell the products or services that are advertised as free of charge but require some form of payment (Article 12)
- Offer the sale of products or services using any method which causes physical or mental annoyance to consumers (Article 13), and
- Publish advertisements to deceive consumers with respect to quality, quantity, ingredients, mode of use or price of products, rate and time of services, or time to deliver products or services.(Article 14)

Essential Point

The Consumer Protection Law regulations are very strict and may impose criminal penalties for any violations. Further, the law is exceptionally strict with respect to the principle of party autonomy. Without any justification under the Consumer Protection Law or other consumer protection laws, it is not appropriate to make a decision against an entrepreneur for the sole reason that a consumer filed a claim against such entrepreneur.

Chapter 8
Myanmar Investment Law and Foreign Investment Regulations

1. Framework of Foreign Investment Regulations in Myanmar

The regulations that govern foreign investors who make foreign investments into Myanmar are generally classified into the following categories:

(1) Regulations on the type of investment business
Prohibits or restricts certain types of investment businesses
(2) Regulations on the use of immovable property
Prohibits the acquiring immovable property or being granted a lease of immovable property for a term exceeding one year
(3) Regulations by the Myanmar Companies Law*
Requires, for example, all overseas corporations to be registered

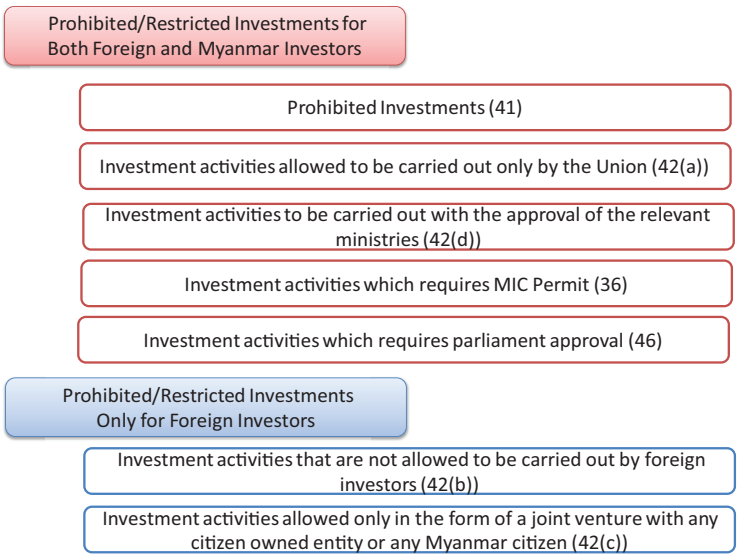
* The Myanmar Companies Law regulations, including the distinction between a "foreign company" and an "overseas corporation", will be explained in Chapter 10.

(1) Regulations on the type of investment business

(a) Framework of regulations on the type of investment business

The Myanmar Investment Law (the "MIL") regulates both foreign investment in Myanmar as well as domestic investments by Myanmar citizens.

The framework of regulations on the type of investment business is as follows:



The MIL clearly sets forth the regulations on the types of investment business in which both foreign investors and Myanmar citizens may engage. The clarification set forth in the MIL allow both foreign investors and Myanmar citizen investors to clearly understand that any investment business not specified as subject to the regulations will not be prohibited or restricted. The MIL and Myanmar Investment Rules (the "MIR") set forth that any investment activities which are not specifically prohibited under the notification issued by the MIC shall not be considered prohibited or restricted investment activities under the MIL. This interpretation, that both Myanmar citizens and foreign investors may engage in any investment businesses not specifically prohibited under any of the MIL, MIR or the Notification, is in conformance with the purpose of the MIL.

Related provisions in the MIR

- Rule 13: An investment not included in a notification referred to in Rule 12 shall not be deemed to be a prohibited investment activity under the Law; provided that such investment shall not have an effect on the prohibited business under any other laws.

- Rule 19: An investment activity not included in the notification referred to in Rule 17 shall not be deemed to be a restricted investment activity under the Law.

Endorsement is not a restriction on the investment business

The MIL newly introduced an award called an "endorsement", which an investor must obtain from the MIC in order to enjoy certain privileges, including a long-term lease of immovable property and tax benefits. This endorsement is required only for investors who wish to obtain such privileges. Investors do not need to obtain the endorsement if they do not require such privileges. In other words, the endorsement will in no event restrict or prohibit the investors from engaging in any business.

(b) **Treatment of foreign investors**

(i) **No discrimination against foreign investors**

The MIL clearly prohibits discrimination between Myanmar citizen investors and foreign investors, and discrimination based on the nationality of an investor with respect to their direct investment under the MIL (Article 47(a)(b)).

Case 8-a

Both Company X, a company established in Myanmar by a Country A company, and Company Y, **a company established in Myanmar with 100% investment from Myanmar citizens**, submitted an application to a competent authority in order to obtain a license required to conduct Business Alpha. Business Alpha is not a type of business that is prohibited or restricted to foreign investors.

The competent authority **granted the license to Company Y, but not Company X**.

Does this treatment by the competent authority comply with the MIL?

Case 8-b

Each of Company X, a company established in Myanmar by a Country A company, and Company Z, **a company established in Myanmar by a Country B company**, submitted an application to a competent authority in order to obtain a license required to conduct Business Alpha. Business Alpha is not a type of business prohibited or restricted to foreign investors.

The competent authority **granted the license to Company Z, but not to Company X**.

Does this treatment by the competent authority comply with the MIL?

The competent authority will be deemed to have violated the MIL if Company X was unable to obtain the license above for the reason that Company X was established by a Country A company.

(ii) **Investments will not be nationalized**
Under the MIL, the investments made pursuant to the MIL will not, in principle, be nationalized, except as allowed under the following conditions (Article 52). Nationalization will be allowed where:

(a) necessary for the public interest;
(b) conducted in a non-discriminatory manner;
(c) conducted in accordance with due process of law; and
(d) the investor receives payment of prompt, fair and adequate compensation.

Case 8-c

Company X, a foreign company, established a 100% subsidiary in Myanmar, and the subsidiary conducted Business Beta with approval from Ministry Y of the Myanmar Government. Ministry Y suddenly issued a notification that only the Myanmar Government was allowed to conduct Business Beta, and declared that pursuant to this notification, the subsidiary`s right to use land for the business would be null and void. Further, Ministry Y also nationalized the factory and equipment used for the Business Beta without paying the subsidiary any compensation.

Does this treatment by Ministry Y comply with the MIL?

Case 8-d

Company X, a foreign company, established a joint venture company with Ministry Y of the Myanmar Government, and the JV company engaged in Business Beta. Ministry Y, without any specific reasons nor prior discussion with Company X, issued a notification that Company X was prohibited to engage in the management of the JV company, and subsequently began managing Business Beta alone. Company X originally made a substantial investment in a plant and equipment for Business Beta, and suffered an enormous amount of damages as a result of this prohibition. However, Ministry Y did not compensate Company X for such damages.

Does this treatment by Ministry Y comply with the MIL?

Even though Ministry Y did not compulsorily acquire or confiscate Company X`s shares of the subsidiary, it can be interpreted that Ministry Y, in fact, substantially expropriated Business Beta by issuing the notification that prohibited Company X from engaging in Business Beta.

In addition, the following points should be considered:
(1) The notification did not state the reasons that the prohibition was actually necessary for the interest of the Union or its citizens, because it did not include any specific reasons;
(2) It is unclear whether the Ministry took measures that were in accordance with the applicable laws because the notification was issued without any prior discussion with Company X; and
(3) Company X did not receive any compensation.

(iii) **Transfer of funds**

Pursuant to the MIL, foreign investors may transfer the funds related to the investments made under the MIL overseas (Article 56).

It is an essential condition for a foreign investor who plans to invest in Myanmar that such foreign investor be entitled to receive its invested funds, proceeds and other funds as a collection of invested capital in its home country. The appropriate protection of international transfer of funds accelerates foreign investments.

Types of funds that may be transferred overseas

Article 56 of the MIL

(a) capital designated under the provisions relating to capital account rules stipulated by the Central Bank of Myanmar;
(b) proceeds, profits from the asset, dividends, royalties, patent fees, license fees, technical assistance and management fees, shares and other current income resulting from any investment under this Law;
(c) proceeds from the total or partial sale or liquidation of an investment;
(d) payments made under a contract, including a loan agreement;
(e) payments resulting from any settlement of investment disputes;
(f) other compensation or money as compensation under the investment or expropriation; and
(g) remuneration, salary and earnings of foreign experts legally employed in the Union.

The MIL states that the Government of Myanmar shall allow investors to transfer capital or expenditures and foreign loans required for their investments from overseas into Myanmar (Article 63).

(2) **Regulation of land use**

The Transfer of Immovable Property Restriction Law (the "TIPRL") prohibits foreigners or foreigner owned companies from acquiring immovable property or being granted a lease of immovable property for a term exceeding one year (Article 3 to 5).

The TIPRL defines a "foreigner owned company" as follows:

Article 2 (c)

"Foreigner owned company" means a company or partnership organization whose administration and control is not vested in the hands of the citizens of the Union or whose major interest or shares are not held by citizens of the Union.

According to this definition, a company of which the majority of shares are not held by Myanmar citizens will be considered a "foreigner-owned company." For example, if Myanmar citizens hold 49% and foreign individuals and/or entities hold 51% of the shares of a company, such company will be considered a "foreigner owned company," and prohibited from acquiring immovable property or being granted a lease of immovable property for a term exceeding one year.

On the other hand, a company of which the majority of the shares are held by Myanmar citizens will not be considered a "foreigner-owned company." For example, if Myanmar citizens hold 51% and foreign individuals and/or entities hold 49% of the company's shares,

such company will not be considered a "foreigner-owned company," and will be allowed to acquire immovable property or to be granted a lease of immovable property for a term exceeding one year. The understandings above are based on the normal interpretation of the provision.

Essential Point: Distinction between "foreigner-owned company" in the TIPRL and "foreign company" in the Myanmar Companies Law

The Myanmar Companies Law, which was enacted in 2017 (the "MCL"), sets forth the definition of "foreign company" ("…foreign person…owns…more than thirty-five percent"). However, the MCL also states that the MCL statutes relating to foreign companies shall not affect the operation of any TIPRL statute (Article 464). This statute appears to clarify that the MCL and the TIPRL are separate laws, and the definition of a "foreigner-owned company" under the TIPRL shall be interpreted literally.[5]。

Essential Point: Cases where a foreigner-owned company is granted a long-term lease of immovable property

Although a foreigner-owned company is generally prohibited from entering into lease of immovable property for a term exceeding one year, a foreigner-owned company may enter into such lease for a term exceeding one year if the company has (i) obtained an endorsement in conformance the MIL and has received permission to enter into a long-term lease of immovable property from the MIC, or (ii) received permission to enter into a long-term lease of immovable property under the Special Economic Zone Law.

2. **Resolution of Investment Disputes**

The MIL separately sets forth the rules that govern investment disputes that arise (i) between an investor and the Union and (ii) between investors. As each of the disputes in (i) and (ii) is treated differently, if an investment dispute is brought before a court, it is first necessary to classify the dispute into either category (i) or (ii).

For example, a dispute between an investor and the Union may occur where a governmental agency refuses to issue an approval or permission (for example, MIC investment permit) and an investor makes an argument that (i) the rejection was not legitimate, or (ii) that a governmental agency unjustly infringed an investor's interests.

For example, a dispute between investors may occur where a Myanmar enterprise and a foreign enterprise disagree on the management of their joint venture company.

[5] The Myanmar Companies Act (1914) (the "MCA") sets forth the definition of "Foreign Company," which states that if a foreigner holds one share of a company, such company will be deemed to be a "Foreign Company." The definition of "Foreign Company" in the MCA was a different legal definition from the definition of "foreigner-owned company" in the TIPRL. These two definitions are to be interpreted individually without reference to the other, but occasionally are confused in practice.

Caution: Cases where the Union is a party making an investment!

In the case where the Union is a party to an investment dispute, the investment dispute will not necessarily be classified as a dispute between an investor and the Union.

For example, if a ministry of the Union and a foreign investor make a joint investment to a joint venture company, any dispute that arises between them with respect to their joint venture agreement will not be treated as a category (i) dispute (between an investor and the Union), but as a category (ii) dispute (between investors), because the position of the ministry of the Union as an investor is at issue in the dispute.

On the other hand, if a dispute arises between a ministry of the Union and an investor because the investor argues that the ministry of the Union improperly refused to issue the investor permission for a business, the ministry will enter into this dispute, not as an investor, but in its official capacity as a ministry of the Union, and as a result, the dispute must be treated as a category (i) dispute (between an investor and the Union).

As described above, the classification of an investment dispute must be determined not only with consideration for the fact that the Union is a party to the dispute, but with consideration for the substance of the investment, the nature of the dispute and the position of the Union in the dispute. These circumstances must be considered as a whole and determined carefully.

The MIL states that all disputing parties must make due attempts to resolve any investment dispute before bringing the investment dispute to a court or arbitral tribunal, regardless of whether the investment dispute may be classified as a category (i) dispute between an investor and the Union or a category (ii) dispute between investors (Article 83).

(1) **Disputes between an investor and the Union**

The MIR provides that an investor must deliver a written notice to the Investment Assistance Committee in the MIC if a dispute arises with respect to any of the following matters (Article 170 and 171).

Cases where notice must be submitted in accordance with Article 170

(a) a decision of a governmental department or governmental organization in respect of their Investment was incorrectly made;
(b) an application for a permit, license, registration or approval was incorrectly refused by a governmental department or governmental organization; or
(c) any right, protection or approval benefiting them under the Law has been frustrated.

After sending the aforesaid notice, if there is any dispute settlement mechanism for amicable resolution set forth in the applicable laws, the investor shall comply with the such dispute settlement mechanism. If the parties are unable to reach a resolution, they may bring the dispute before a court or arbitral tribunal (Article 173 of the MIR).

(2) **Disputes between investors**

The method of resolution available to investors to an investment dispute that cannot be settled amicably depends on whether the relevant agreement includes a dispute resolution mechanism (Article 84 of the MIL).

Dispute Resolution Provisions

In investment-related contracts, there are usually provisions titled "Governing Law" or "Dispute Resolution," which regulate which law is applicable and which body shall settle an investment dispute (a court or an arbitration tribunal). These provisions are generally called dispute resolution provisions. In the contracts, however, the term "dispute resolution mechanism," is not commonly used, and each provision must be interpreted with consideration for the purpose of the provision, not in its wording, .

The agreement includes a dispute resolution provision:
the dispute shall be settled pursuant to the provision.

The agreement does not include a dispute resolution provision:
the dispute shall be settled by a competent court or an arbitral tribunal in accordance with the applicable laws.

Case Study

How should a court in Myanmar treat an investment dispute if the relevant contract includes the following provisions:

(a) The governing law is Myanmar law, and all contract-related disputes will be resolved in a court in Myanmar.
>>> The Myanmar court shall resolve the case in accordance with Myanmar law.

(b) The governing law is Myanmar law, and all contract-related disputes will be resolved by arbitration.
>>> The court in Myanmar shall not accept, or dismiss, such claim, and any issues should be resolved by an arbitral tribunal

(c) The governing law is the law of a foreign country, and all contract-related disputes will be resolved in a court in Myanmar.
>>> The Myanmar court may resolve the case in accordance with the selected foreign law (but shall not apply Myanmar law, except that the Myanmar court may apply laws related to court proceedings, such as Code of Civil Procedure). The court may use various measures to determine the foreign law, including requesting that the parties to the dispute submit information regarding such foreign law.

(d) The governing law is the law of a foreign country, and there is no provision regarding the dispute resolution body.
>>> To the extent that the Myanmar court has jurisdiction under Myanmar law, the court shall resolve the case according to the selected foreign law.

(e) The governing law of the contract is not determined, and there is no provision regarding the dispute resolution body.
>>> To the extent that the Myanmar court has jurisdiction under Myanmar law, the court shall resolve the case according to the governing law determined by private international law in Myanmar.

Chapter 9
Relationship between Investment Activity and the Government - International Investment Law

1. **What is International Investment Law?**

International investment law is a body of jurisprudence regulating international investments. International investment law is usually governed under the terms of an international investment agreement ("IIA"), which is a "general or special international treaty" executed between two or more countries. A bilateral investment treaty ("BIT") is an IIA that is executed between two countries and is the most common type of IIA.

One of the main purposes of an IIA is to protect "investments" made by "investors". In addition, since an IIA will generally include a dispute resolution provision (explained in 2(3) below), the investor's right to obtain relief in connection with such an investment is protected as these dispute resolution provisions allow the investor to submit a claim against the country in which the investor made an investment under the IIA in either the courts or through arbitration. In order to ensure the investor has this right, it is common that an IIA includes provisions that determine the relationship between an investor of a country and the host country.

2. **Main Provisions of IIA**

A standard IIA generally includes the following provisions.

(1)Scope of protection of investment (definitions of investor and investment);
(2)Treatment of investors and investments; and
(3)Dispute resolution regarding investments.

(1) **Scope of protection**

As explained above, one of the main objectives of IIAs is to protect an investment made by an investor. The definitions of investor and investment are different in each IIA. An example of each definition is set forth below.

(a) **Definition of investor**

Investor of a Contracting Party

The term "investor of a Contracting Party" means:
(i) a natural person having the nationality of that Contracting Party in accordance with its applicable laws and regulations; or
(ii) an enterprise of that Contracting Party,
that seeks to make, is making or has made investments in the Area of the other Contracting Party.

(Excerpts from Article 1(b) of the Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment)

(b) **Definition of investment**

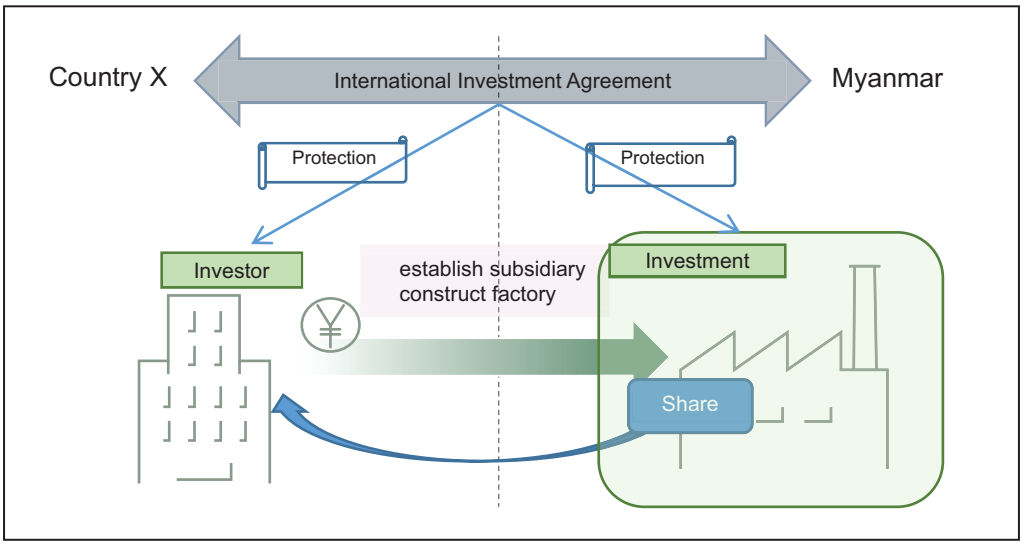
Investment of a Contracting Party (*simplified)

The term "investment" means every kind of asset owned or controlled, directly or

indirectly, by an investor, including:
(i) an enterprise and a branch of an enterprise;
(ii) shares, stocks or other forms of equity participation in an enterprise;
(iii) bonds, debentures, loans and other forms of debt;
(iv) rights under contracts;
(v) claims to money and to any performance under contract having a financial value;
(vi) intellectual property rights;
(vii) rights conferred pursuant to laws and regulations or contracts; and
(viii) any other tangible and intangible, moveable and immoveable property, and any other related property rights.

(Excerpts from Article 1(a) of the Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment)

For example, in the case where Country X and Myanmar execute an IIA with the same definitions of "investor (of a Contracting Party)" and "investment" as those set forth in the box above, if a company of Country X establishes a subsidiary in Myanmar and the subsidiary constructs a factory in Myanmar, the company of Country X will fall within the scope of "investor (of a Contracting Party)", and the shares of the subsidiary and the factory will be considered an "investment"; and both the company and the subsidiary will be protected under the IIA.



(2) **Treatment of Investor and Investment**

Generally, IIAs include a provision with respect to the method of treatment of investors and investments of the other contracting country. The main framework for the treatment of investments set forth in an IIA are as follows:

(1) National treatment;
(2) Most-favored-nation treatment;
(3) Fair and equitable treatment;
(4) Restriction of expropriation and appropriate compensation; and
(5) Umbrella clause.

(a) **National treatment**
National treatment is a principle in international law that a country must treat foreign investors and investments of a country with which it has executed an IIA in the same manner as it treats its domestic investors and investments.

An example of a national treatment provision is as follows:

Article XX National Treatment

Each Party shall accord to investors of another Party, and to covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition of investments, treatment no less favorable than that it accords, in like circumstances, to its own investors and their investments.

(Excerpt from Article 4 of the ASEAN Australia New Zealand Free Trade agreement ("AANZFTA"))

A country that is party to an IIA is prohibited from treating foreign investors or investments less favorably than its own domestic investors or investments. A contracting country that engages in any unequal treatment will be deemed in violation of the IIA.

Case 9-a

Company A, a company of Country X, established a Country Y subsidiary and is preparing to commence business in Country Y. Country X and Country Y executed a standard IIA. Country Y enacted a special law that causes Company A's business to be treated less favorably than competing domestic companies in Country Y.

Are the actions of Country Y acceptable under the IIA?

In Case 9-a, Country Y is in violation of the IIA executed between Country X and Country Y because Country Y enacted a law that treats Company A's business less favorably than Country Y's domestic investors.

(b) **Most-favored-nation treatment**
Most-favored-nation treatment requires a country to provide investors and investments of a country with most-favored-nation status with equal advantages as the investors and investments of other third countries.

An example of a most-favored-nation treatment provision is as follows:

Article XX Most-Favored-Nation Treatment

Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities.

(Excerpts from Article 3 of the Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment)

A country that is party to an IIA must treat foreign investors or investments from a foreign country less favorably than foreign investors or investments from another foreign country. If a

contracting country enters into another IIA with a third-party country, if the IIA with the third-party country includes terms that are more favorable than those provided under the IIA with the former country, the contracting country will breach the most-favored-nation treatment under the IIA with the former country, and investors of the former country will be able to seek at least such favorable treatment set forth in the IIA with the third-party country.

Case 9-b

Company A, a company of Country X, established a Country Y subsidiary and will commence business in Country Y through such subsidiary. Country X and Country Y executed a standard IIA. Country Y subsequently entered into an IIA with Country Z, which set forth that Country Y will treat investments from Country Z more favorably than investments from Country X. As a result, Company A's business received treatment less favorable than competing companies from Country Z.

Company A seeks to guarantee at least such favorable treatments under the IIA with Country Z due to the most-favored-nation treatment provision in the IIA between Country X and Y. Does Company A have grounds to make this claim?

In Case 9-b, Country Y entered into an IIA with Country Z, which set forth treatment for investments from Country Z that were more favorable than investments from Country X. Country Y's execution of the IIA with Country Z will be considered a breach of the most-favored-nation provision under Country Y's IIA executed with Country X, and as a result, investors from Country X will be able to file a claim to demand that they receive the same favorable treatment under the IIA with Country Z. Therefore, the claim of Company A is plausible.

(c) **Fair and equitable treatment**

Fair and equitable treatment is a standard of investment protection that imposes an obligation on a country receiving investments to accord investments of a contracting country "fair and equitable treatment". The precise definition of "fair and equitable treatment" is unclear and the arbitral awards on this issue are not always consistent.

An example of a fair and equitable treatment provision is as follows:

Article XX Treatment of Investment

Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.

(Excerpts from Article 3 of Agreement Between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments)

Since term "fair and equitable treatment" is broad and ambiguous, there are cases where the contracting countries to the IIA attempt to include a more concrete definition. An example of such a provision is as follows:

Article XX Treatment of Investment

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty:
   (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
   (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

(Excerpts from Article 6 of the AANZFTA)

The scope of a fair and equitable treatment obligation must be determined on a case-by-case basis. However, if an investor has a fair and reasonable expectation for an investment, and the conduct of a contracting country is not in compliance with such expectations, the contracting country may be considered to be in violation of its fair and equitable treatment obligation.

Case 9-c

Country X and Country Y executed a standard IIA. Company A, a company of Country X, established a Country Y subsidiary and has conducted business in Country Y for the past 20 years. Company A holds a business license from Country Y (each license term is four years, and the license has been renewed four times).

Neighboring residents opposed Company A's business, and Company A agreed with Country Y to relocate its subsidiary within Country Y to a new location designated by Country Y on the assumption that the subsidiary could continue its business at the existing location until Country Y granted a license for Company A's business at the new location. However, Country Y rejected the application of Company A's subsidiary for the fifth renewal of its license without designating a new location. Country Y explained only that the renewal of Company A's license would be against the public interest. Company A and its subsidiary did not engaged in any misconduct to justify the rejection of the renewal application.

Is such treatment by Country Y acceptable under the IIA?

In Case 9-c, Country Y renewed Company A's license four times over a period of 20 years and agreed that Company A's subsidiary would be allowed to continue its business in the existing location until Country Y designated a new location. As Company A's subsidiary could have continued its business in the existing location until Country A designated the new location, as long as Company A and its subsidiary did not engage in any acts that would give Country Y reason to not renew the license, the expectation of Company Y and its subsidiary that the license would be renewed was fair and reasonable. Country Y's decision to not renew the license did not meet such fair and reasonable expectations, and Country Y will be deemed in violation of the fair and equitable treatment obligation under the IIA.

(d) **Expropriation restrictions and appropriate compensation**

Modern IIAs generally prohibit expropriation of investments made by foreign investors. These prohibitions are generally subject to certain exceptions, which generally allow a country to expropriate any investments in the case where the expropriation meets all four of the following conditions:

(1) without discrimination;
(2) for the public interest;
(3) upon due process of law; and
(4) with compensation.

As set forth in requirement (4) above, the expropriating country must pay the investor of another contracting country an appropriate amount of compensation ("obligation to compensate for expropriation") for such appropriation; the expropriating country's failure to grant appropriate compensation will be deemed a violation of the IIA. Many IIAs include a provision that the receiving country must pay "prompt, adequate and effective compensation".

An example of a restriction on land expropriation and appropriate compensation provision is as follows:

Article XX Expropriation and Compensation

1. Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.
2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, which is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.

(Excerpts from Article 4 of Agreement Between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments)

Case 9-d

Company A, a company of Country X, established a subsidiary in Country Y and is preparing to start its business. Country X and Country Y executed a standard IIA. Country Y has enacted a special law that allows Country Y to elect not to compensate a foreign investor when Country Y expropriates the foreign investor's investments for an unavoidable reason. Company A's factory in Country Y was expropriated for a public purpose but Company A did not received any financial compensation because Country Y elected under the special law not to compensate Company A.

Is such treatment by Country Y acceptable under the IIA?

A country has an obligation to compensate a foreign investor of a contracting country for expropriating the foreign investor's investments without compensation. In Case 9-d, Country Y expropriated Company A's factory without any compensation, and will be deemed to have violated the IIA.

(e) **Umbrella clause**

A receiving country promises to comply with the obligations under the agreements between an investor and the receiving country or grant the authorizations in an umbrella clause. If an IIA includes an umbrella clause, if a country receiving an investment violates its obligations under an agreement with an investor, the violation may also constitute a violation of the IIA. This means that an investor and/or the country receiving the investment may submit a claim to arbitration that the receiving party violated the IIA (please also see II-3 regarding dispute resolution).

As explained in Topic 8, a dispute between an investor and a government authority may not necessarily result in an investment dispute even if the government authority is a party to the dispute, and a violation of a joint venture agreement between an investor and a government authority will be treated as a dispute between investors. The explanation in this section is in conformance with the explanation in Topic 8 as a dispute between investors will be treated as an investment dispute if there is a violation of an IIA only if the IIA includes an umbrella clause. As a result, if the IIA does not include an umbrella clause, the dispute will be treated merely as a dispute between investors.

An example of an umbrella clause is as follows:

Article XX Application of Other Rules

Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the other Contracting Party.

(Excerpts from Article 10.2 of the Agreement Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar for the Promotion and Protection of Investments)

Case 9-e

Company A, a company of Country X, established a subsidiary in Country Y and is preparing to start its business. Country X and Country Y have executed a standard IIA. Is it acceptable under the IIA for Country Y, which executed a lease agreement for state-owned land with Company A and promised to deliver the land to Company A, to refuse to deliver the land to Company A because a third party offered to pay higher rent to Country Y?

In Case 9-e, even though Country Y executed a lease agreement for state-owned land with Company A, Country Y did not fulfill its contractual obligations and did not deliver the land. Country Y will be deemed to have violated the lease agreement between Country Y and Company A, and as well as the IIA.

(3) **Dispute Resolution**

It is common for an IIA to include a provision that allows an investor to submit a claim to arbitration against the country receiving investments with respect to a dispute between the investor and the receiving country. Generally, the dispute resolution procedure will commence when an investor submits a claim to arbitration under the dispute resolution provision of the IIA. If the IIA does not include a specific dispute resolution provision, an investor may elect to either file a lawsuit in the court of the receiving country or submit a claim to arbitration. However, it is common for IIAs to include a provision that an investor may resolve a dispute through only one of these methods, and may not resolve the same dispute through both methods.

Although the specific rules in each IIA differ, arbitration proceedings are generally presided over by an arbitral tribunal of three arbitrators, and any arbitral award made by the tribunal will be final and binding on the parties. This means that none of the parties has the right to challenge the award and appeal to a court, even if they are not satisfied with the award.

When the contracting countries of an IIA agree that a dispute may be resolved through arbitration and an investor has elected to resolve a dispute through arbitration, courts must respect such the agreement of the contracting countries of the IIA and the choice made by the investor. If a contracting country conforms to the agreement of the contracting countries and the choice made by the investor, and files a lawsuit in the courts that asserts the same cause of action set forth in the arbitration filed by the investor, the courts must reject the filing unless the investor agrees to resolve the dispute in the courts.

An example of a dispute resolution provision between an investor and a country receiving investments in an IIA is as follows:

Article XX Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party

1. This Article applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former Contracting Party under this Agreement which causes loss or damage to the investor or its investment.
2. Such a dispute should, if possible, be settled by negotiations or consultations. If it is not so settled within one hundred and eighty (180) days from the date on which the dispute has been raised with written request by either party, the investor may choose to submit it for resolution:
   (a) to the competent courts of the contracting Party in the territory of which the investment has been made; or
   (b) by arbitration in accordance with this Article under:
      i. the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;
      ii. the Additional Facility Rules of the Center for Settlement of Investment Disputes ("ICSID Additional Facility"), if the ICSID Additional Facility is available;
      iii. the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"); or
      iv. if agreed by both parties to the dispute, any other arbitration institution or any other arbitration rules.
3. Each Contracting Party hereby consents to the submission of a dispute to international arbitration in accordance with the procedures set out in this Agreement. The consent and the submission of a claim to arbitration under this Article shall satisfy the requirements of:
   (a) Chapter II of the ICSID Convention (Jurisdiction of the Center) and the ICSID Additional Facility Rules with regards to the written consent of the parties to the dispute; and
   (b) Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") for an "agreement in writing."
4. Once the investor has submitted the dispute to the courts of the disputing Contracting Party or any of the arbitration mechanisms provided for in paragraph 2, the choice of

the procedure shall be final.

(Excerpts from Article 11 of Agreement between the Government of the Republic of Korea and the Government of the Republic of Myanmar for Promotion and Protection of Investment)

Chapter 10
Basics of Company Law

1. Company and a Body Corporate

A company is defined as a body corporate incorporated and registered under the Myanmar Companies Law (the "MCL").

Definitions (Article 1(c)(v) and Article 2(a) of the MCL

Article 1(c)(v)
"company" means a company incorporated and registered under this Law or an existing company;

Article 2
The following types of body corporate may be incorporated and registered under this Law:
(a) a company limited by shares, which may be either:
  (i) a private company which may have no more than 50 members (not including persons who are in the employment of the company); or
  (ii) a public company which may have any number of members;

In general, a body corporate is an entity with the legal authority to act as a single person independent from the shareholders who own the entity.[6]

(1) Characteristics of a body corporate

The three main characteristics of a body corporate, are listed below.

(a) Independence

A body corporate is a legal entity independent from its shareholders.
The term "independent" implies the following two consequences:
(1) A creditor to a *shareholder* will not be able to submit a claim against a *body corporate* for attachment of a body corporate's property.
(2) A creditor to a *body corporate* will not be able to submit a claim against a *shareholder* for attachment of the a shareholder's property.[7]

(b) Legal person

A body corporate is recognized as a legal person under the law. This means that the body corporate itself can enter into a contract and can serve as an obligor or obligee. In comparison, shareholders do not have the same rights, as they are only members of the body corporate.

(c) Organizational structure under law

A body corporate continuously engages in economic activities with interested parties, such as shareholders, directors, employees, suppliers and customers. To manage the interests of such parties, the MCL determines the rules for operation and management of a body corporate.

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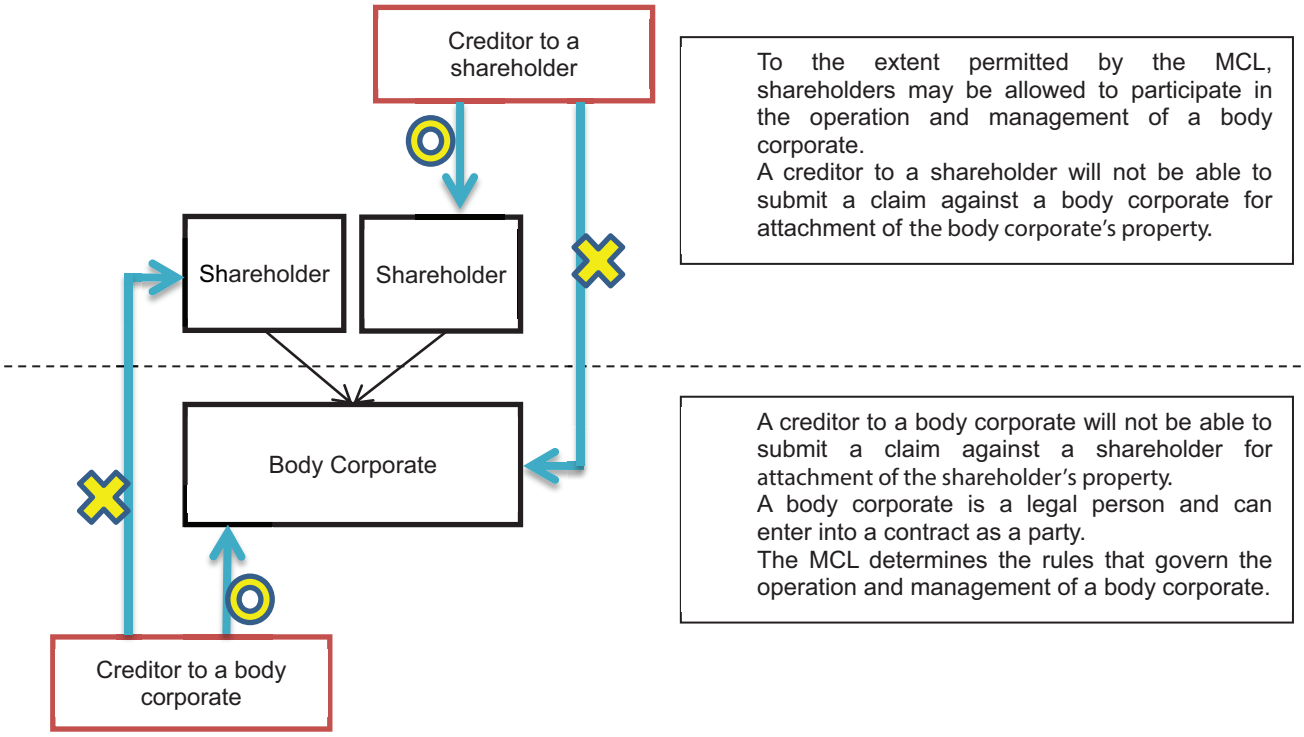
6 Body Corporate / Corporation: An entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely…(Black's Law Dictionary, 10th ed.).

7 The limited liability of shareholders will be explained in 2(1) below.



(2) **Functions of company**

Companies limited by shares play an essential role in the economy since multiple parties are able to use the companies limited by shares to raise funds and continuously cooperate to engage in large-scale business operations.

We will explain certain important concepts of a company, and focus on companies limited by shares (a "company"), which is the most popular type of corporate entity, in the following sections.

2. Relationships between Shareholders, Company and Directors

(1) Limited liability

(a) Definition

Limited liability is a principle that the financial obligation of a shareholder for the business debts of the company is limited to the value of the shareholder's investment in such company. This principle, which limits the financial liability of the investor (shareholder), is beneficial for investors interested in making a new investment into the company. Creditors of a company must ensure that the company's assets are preserved in order to preserve any claims against the company, since these assets are the only resources that the creditor can use to secure its right to receive repayment.

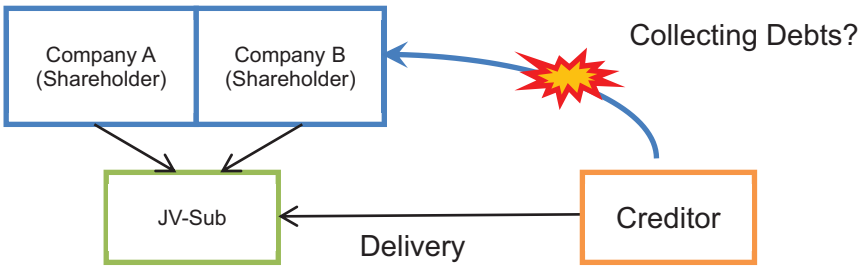
Limited Liability (Article 6(a)(i) of the MCL)

A company having the liability of its members limited by the constitution to the amount, if any, unpaid on the shares respectively held by them (in this Law termed a company limited by shares).

Case 10a

Company A, a Myanmar company, and Company B, a Country X company, established a joint venture subsidiary (the "JV-Sub") in in Myanmar.

The parties began construction of new facilities for JV-Sub, but the construction costs exceeded the originally estimated costs, and as a result, construction was suspended due to insufficient funds. As JV-Sub became unable to pay the creditor which delivered building materials for the construction for its debts, the creditor wants to reach the assets of Company A and Company B, the shareholders of JV-Sub, in order to obtain payment for JV-Sub's debt. Can the creditor submit a claim to Company A and Company B for the payment owed by JV-Sub?



In this case, under the principle of limited liability, the financial liabilities of Company A and Company B are limited to the subscribed amount of shares in JV-Sub. Company A and Company B do not owe any direct liabilities to any creditors of JV-Sub unless Company A and Company B directly executed a contract with the creditor that included a provision stating Company A and/or Company B would be responsible for the liabilities of JV-Sub.

Creditors should conduct research on the financial status of a company and its business before entering into a transaction.

(b) **Preservation of company's property**

Since the financial liability of a company's shareholders is limited, creditors of a company must take steps to preserve their rights to repayment.

The MCL prohibits a company from returning the paid shareholders' equity interests in order to preserve a company's property for repayment to creditors. Further, creditors of a company have priority to the company's property in the event the company enters into voluntary winding up proceedings.These regulations preserve a company's property to protect creditors.

Below are examples of the regulations under the MCL.

(i) **Regulation on share buy-backs by company**

Article 120. Share buy-backs

(a) A company may buy back its own shares if:
(i) the company will, immediately after the buy-back, satisfy the solvency test;
(ii) the buy-back is fair and reasonable to the company's shareholders as a whole;
(iii) the buy-back does not materially prejudice the company's ability to pay its creditors; and
(iv) it is approved by shareholders under section 121 and the procedures in section 122 are followed.

(ii) **Regulation on the reduction of share capital**

Article 115. Reduction of share capital

(b) The reduction must not be undertaken unless:
(i) the company will, immediately after the reduction, satisfy the solvency test;
(ii) the reduction is fair and reasonable to the company's shareholders as a whole;
(iii) the reduction does not materially prejudice the company's ability to pay its creditors; and
(iv) it is approved by shareholders under section 116.

(iii) **Regulation for shareholders on receiving financial benefits**
Shareholders have the right to receive dividends and distribution of residual assets to receive financial benefits from a company. However, there are several regulations that apply to each right in order to balance the interests of shareholders and creditors.

(A) Regulations for shareholders receiving dividends

Article 107. Requirements for dividends

(a) The company may not pay a dividend unless:
(i) the company will, immediately after the payment of the dividend, satisfy the solvency test;
(ii) the making of the dividend is fair and reasonable to the company's shareholders as a whole; and
(iii) the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

(B) Regulation for shareholders on receiving distribution of residual assets

In the event a company enters into voluntary winding up proceedings, shareholders will receive a distribution after the company repays the creditors (creditors have priority to receive repayment from the Company).

Article 374. Distribution of property (residual assets) of company

Subject to the provisions of this Law as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the constitution otherwise provide, be distributed among the members according to their rights and interests in the company.

(2) **Shareholders′ rights for management of company**

Shareholders have a certain right to participate in the management of a company, such as voting rights at a shareholders′ meeting. However, shareholders should not control all management functions of a company. Matters to be resolved at the shareholders′ meeting are limited to the fundamental matters expressly listed under the MCL. Examples of such matters includes the following.

- ✓ Alteration to the constitution (Article 17)
- ✓ Reduction of share capital (Article 116)
- ✓ Appointment and removal of directors (Article 173(a)(ii) and Article 174)
- ✓ Approval of benefits by members (Article 186)
- ✓ Voluntary winding up proceedings(Article 345)

In principle, resolutions at the shareholders′ meeting shall be made by the majority of voting rights depending on the number of shares of the company (in case of poll).

(3) **Separation of ownership and management**

In general, shareholders are not professionals with the ability to manage a company. Thus, shareholders usually appoint directors and delegate the management of the company to these directors. Shareholders will, in principle, only decide certain important issues at the shareholders′ meeting.

This is called separation of ownership and management, which is set forth in the following article of the MCL.

Article 160. Powers of directors

The powers of the directors shall be as set out below:

(a) The business of a company is to be managed by or under the direction of the board of directors or, in the case of a single director company, the single director.

(b) In managing the business of the company the directors (or single director) may exercise all the powers of the company, subject to any powers which are required to be exercised by members as expressly set out in this Law or the company′s constitution.

In reality, there are many companies in Myanmar managed primarily by families, where shareholders are also directors and there is no clear separation of ownership and management.

Typical Myanmar Company	Listed Myanmar Company (e.g., Myanmar Thilawa SEZ Holdings Public Ltd. (YSX Listed))
Shareholders: U x y z (Father) Daw a b c (Mother) U e f g (Son) Daw h i j (Daughter)	Number of shares: 38,929,150 Number of shareholders: 17,220 (As of 11 August 2017)
Directors: U x y z (Father) Daw a b c (Mother) U e f g (Son) Daw h i j (Daughter)	Number of Directors: 12 persons

(4) **Fiduciary duty of directors**

As the ownership and management of a company are separate, the power of the shareholders is limited and management is entrusted to the directors.

To secure proper management of a company by directors, the directors have a duty to operate the company in good faith, in a trustworthy manner, honestly and confidently. This duty to act as such is referred to as a fiduciary duty[8].

The fiduciary duty owed by a director is determined under the MCL as follows.

Fiduciary Duty Under the Myanmar Companies Law (From Article 165 to Article 172)

Article 165. Duty to act with care and diligence

(a) A director or officer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
  (i) were a director or officer of the company in the company's circumstances; or
  (ii) occupied the office held by, and had the same responsibilities within the company as, the director or officer.

[omitted]

Article 166. Duty to act in good faith in the company's best interest

(a) Subject to this section, a director or officer must exercise their powers and discharge their duties:
  (i) in good faith and in the best interest of the company; and
  (ii) for a proper purpose.

[omitted]

Article 167. Duty regarding use of position

A director or officer must not improperly use their position to:
(a) gain an advantage for themselves or someone else; or
(b) cause detriment to the company.

Article 168. Duty regarding use of information

A director or officer must not improperly use information obtained by them as a director or officer to:
(a) gain an advantage for themselves or someone else; or

[8] Fiduciary duty: a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's or corporate officer) (Black's Law Dictionary, 10th ed.).

(b) cause detriment to the company.

Article 169. Duty to comply with the Law and constitution
A director or officer must not act, or agree to the company acting, in a manner that contravenes this Law or the company's constitution.

Article 170. Duty to avoid reckless trading
A director or officer must not cause or allow the business of the company to be carried on, or agree to the business being carried on, in a manner likely to create a substantial risk of serious loss to the company's creditors.

Article 171. Duty in relation to obligations
A director or officer must not agree to a company incurring an obligation unless that director or officer believes at the time on reasonable grounds that the company will be able to perform the obligation when required to do so.

Article 172. Duty to disclose certain interests
(a) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless:
[omitted]

A business does not always succeed. However, directors are often required to make prompt decisions in daily operations even if the director is not certain of the results. If directors are liable for all unsuccessful business decisions that they make, directors will have difficulty making business decisions that have risks (but have a possibility of success), which will subsequently disrupt the director's business operations. This may result in a decrease of the number of candidates for directors.

The business judgment rule[9] is an internationally accepted rule, and requires that a director of a company will not violate his/her fiducial duty even if the company suffers any losses as a result of such decision, provided that the director made the business decision in good faith and with loyalty to the company.

The MCL also determines this business judgment rule in the following article.

Article 165(b) Duty to act with care and diligence

(b) A director or other officer who, in the exercise of their powers and discharge of their duties, makes a decision to take, or not take, an action in relation to the operation of the company's business, is taken to meet the requirements of sub-section (a), and any like legal or equitable duties, and the duty in section 170, if they:
(i) make the decision in good faith for a proper purpose;
(ii) do not have a material personal interest in the subject matter of the decision;
(iii) inform themselves about the subject matter of the decision to the extent they reasonably believe to be appropriate; and

[9] Business Judgment Rule: The judicial presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. The rule shields directors and officers from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors' or officers' authority (Black's Law Dictionary, 10th ed.).

(iv) rationally believe that the decision is in the best interests of the company.

Important Points: Business Judgment Rule Limitations

Under the business judgment rule, directors are shielded from liability, which in turn may also harm the rights and interests of shareholders. As a result, the business judgment rule should not automatically apply without carefully considering certain conditions, including those set forth in Article 165(b)(i)-(iv) (for example, whether the decision was made in good faith, whether a director has a material personal interest.)

3. **Shares**

(1) Functions of shares

A benefit of listed companies with numerous shareholders is that these shareholders provide the company with the resources to raise a large amount of funds. The company may raise funds using various methods, and one of the most essential methods is through the issuance of shares. A share is an equal proportional unit of equity interest in a company.[10]

Dividing equity interests in a company into shares of small amounts allows a company to give numerous people the opportunity to purchase a small amount of shares (for example, one million shareholders may each purchase one share for one US dollar). As a result, the company is able to raise a large amount of funds (for example, one million US dollars).

(2) **Negotiability of shares**

A share is considered moveable property under the MCL, which is a separate object of a transaction. Shareholders are able to easily collect their invested capital by transferring their shares to a third party. This method allows the shareholders to obtain the amount of their invested capital without forcing the company to enter into voluntary winding up proceedings and allows the company to survive even if the shareholders must reacquire their invested capital.

Article 60. Nature of shares and other securities

(a) The shares or other securities of any member in a company shall be moveable property, transferable in the manner provided or permitted by this Law and any other applicable law and subject to the constitution of the company.

Further, under the MCL, a private company may restrict share transfers by including a provision in its constitution that prohibits or restricts shareholders from engaging in share transfers. This is an exceptional rule that may be utilized by private companies, which are usually small or medium sized entities, and ensures such companies are able to avoid ownership by an unknown, improper third party.

Transfer Limitation on Private Company's Share (The Myanmar Companies Law Article1(c)(xxv))

[10] Share: one of the definite numbers of equal parts into which the capital stock of a corporation or joint-stock company is divided (Black's Law Dictionary, 10th ed.).

"private company" means a company incorporated under this Law or under any repealed law which:

(A) must limit the number of its members to fifty, not including persons who are in the employment of the company;

(B) must not issue any invitation to the public to subscribe for the shares, debentures or other securities of the company; and

(C) may, by its constitution, restrict the transfer of shares.

(3) **Rights in shares**

A share is comprised of the following rights:

(i) Voting right in the shareholders' meeting;

(ii) Right to receive dividends; and

(iii) Right to receive distribution of residual assets.

Article 61(a). Rights and powers attaching to shares

(a) Subject to sub-section (b), a share in a company confers on the holder of such share:

(i) the right to one vote on a poll at a meeting of the company on any resolution;

(ii) the right to an equal share in dividends; and

(iii) the right to an equal share in the distribution of assets of the company.

Important Points: An In-Depth Look at Shareholders' Rights

The rights of a shareholder to (i) receive financial benefits from the company and (ii) participate in the management of the company, are limited,[11] and the shareholder does not have direct ownership rights to the property of the company.

[11] We have explained the limitation on the shareholders' right to receive financial benefi ts in in 2(1)(b)(iii) above and the limitation on the shareholders' rights to participate in the management of the company in 2(2) above.

Chapter 11
Lawsuits under the Myanmar Company Law and the Role of the Courts

Under the Myanmar Companies Law (the "MCL"), there are situations where courts are assumed to perform certain roles. These situations can be broadly classified into the following three categories, each of which is explained in this Chapter.

(1) Exercise of rights under the MCL
(2) Procedures under the MCL
(3) Penalties for violations of the MCL

1. Exercise of Rights under the MCL

(1) Shareholders' rights

(a) Derivative action

A "derivative action" is a litigation claim that is brought by a shareholder on behalf and in the name of the company with respect to the company's claims against a third party.[12]

For example, directors owe fiduciary duties to the company under the MCL.[13] It is a fundamental rule that the board of directors has the right to determine whether the company will bring a lawsuit against a director who has breached a fiduciary duty. However, as the directors are colleagues of one another, there is a possibility that a director may determine not to bring a lawsuit against another director. Accordingly, when the board of directors fails to appropriately file a lawsuit to hold the director liable for the breach of his fiduciary duty, the derivative action allows shareholders to file the lawsuit on behalf of, and in the interests of the company, subject to certain requirements.

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12 Derivative action: a suit asserted by a shareholder on the corporation's behalf against a third party (usu. a corporate officer) because of the corporation's failure to take some action against the third party (Black's Law Dictionary, 10th ed.).

13 These fiduciary duties include the duty to act with care and diligence, duty to act in good faith for the company's best interests, duty regarding use of position, duty regarding use of information, duty to comply with laws and the constitution, duty to avoid reckless trading, duty with respect to company's obligations [, and duty to disclose certain interests (Articles 165 to 172).

Case 11-a

Company X, a foreign company, established a joint venture, Company Z, in Myanmar together with Company Y, a Myanmar company. The equity ratio in Company Z is **30% held by Company X** and **70% held by Company Y**. **The majority of the directors** of Company Z **are made up of Director A, the owner of Company Y, and Director A's relatives, friends, and similar individuals**.

Director A of Company Z purchased an unreasonably expensive commodity on behalf of Company Z from Company B, a company separately managed by Director A. As a result of this purchase, Company Z suffered significant damages.

Company X requested that the board of directors of Company Z bring a lawsuit against Director A for breach of a fiducial duty. However, although one month has passed since the request, the board of directors of Company Z failed to bring, and indicated that it did not intend to bring, a lawsuit against Director A.

What measures may Company X take under the MCL?

Company X may directly file a lawsuit to the courts on behalf of, and in the name of Company Z, to force Company Z to take action against Director A.

In this case, the courts must confirm whether the requirements set forth below are satisfied. If satisfied, the courts must give Company X, as a shareholder of Company Z, permission to bring a lawsuit on behalf of Company Z against Director A (Article 197(b) of the MCL):

Article 197(b)

(b) The Court must grant the application if it is satisfied that:
- (i) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them;
- (ii) the applicant is acting in good faith;
- (iii) it is in the best interests of the company that the applicant be granted leave;
- (iv) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and
- (v) either:
  - (A) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
  - (B) it is appropriate to grant leave even though sub-paragraph (A) is not satisfied.

(b) **Cases where shareholders' rights are restricted or otherwise adversely affected**
Decisions regarding important matters relating to the operation of a company (for example, winding up of the company or amendments to the constitution) are generally made by a resolution of a general meeting of shareholders. However, it is possible that some shareholders may abuse the majority-decision rule and acquire excessive profits or the rights of other shareholders may be unfairly damaged. In these cases, under the MCL, the court will give minority shareholders permission to bring a lawsuit against the shareholders.

Case 11-b

Company X, a foreign company, established a joint venture company, Company Z, which engages in the construction business, with Company Y, a Myanmar company. **Company X holds 20%**, and **Company Y holds 80%** of the shares of Company Z. Persons nominated by Company Y account for the majority of the members of the board of directors.

Company Y desired to obtain independent control of Company Z, and resolved by a special resolution at a general meeting of shareholders of Company Z to add a provision to the constitution that allowed the sale of shares held by Company X to be freely sold by adopting a resolution of the board of directors of Company Z.

What measures may Company X take under the MCL?

Company X may consider the following measures set forth in (i) and (ii) below.

(i) **Change in shareholders' rights**

Rights to certain classes of shares (for example, preferential rights to receive dividends) may be changed by a special resolution (Article 126(b) of the MCL) (however, if the constitution of the company sets forth procedures that differ from those of the MCL, the procedures of the constitution apply).

Further, the shareholders of the relevant class of shares who satisfy the following requirements may apply for an injunction with respect to the change in their rights to the relevant class of shares. If the courts determine that the rights of the relevant shareholders may be unreasonably restricted, the courts may prohibit the company from changing the rights to the relevant shares (Article 126(e) to (h)).

(A) Shareholders who hold 10% or more of the issued shares of the class to be changed; and

(B) Shareholders who did not vote in favour of or consent to the resolution for the change.

(ii) **Other methods of relief of shareholders**

Shareholders and other persons specified in the MCL may file a lawsuit to the courts with respect to the company's business affairs, actions, resolutions and other similar matters related to the company (Article 194 of the MCL). The courts may render a decision in favor of the shareholders if the alleged action set forth in the lawsuit would be (Article 192 of the MCL):

(A) contrary to the interests of the shareholders as a whole; or

(B) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a shareholder.

The scope of the alleged actions set forth in (i) and (ii) above also include winding up of a company; modification of the constitution; regulation of the conduct of affairs; transmission of shares; purchase of shares with a reduction of capital; orders that require a person to conduct a specific act, such as bringing a lawsuit; and orders in relation to a claim for damages or other similar claims for compensation.

(2) **Pre-incorporation contracts**

In some cases, an individual may execute a contract on behalf of a company (for example, a person authorized by a potential shareholder to incorporate the company before the company is incorporated (a "Pre-Incorporation Contract")(Article 33(a) of the MCL).

(Example) A lease agreement for the office that is executed before a new company is incorporated, and will be used by the new company after its incorporation.

Since the new company does not exist at the time the Pre-Incorporation Contract is executed, the new company cannot be a party to such contract. However, the MCL sets forth that, subject to certain conditions, a company can take certain procedures to adopt the Pre-Incorporation Contract and take responsibility and obtain any benefits after its incorporation (Article 33(c) and (d) of the MCL).

(a) **Court order regarding Pre-Incorporation Contracts**
In principle, if the company does not adopt the Pre-Incorporation Contract, the counterparty of the Pre-Incorporation Contracts will not be able to submit a claim against the new company under the relevant contract.

This may cause an unreasonable disadvantage to a counterparty who executed the contract under the assumption that the new company would be held responsible under the contract.

In order to ensure that the counterparty is not left without a remedy, the MCL states that such counterparty may file a lawsuit to the courts requesting that the court issue any of the following orders with respect to the Pre-Incorporation Contract (Article 35(a)):

- direct the company to return any property assigned under the Pre-Incorporation Contract;
- validate the Pre-Incorporation Contract, in whole or in part; or
- any other relief that the courts deem necessary.

Court order regarding Pre-Incorporation Contracts

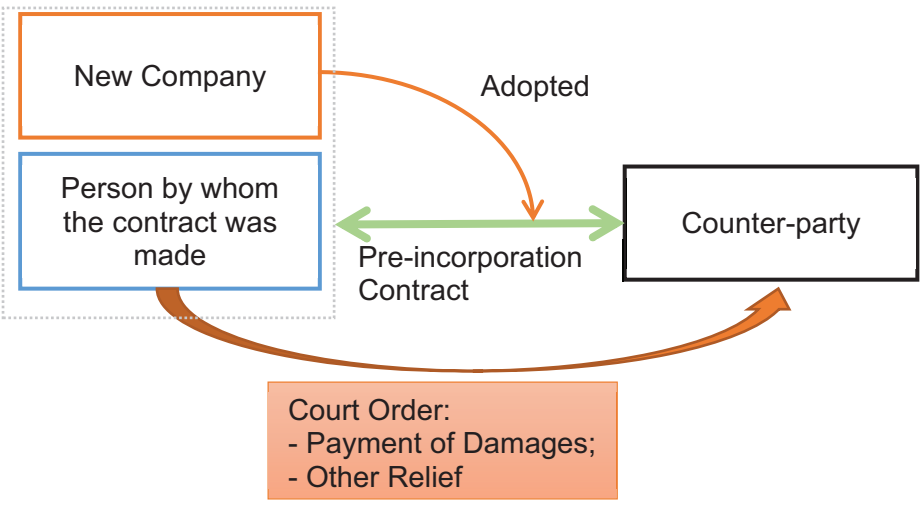
Article 35. Failure to adopt

(a) A party to a pre-incorporation contract that has not been ratified by the company after its incorporation may apply to the court for an order:
  (i) directing the company to return property, whether real or personal, acquired under the contract to that party;
  (ii) for any other relief in favour of that party relating to that property or the contract; or
  (iii) validating the contract whether in whole or in part.

(b) **Responsibilities of the person who executed the Pre-Incorporation Contracts**
Even if the company adopts a Pre-Incorporation Contract, if a claim was submitted to the courts, the courts may issue an order that, in addition to or in substitution for any order made against the new company, the person who executed the Pre-Incorporation Contracts also pay damages or other relief to the other party (Article 36 of the MCL).

Responsibilities of the person who executed the Pre-Incorporation Contracts

Article 36. Breach of pre-incorporation contract
In proceedings against a company for breach of a pre-incorporation contract which has been ratified by the company, the court may, on the application of the company, any other party to the proceedings, or of its own motion, make such order for the payment of damages or other relief as the court considers just and equitable, in addition to or in substitution for any order which may be made against the company, against a person by whom the contract was made.



(3) **Winding up**
There are two types of winding up proceedings of a company: (i) winding up proceedings led by the shareholders (based on the events provided in Article 345 of the MCL) and (ii) other winding up proceedings.

The courts are generally not involved in type (i) winding up proceedings.

In comparison, the courts are authorized to supervise type (ii) winding up proceedings to ensure the fair distribution of residual assets of the company. For example, the courts have the authority to:

- Appoint an official liquidator;
- Summon and examine persons suspected of holding property of the company; and
- Arrest any contributory that may flee the country.

2. **Amendments, Repairs and Other Remedies through Proceedings under the MCL**
Under the MCL, a company is required to file documents with the relevant authorities, to keep accounts and other documents, and to carry out other procedures. If the documents include any deficiencies or if there are any defects or non-performance of the company's obligations, upon receipt of a request, the courts are expected to remedy such deficiencies, including but not limited to the following actions:
(1) extend the time for filing of documents with respect to the amendment of the constitution (Article 18(b));

(2) amend inaccurate or improperly updated registers maintained by a company (for example, the register of members) (Article 101);
(3) call an annual general meeting or any other general meeting of the company if such meetings are not properly held (Article 147(b), 148(i), 151(a)(x) and 152(c));
(4) issue an order to compel a company to allow inspection of its accounts and/or furnish copies if the company refuses to allow an inspection or furnish copies when required (Article 159);
(5) appoint an appropriate number of directors to companies with less than the requisite quorum of directors (Article 173(h));
(6) order a company that refuses an inspection of the register of directors and secretary to allow such inspection (Article 189(e));
(7) extend the time for registration or amend any omission or misstatement on any mortgage or charge created on the company's assets that is not properly registered, as necessary (Article 244);
(8) issue an order to compel the company to allow inspection of the copies of instruments creating any mortgage or charges if the company refuses to allow an inspection (Article 250);
(9) issue an order to compel the company to allow inspection of the register of debenture-holders if the company refuses to allow an inspection (Article 252); and
(10) order the company to produce any required documents and allow inspection by the registrar if the company refuses to provide any information or explanation to the registrar (Article 270).

3. **Penalties for Violations of the MCL**

Under the MCL, various penalties may be imposed on an person for breaching its obligations under the MCL. Courts are required to consider the following matters when determining whether to impose a penalty under the MCL, including but not limited to:

(1) determination with respect to an officer in breach of the obligation to display the company name of a limited company shall be held personally liable (Article 144);

Non-publication of company name

Article 144. Penalties for non-publication of name

(a) If a limited company does not conspicuously display its name in manner directed by this Law, it shall be liable to a fine of 50,000 kyats, and every officer of the company, who knowingly and wilfully authorizes or permits the default, shall be liable to the same penalty.
(b) If any officer of a limited company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company on which its name is not so engraved as aforesaid, or issues or authorizes the issue of any communication or document referred to in sub-section 143(c) wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine of 50,000 kyats, and shall further, in the case of a document evidencing or creating a legal obligation of the company, be personally liable to the same extent as the company if the company fails to discharge the obligation unless:
    (i) the person who issued and signed the document proves that the person in whose favour the obligation was incurred was aware or was entitled to assume that the obligation was incurred by the company; or
    (ii) the Court is satisfied that it would not be just or equitable for the person who issued or signed the document to be so liable.

(2) determination with respect to whether to impose additional penalties on a breach by officers such as directors and secretaries of the company (Article 190(b)(i) and (ii)); and

Breach by officers of the company

Article 190. Consequences of breach of any requirement of this Division

(a) (Omitted)

(b) Without limiting sub-section (a), every director and any other person subject to the applicable provision of this Division who is knowingly and wilfully a party to the default may also be:

(i) subject to such additional penalty as the Court may determine in accordance with this Law if the default has involved dishonesty on the part of the director or other person subject to the applicable provision; and

(ii) on the application of the Registrar, disqualified from acting as a director or other officer of a company for such period as may be determined by the Court.

(3) application of an exemption for a breach of the description of the prospectus that must be prepared when making an offer of shares to the public for subscription (Article 210 and Article 225(c)(iii)).

Breach in relation to the description of prospectus

Article 210. Non-compliance with section 205

In the event of non-compliance with or contravention of any of the requirements of section 205, a director or other person responsible for the prospectus shall not incur any liability by reason of the noncompliance or contravention if the director or other person proves that:

(a) as regards any matter not disclosed, the director or other person was not cognisant thereof;

(b) the non-compliance or contravention arose from an honest mistake of fact on the director's or other person's part; or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case, reasonably to be excused.

Provided that, in the event of non-compliance with or contravention of the requirements contained in sub-section 205(a)(xvi), no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it is proved that the director or other person had knowledge of the matters not disclosed.

Article 225. Requirements as to prospectus

(a) (Omitted)

(b) (Omitted)

(c) In the event of non-compliance with or contravention of any of the requirements of this Division, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if:

(i) as regards any matter not disclosed, the director or other person proves that they were not cognizant thereof;

(ii) director or other person proves that the non-compliance or contravention arose from an honest mistake of fact on their part; or

(iii) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise

such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in sub-section 205(a)(xvi), no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

Chapter 12
Basics of Joint Venture

1. **Outline of Joint Venture**

(1) **Outline of "Joint Venture"**

A Joint Venture means that two or more entities, collaborating as joint venture partners, to invest in and establish a new company and conduct business together.

Essential Point: Other forms of business alliances

In addition to joint ventures, two or more enterprises may conduct business together using other business structures, such as by executing outsourcing contracts or similar contracts.

(2) **Joint venture formation**

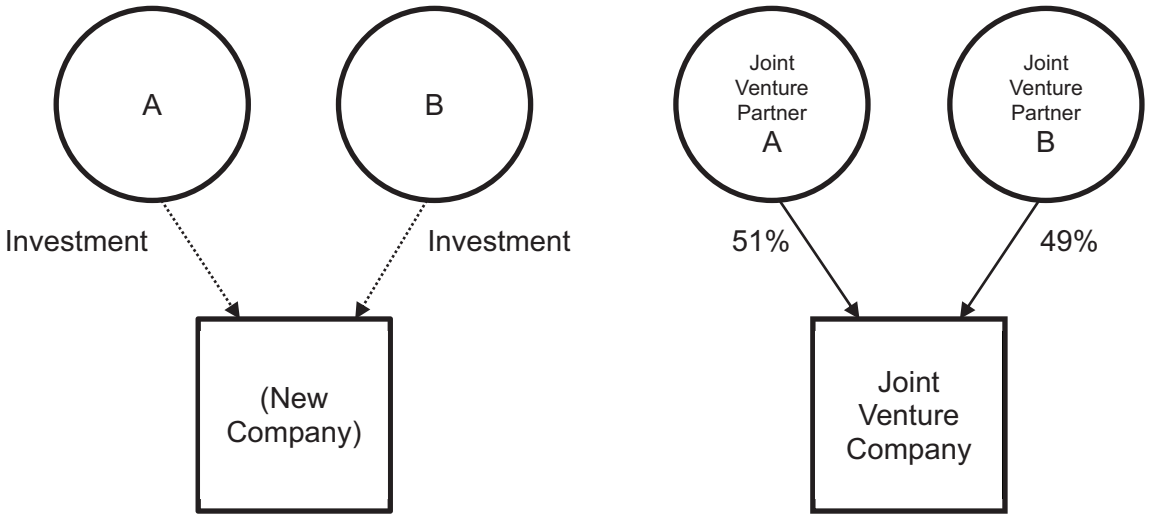
A joint venture company is generally formed using one of the two methods described below.

(1) Joint venture partners establish a new company

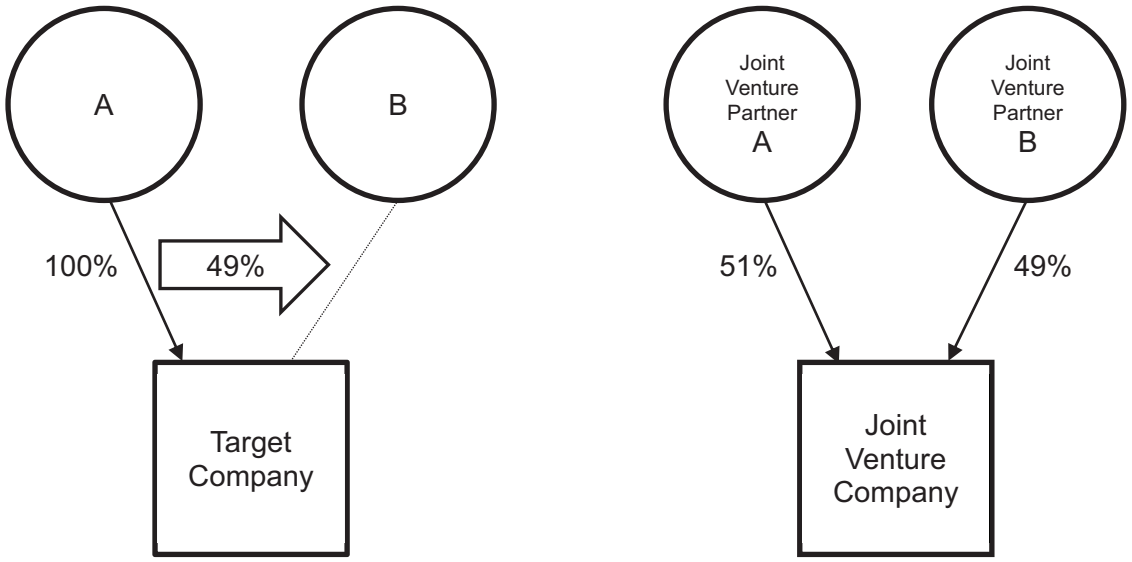
(2) A joint venture partner purchases part of the shares of a company that are held by the other joint venture partner.

{Chart}

(1) Joint venture partners establish a new company



(2) A joint venture partner purchases part of the shares of a target company that are held by the other joint venture partner



Joint ventures can be established by more than two partners, and may be composed of companies that are all Myanmar corporations, all overseas corporations or a combination of both. The explanation below is based on of the formation method set forth in (i) above (two joint venture partners establish a new company).

(3) **Standard joint venture structure between a domestic company and overseas corporation**

Joint ventures work well when each joint venture partner makes the best use of its strong points and makes up for the weak points of the other joint venture partner. If the joint venture is operated by a domestic company and an overseas corporation, each may jointly operate the joint venture and provide the strengths set forth below:

Strengths of Overseas Corporation	Strengths of Domestic Company
• Financial power • Advanced skills • Brand image	• Real estate • Permission from authorities • Labor force • Local business network

(4) **Documents necessary to operate the joint venture**
The most essential document for joint venture is a joint venture agreement.[14] The joint venture agreement between the joint venture partners, and generally determines each party's rights and obligations to the business conducted by the joint venture company.

Essential Point: Other related documents to the joint venture agreement

(i) Constitution: The terms of the joint venture agreement are usually reflected in joint venture company's constitution.
(ii) License agreements to permit the use of technology or brand, lease agreements for real estate, etc.

2. **Shareholding Ratio in a Joint Venture Company**
In principle, the joint venture partners may mutually determine the shareholding ratio in a joint venture company based on the value of the investment made by each joint venture partner.

However, if the joint venture is operated by a foreign investor that must conduct its business in the form of a joint venture with a Myanmar citizen under the Myanmar Investment Law and related regulations (maximum of 80% foreign shareholders), the joint venture partners do not have the freedom to determine the shareholding ratio in the joint venture agreement.

Myanmar Investment Law

Article 42. The following types of investment businesses shall be stipulated as restricted investment:
(omitted)
(c) investment businesses allowed only in the form of joint venture with any citizen owned entity or any Myanmar citizen; and
(omitted)

Myanmar Investment Rules
Article 22. For the purpose of section 42(c) of the Law, subject to any express exception in the relevant notification, the minimum direct shareholding or interest of a Myanmar Citizen Investor in the joint venture is 20%.

Essential Point: Shareholding ratio considerations

(1) Resolution requirements under the Myanmar Companies Law
As set forth above, the joint venture partners may mutually determine the shareholding ratio in a joint venture company based on the value of the investment by each joint venture partner. What factors do the joint venture partners consider when determining this ratio?

[14] A joint venture agreement is often called a "shareholders' agreement." The two agreements in practice set forth the same terms to the extent that the joint venture partners determine the agreed rights and obligations of each party for the business conducted by the joint venture company.

An essential factor that the joint venture partners must consider is the resolution requirements of the general meetings of shareholders under the Myanmar Companies Law. As ordinary resolutions must be approved by a majority (more than 50%), and special resolutions must be approved by 75% or more of the shareholders, a joint venture partner that wishes to control the joint venture company will usually prefers to hold more than 50% or 75% or more of the shares.
A party that wishes to obtain control of the joint venture company is not entitled to obtain such control without investing sufficient assets into the joint venture company.

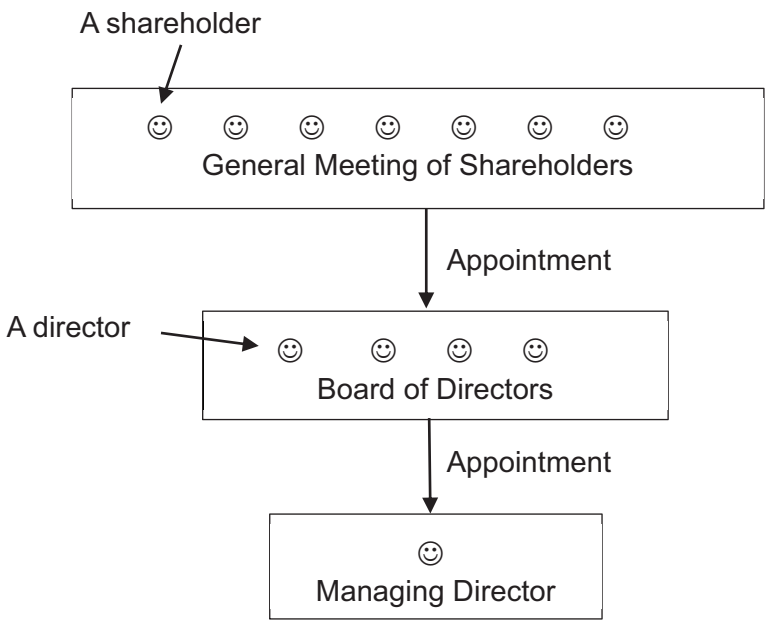
(2) 50:50 ratio
While at first glance, a 50:50 ratio may appear to be a fair allocation of the shares, the joint venture company will not be able to make any decisions at its general meetings of shareholders without the consent of both joint venture shareholders because neither joint venture partner has more than half of the voting rights. As this may result in a situation where the joint venture company is unable to make a decision, this ratio is not recommended.

3. **Standard Clauses of a Joint Venture Agreement**
A joint venture agreement is not executed based on a certain contract template; the terms are determined on a case-by-case basis after negotiations between the parties. However, there are certain items that have been, to some extent, standardized in the international practice. Standard clauses are described below.

(1) **Outline of a joint venture company**
The basic information of a joint venture company, including its trade name, place of head office, business purposes, total amount of capital, shareholding ratio and the like are set forth in the joint venture agreement.

In some cases, the concrete process and schedule of capital paid up for the joint venture company's establishment is also included in the joint venture agreement.

(2) **Governance of a joint venture company**
The specific details of the governance rules, which determine the decision making procedure of the joint venture company, are determined in detail.



(a) **General meeting of shareholders**

The general meeting consists of the shareholders of a company. This is the primary decision-making body of the joint venture company.

The joint venture agreement sets forth certain provisions with respect to the general meeting of shareholders, including identification of the party with authority to call the meeting, method to call the meeting, timing of the meeting, matters to be resolved, quorum requirements, resolution requirements, method of resolutions (written resolutions or TV conference).

Resolution requirements basically follow the standard of the Myanmar Companies Law (simple majority for ordinary resolutions and three-fourths or more for special resolutions), but special requirements apply if the joint venture agreement includes a veto right clause (please see 3(3) below).

(b) **Board of directors**

The board of directors consists of the directors appointed by the general meeting of shareholders and makes decisions with respect to important matters of the joint venture company.

The joint venture agreement sets forth the total number of directors and the number of directors each joint venture partner is entitled to appoint. The joint venture agreement usually includes a provision that the party who has the right to appoint directors has the right to dismiss such directors.

As with the general meeting of shareholders, the joint venture agreement sets forth certain provisions with respect to the board of directors, including identification of the party with authority to call a meeting of the board, method to call the meeting, timing of the meeting, matters to be resolved, quorum requirements, resolution requirements, method of resolutions (written resolutions or TV conference) (please also see the explanation on veto rights in 3(3) below).

(c) **Managing director**

The managing director is appointed by the board of directors as the person authorized to represent the company (affix the managing director's signature on documents on behalf of the company).

The joint venture agreement sets forth the total number and authority of the managing directors, and joint venture partner entitled to appoint managing directors. If two or more managing directors are appointed, the joint venture agreement must expressly state whether one of the managing directors alone may represent the company or if the joint signature of two or more managing directors is necessary.

(d) **Auditor**

The financial statements of a company are prepared by the company itself, but examined by a professional auditor

Essential Point: Appointment of an auditor

Foreign investors that are party to a joint venture established with a foreign investor will generally prefer to use an international standard of financial statement examination, and appoint an audit corporation of international reputation (or its local partner) as the auditor.

(3) **Veto Rights and Deadlock**

(a) **Veto rights**

An explanation of the basic governance structure of a joint venture company are set forth in 3(2) above. If the majority shareholder of the joint venture company

holds the right to determine all matters of the joint venture company under the Myanmar Companies Law, the minority joint venture shareholders will likely be unable to meaningfully engage in the management of the joint venture company. For this reason, the parties may agree that, regardless of the principles under the Myanmar Companies Law, certain material decisions must not only comply with the resolution requirements prescribed in the Myanmar Companies Law but also require consent of the minority shareholder. This mechanism is called a "veto right" (or "reserved matters").

This veto right may be included for (a) the general meeting of shareholders, (b) the board of directors, or (c) both (a) and (b). An example of a veto right clause in a joint venture agreement is as follows:

> None of the Reserved Matters for resolution at [Shareholders' Meeting / BOD Meeting] may be included in the business to be transacted at a [Shareholders' Meeting / BOD Meeting] in any notice given pursuant to Section X except with the prior written approval of each Party.

The following are examples of matters for which the joint venture partners may require a veto right .

- Amendment to the constitution
- Issuance of shares
- Increase or reduction of share capital
- Borrowing and guarantee (of more than a certain amount)
- Disposal of assets (of more than a certain amount)
- Restructuring of enterprises such as amalgamation
- Dissolution and liquidation

(b) **Resolving deadlock**

When difference of opinion between the joint venture partners continues for a certain essential matter due to the exercise of a veto right by a joint venture partner, the joint venture company may not make a decision. This inability of the joint venture partners to make a decision is called a "deadlock."

The joint venture agreement must include a mechanism to resolve such deadlock in order to avoid a situation of irresolvable conflict.

Essential Point: Steps to resolve deadlock (example)

Step 1: Good faith negotiation between the parties for a certain period

if the parties are unable to resolve the issue

Step 2: Good faith negotiation between high-level executives of the parties

if the parties are unable to resolve the issue

Step 3:
(a) Transfer of the shares owned by one of the parties to the other party; or
(b) Dissolution of the joint venture company.

(4) **Fundraising**

If a joint venture company requires additional new funds in order to expand its business or keep up with market change, the joint venture agreement should include a provision regarding the method of fundraising.

If the joint venture partners make additional investments into the joint venture company, the joint venture agreement usually includes a provision that the joint venture partners may make an additional investment on a pro-rata basis.

Essential Point: Possibility of disputes regarding additional investments

Even if a joint venture agreement includes a provision that joint venture partners will make additional investments on a pro-rata basis (based on the existing share holding ratio), this method will not be effective if one of the joint venture partners does not have enough funds to make the additional investment. The joint venture agreement may include a provision that if a joint venture partner is unable to make the additional investment, the other joint venture partner may make an investment in the amount of the pro rata portion of such joint venture partner unable to make an additional investment; however, the amount of additional investment by such joint venture partner will change the existing shareholding ratio, and may have an effect on the governance of the joint venture company. If a joint venture partner wishes to avoid such change, the actual application of the provision may lead to a dispute between the parties.

(5) **Restrictions on share transfers**

As a joint venture company is established based on mutual reliance on each joint venture partners, it is generally understood at the formation of the joint venture company that neither joint venture partner will be allowed to transfer its shares to a third party during the existence of the joint venture company. For this reason, the joint venture agreement usually prohibits the parties from transferring their shares without consent from the other party in advance.

However, after a period of time, the joint venture partners may eventually determine that they do not want to continue in the joint venture company. A joint venture agreement sometimes includes a provision that a party may transfer the shares of the joint venture company in certain cases (for example, after a period of 5 years from the execution of the joint venture agreement). Even if the parties are allowed to execute a share transfer, before transferring the shares to a third party, the joint venture partner who wishes to transfer its shares has an obligation to first offer to sell the shares to the other joint venture partner on the same conditions as to the third party (“first refusal right”).

On a related note, if a joint venture partner breaches the joint venture agreement, the joint venture agreement often includes a provision that the other joint venture partner may exercise the following rights (as a penalty to the breaching joint venture partner):

(1) Put option: Right to request the breaching party to purchase the shares of the non-breaching party (usually at the prescribed reasonable price of shares with an additional premium (for example, 120%)).

(2) Call option: Right to request the breaching party to sell its shares to the non-breaching party (usually at the prescribed reasonable price of shares with a discount (for example, 80%)).

The joint venture agreement occasionally includes a provision that a party is authorized to exercise a put option or call option in order to resolve a deadlock (described in 3(3)(b) above).

Essential Point: Evaluation of shares

There are internationally accepted methods to reasonably evaluate the value of shares, which are available only from high-grade professionals. Joint venture agreements often include a provision that the evaluation of the shares shall be made by an identified financial advisor or audit corporation with international fame.

(6) **Roles of each joint venture partner**

As set forth in 1(3) above, each joint venture partner in a joint venture company is generally expected to make best use of its strong points and compensate the weak points of the other partner. Such roles of each joint venture partner are expressly set forth in the joint venture agreement.

At the same time, as set forth in 1(4) above, the joint venture agreement sets forth the other relevant agreements to be executed between the joint venture partners and the joint venture company, such as license agreements to permit the use of technology or brand, lease agreements for real estate, temporary transfer agreements for employees, and loan agreements.

(7) **Non-competition**

A joint venture agreement usually prohibits the joint venture partners from engaging in any competing business which hinders the growth of the joint venture company ("non-competition"). With consideration for the nature of joint venture, this restriction is reasonable during the existence of the joint venture company.

In addition, if a joint venture partner is permitted to engage in a competing business from the day following the termination of the joint venture agreement, the business secrets of the joint venture company, such as know-how, which have been provided from a joint venture partner to the joint venture company may be used by the other joint venture partner if the joint venture company fails. In order to avoid this impropriety, joint venture agreements commonly include a non-competition provision to prohibit a joint venture partner from engaging in any such competing business for a predetermined period of time that extends after the termination of the joint venture agreement. These non-competition provisions are widely accepted in international practice.[15]

(8) **Dissolution of Joint Venture**

A joint venture agreement also sets forth the method of dissolution of the joint venture.

The joint venture partners may terminate the joint venture agreement by simply by coming to a mutual agreement. This is a simple process, as the joint venture agreement is merely a contract. If the joint venture company obtained approval from a state authority for its business and such approval is limited to a certain period of time, the joint venture partners may agree to terminate the joint venture agreement upon the expiration of such government approval.

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15 However, in some jurisdictions, such restriction can be considered to be a violation of a statute.

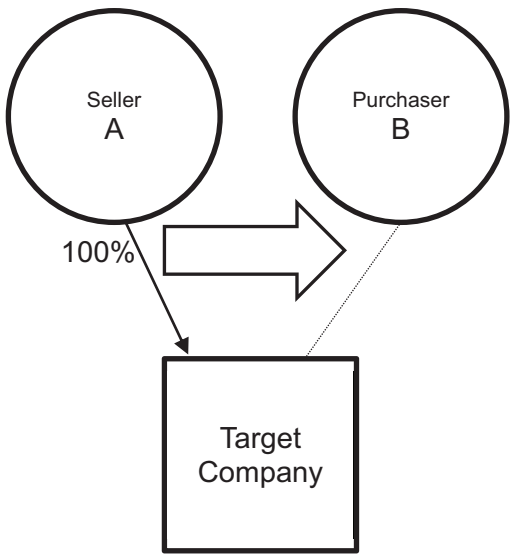
In addition, a joint venture agreement is terminated if a put-option or call option is exercised by a joint venture partner in the case of a deadlock (described in 3(3) above) or breach of the agreement (described in 3(5) above) or share purchase through the first refusal right (described in 3(5) above).

Chapter 13
Basics of M&A

1. **What is M&A?**
   Mergers and Acquisitions ("M&A") means the purchase of the shares or assets of an entity by a third party.

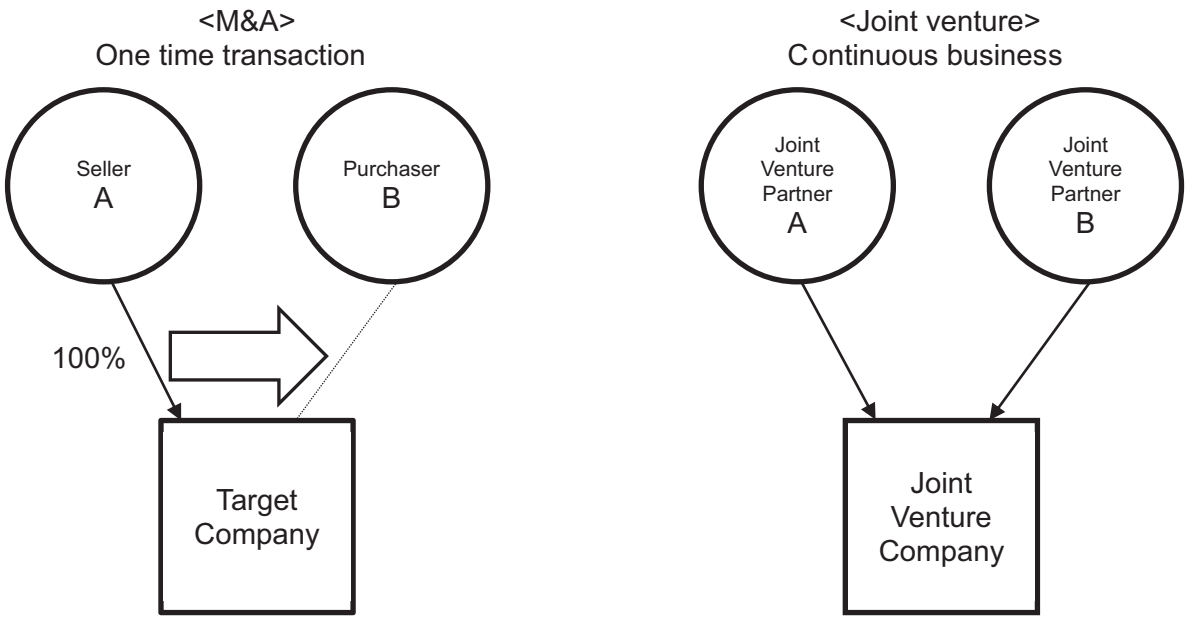
   Transactions for the purchase of outstanding shares will be conducted in the form of a share transfer from an existing shareholder to the purchaser. Transactions for the purchase of new shares will be conducted in the form of an issuance of new shares by the target company to the purchaser. The explanation below is made under the assumption that the M&A transaction method will be a share transfer.

{Chart A} Share transfer: A popular M&A transaction method
(Example) Company A owns 100% of the outstanding shares of the target company and transfers 100% of these shares to Company B.



M&A transactions are different from joint ventures, as they are one time sale and purchase transactions conducted between a seller and purchaser, while joint ventures are cooperative businesses that involve continuous transactions between two or more parties.

{Chart B} M&A ≠ Joint Venture



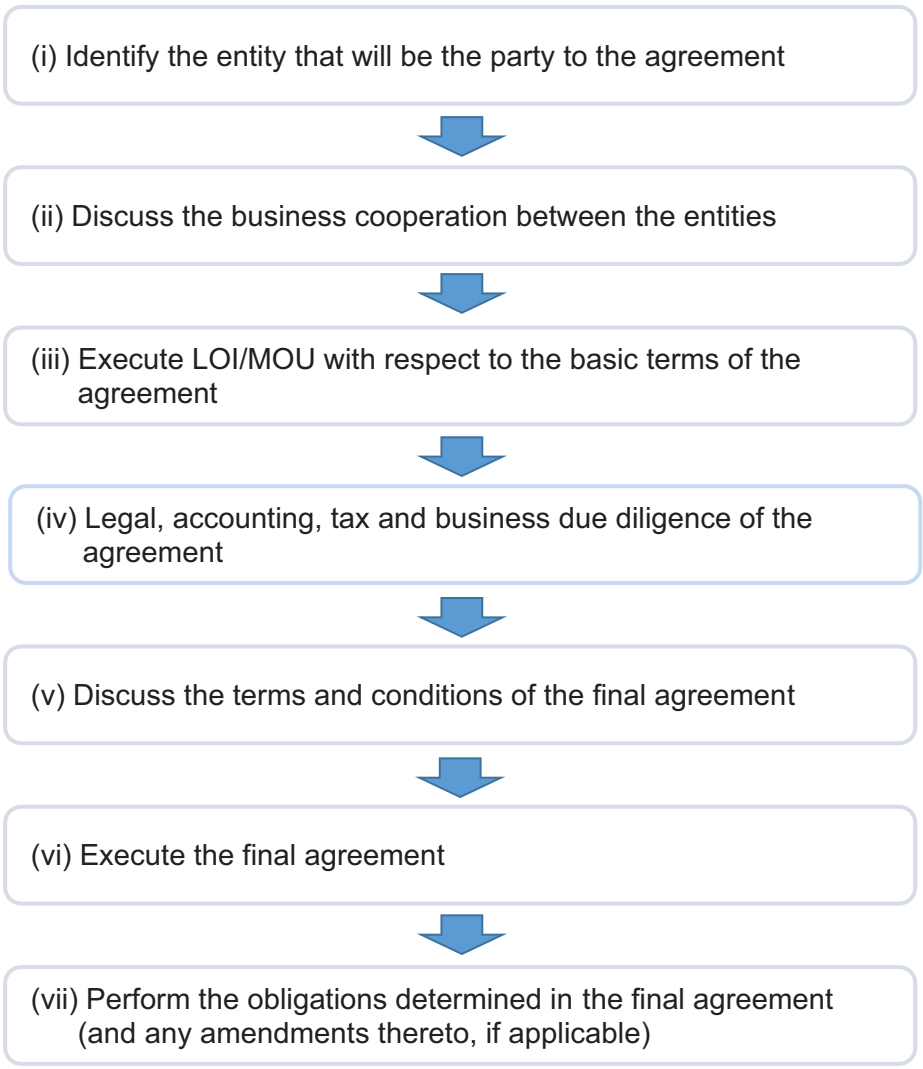
An M&A transaction is conducted in order to obtain the following benefits:

Purchaser	Seller
- Timely process (M&A transactions completed more quickly than establishing a new company or starting business) - Acquisition of existing land and buildings (as compared to constructing a new building) - Workers already employed at target company - Established Vendor and customer relationships - Permissions and permits from authorities in place	- Convert the value of its business into cash through a transfer to a third party (for example, business founder may retire upon receipt of the purchase price for the M&A transaction)

Please see "Essential point: Evaluation of shares" in Chapter 12 regarding the benefits available for both parties and the method of share evaluation.

2. **M&A Procedures**
   (1) **Outline**

{Chart C}



(2) **Due diligence**

Due diligence is the examination of a target company conducted by a potential purchaser to evaluate the fair corporate value of the target company. The due diligence process involves document review, written answers to questions, interviews and other procedures.

Due diligence is conducted with consideration for the following matters:

- Feasibility of the contemplated M&A transaction
- Fairness of offered purchase price
- Existence of any obstruction to a purchaser's business plans after completion of the M&A transaction

A seller is not under any obligation to respond to due diligence requests from a purchaser and engages in the due diligence process voluntarily. The due diligence process will involve disclosure by the seller of confidential and sensitive information, and it is an internationally accepted practice for the parties to execute a non-disclosure agreement before conducting the due diligence procedures in order to

ensure that the parties do not use this information for any purpose (such as stealing business secrets of the seller) other than the due diligence.

There are cases where a purchaser determines, pursuant to the due diligence results set forth above, to not execute the transaction. In this case, the purchaser will withdraw from the transaction.

3. **Standard Structure of Share Purchase Agreement**

The standard structure of a share purchase agreement is as follows:

- Preamble
- Definitions
- Agreement to transfer shares
- Conditions precedent
- Closing date
- Representations and warranties
- Covenants
- Indemnification
- Boilerplate provisions

Chapter 14
Outline of International Trade Dispute Resolution

1. **Methods for Dispute Resolution**

The following methods are most commonly used to resolve disputes between parties.

(1) Negotiation
(2) Arbitration
(3) Litigation

Arbitration or litigation is typically used as the final method of dispute resolution for international transactions.

Essential Point: Advantages of alternative dispute resolution over litigation

In international trade disputes, the courts of a country may favor its own citizens. Further, the court may not have the necessary expertise to make a proper decision on complex international trade disputes, especially if the country in which the court is located does not have a legal system with developed international trade related laws, or if the court does not have enough experience or precedent with international trade disputes. In addition, the court may take a long time to render a final judgment, as either party will have the right to appeal any decisions made by the court (for example, in a three-tiered judicial system).

Essential Point: Advantages of arbitration

- International: The recognition and enforcement of arbitral awards has improved in many countries through international treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

- Impartiality: An arbitral tribunal may consist of arbitrators who are not citizens of the same country as either disputing party

- Expertise: The arbitrators selected to be on the arbitral tribunal are generally experts in international transactions and disputes.

- Confidentiality: The parties are able to protect their business secrets as the arbitration is a private process, as compared to the litigation process, which is conducted in a public courtroom.

- Speed: The arbitration process is faster than the litigation process, as the parties are unable to appeal against an arbitral award.

2. **Involvement of Myanmar Courts**

(1) **May the Myanmar courts hear an action?**

The jurisdiction of the court will depend on whether:

(1) The Myanmar courts have international jurisdiction to hear the case.
(2) The parties have agreed to a dispute resolution method (described in Chapters 15 and 16).

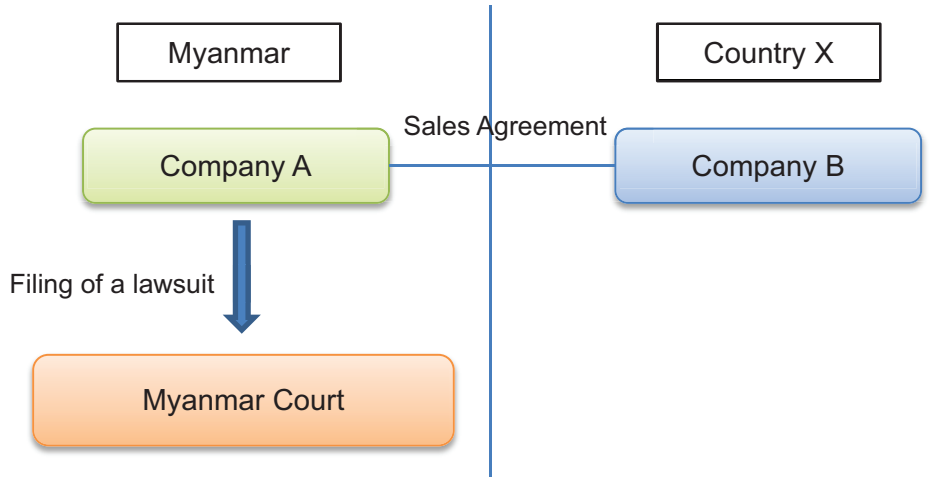
(2) **Service of Documents (described in Chapter 20)**
(3) **May the Myanmar courts assert jurisdiction and enforce a decision made by another dispute resolution body?**
The Myanmar courts will be required to enforce the following decisions:
(1) Decisions rendered by a foreign courts (described in Chapter 18))
(2) Arbitral awards rendered by foreign arbitral tribunals (described in Chapter 17)

Chapter 15
International Jurisdiction and Agreement on Dispute Resolution

1. International Jurisdiction of a Court in Myanmar

Case 15-a

Company A in Myanmar executed a sales agreement to purchase a machine for use in its factory from Company B, a company located in Country X. When Company A received the machine, Company A's inspection revealed that the machine contained defects and was useless. Company A brought a lawsuit against Company B in the Myanmar courts to demand the cancellation of the sales agreement and claim damages for Company B's breach of contract.



In Case 15-a, the Myanmar court's jurisdiction over the civil or commercial suit is generally determined under the Code of Civil Procedure (Article 9 and Article 15 to 20).

However, in international transactions such as Case 15-a, the parties typically agree that any dispute arising out of the agreement will be resolved in through alternative dispute resolution, not the Myanmar courts. As a result, even if the court in Myanmar has jurisdiction over the lawsuit under the Code of Civil Procedure, the court should not to assert jurisdiction over the lawsuit in the case that the parties have agreed to another form of dispute resolution (for example, arbitration in Country Y, which is a third-party country that does not share nationality with either Company A or Company B).

Essential Point: Cases where a defendant is an overseas corporation

In order for a court to assert jurisdiction under Article 20(a) or (b) of the Code of Civil Procedure, a lawsuit must be brought before the court that has jurisdiction where the defendant "carries on business."

In order to determine that the defendant "carries on business" in such place, the defendant must carry on business "in Myanmar."[16] As a result, it is understood that the defendant needs to be registered under the Myanmar Companies Law.[17]

16 Explanation II to Section 20 "A corporation shall be deemed to carry on business at its sole or principal office in the Union of Myanmar or, in respect of any cause or action arising at any place where it has also a subordinate office, at such place."

2. **Agreement between the Parties to a Dispute Resolution Method**

(1) **Types of agreement on dispute resolution**

Generally, there are two types of agreements on dispute resolution:

(a) **Resolution of a dispute through arbitration**

For example, in Case 15-a, the parties may agree to resolve the dispute through arbitration in Country Y, a third country to the sales agreement for the machine.

(b) **Resolution of a dispute through litigation in a foreign court**

Validity of Dispute Resolution Clause

Article 28 of the Contract Act states that "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The explanation to the article clearly states that an agreement to use arbitration as a dispute resolution method is legally valid.[18] An agreement to resolve a dispute in the courts of a foreign country will not be considered within the scope of the above "absolute" restriction and will be deemed legally valid. This is a concept that is generally accepted not only in other common-law countries but also in civil-law countries. According to a prominent academic scholar, the courts shall reject a plaintiff's assertion that such agreement is invalid (because it is against public policy).[19]

Essential Point: Difference between an agreement on governing law and dispute resolution

It is essential to distinguish the agreement on (i) the law that will apply to the interpretation of the contract and (ii) the dispute resolution method. This difference should be considered as these provisions are often included in the same clause to or near each other in a contract.

(2) **Existence of an arbitration agreement**

Upon receipt of a request from a party, which must be submitted no later than the date on which a written statement on the substance of the dispute is submitted, the courts must refer the parties to arbitration, except if the courts render a decision that the agreement is null or the like (Article 10(a) of the Myanmar Arbitration Law).

In such case, the court shall issue a stay order (Article 10(d) of the Myanmar Arbitration Law). The parties will not be allowed to file an appeal against such order

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17 *See,* Adrian Briggs, "Private International Law in Myanmar", pp. 24 -25.

18 Exception 1.This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

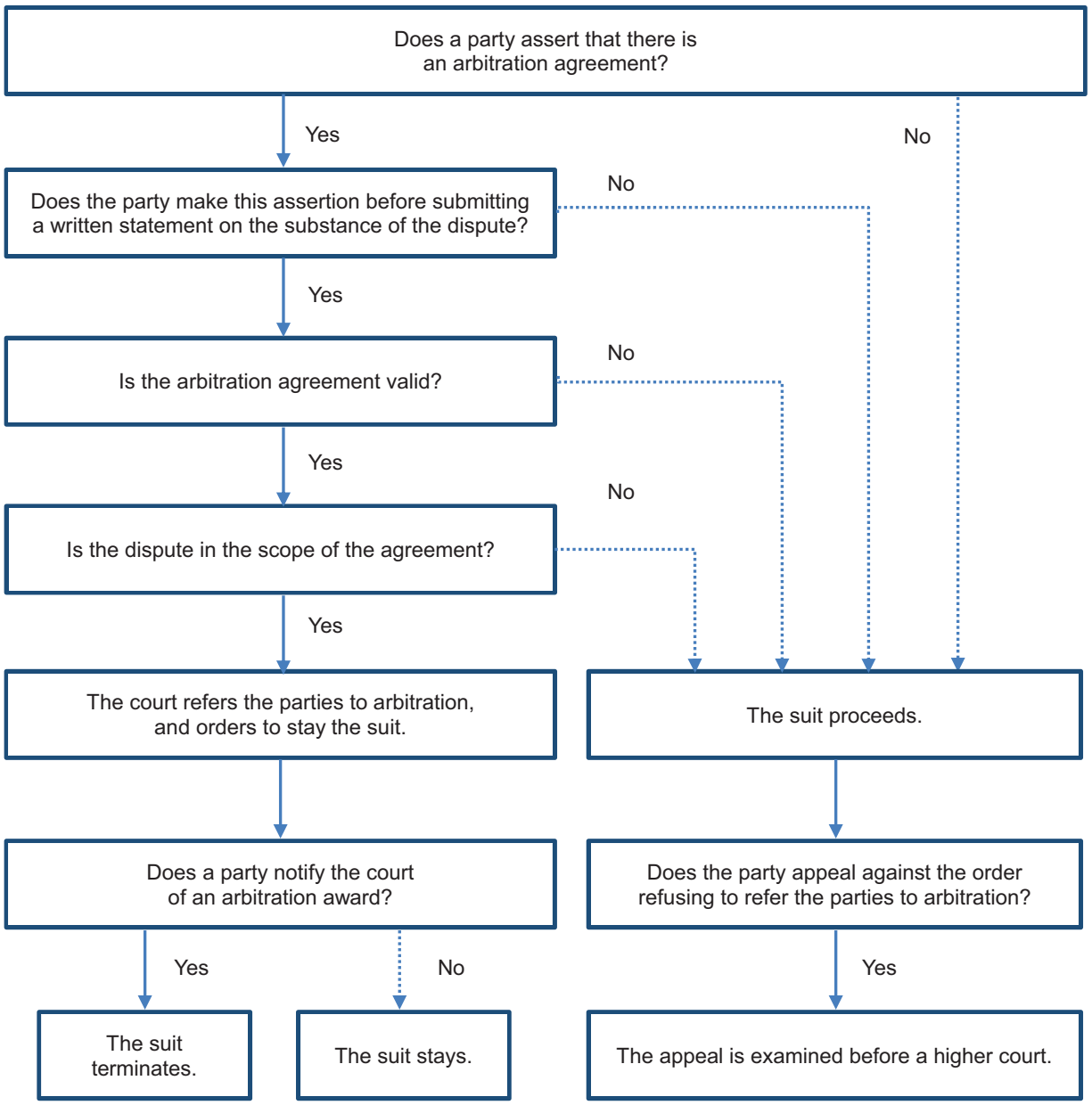
Exception 2. -Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

19 *see*, Briggs, pp.34.

(Article 10(e) of the Myanmar Arbitration Law), but the parties will be allowed to file an appeal with respect to a decision that declines to refer the dispute to arbitration (Article 10(f) of the Myanmar Arbitration Law).

If the court issues a stay order, the court must request that the parties notify the court when the arbitration procedures have completed. When an arbitration award is made and a parties notify the court of the award, the court must use its authority to terminate the lawsuit (Article 114 of the Code of Civil Procedure).

Below is the summary of the explanation above:



(3) **Agreement to use a foreign court to resolve a dispute**
The courts will return the complaint to the plaintiff when the court confirms the agreement between the parties to use a designated foreign court to resolve any disputes (Rule 10 of Order 7 of the Code of Civil Procedure).

Chapter 16
Basics of International Arbitration

1. **Arbitration in Myanmar**

The Republic of the Union of Myanmar is a signatory country of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)(the "New York Convention"), and the Myanmar Arbitration Law (2016) was enacted based on the New York Convention.

Under this treaty and legislation, even if a party to a contract files a lawsuit to the Myanmar courts, the relevant court shall refer the parties of the suit to arbitration and issue a stay order at the request of a party if the parties have agreed in the relevant contract to resolve all disputes through arbitration.

New York Convention

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Myanmar Arbitration Law

10. (a) A court before which an action is brought in a matter which is the subject of an arbitration agreement, a party may apply to the court to refer the arbitration not later than when submitting any statement on the substance of the dispute. For such application, the court may refer the dispute parties to arbitration if the court found that the agreement is not null and void, inoperative or incapable of being performed;
(d) the court shall order to stay the suit, if the court refers the parties to arbitration;
(e) No appeal shall be allowed against the court's order which refers to arbitration applied under subsection (a);
(f) Appeal shall be allowed upon the decision of the court which refuses to refer to arbitration applied under subsection (a).

In other words, when a party submits a request to the court to refer the parties to arbitration, the court must confirm the existence of an arbitration agreement.

2. **Key Elements of an Arbitration Agreement**

Generally, the parties agree to the following matters in an arbitration agreement:

- Whether to use arbitration
- Place of arbitration
- Arbitration institution
- Arbitration rules
- Number of arbitrators
- Language

Sample Arbitration Clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by [*Name of Institution*] in accordance with the Arbitration Rules of [*Name of Arbitration Rule*] for the time being in force, which rules are deemed to be incorporated by reference in this clause.
The seat of the arbitration shall be [*Venue*].
The Tribunal shall consist of [*Number*] arbitrator(s).
The language of the arbitration shall be [*Language*].

Validity of Agreement

It is generally accepted that even if the parties contest the validity of a contract, the validity of the dispute resolution clause in the contract will remain unaffected[20]. This view is also adopted by the Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 of the United Nations Commission on International Trade Law (UNCITRAL) and the articles on local arbitration in the Myanmar Arbitration Law (2016).

Reference: UNCITRAL Model Law

16. Competence of arbitral tribunal to rule on its jurisdiction
(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Reference: Myanmar Arbitration Law

18. (a) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose:
(1) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract;
(2) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Arbitration Procedure in Arbitration Institutions

An arbitration institutions typically carry out arbitration procedures in accordance with their relevant rules of arbitration, which typically include the following items:
- Introductory provisions
- Commencing the arbitration
- Multiple parties, multiple contracts and consolidation

[20] *See* Briggs. pp. 40 " In the context of arbitration, which is discussed under point (18), it has long been accepted that an arbitration agreement is separate, or severable, from the contract in which it is contained. There is no reason why a jurisdiction agreement should be treated any differently."

- Arbitral tribunal
- Arbitral proceedings
- Awards
- Costs
- Miscellaneous

(ICC Rules of Arbitration)

The Myanmar Arbitration Law sets forth the same items, but it should be noted that when an arbitration procedure is carried out in a foreign arbitration institution, the arbitration rules of the foreign arbitration institution, not the Myanmar Arbitration Law, will be applicable.

Article 2(b) of the Myanmar Arbitration Law
"If the place of arbitration is at any other country except in the Union, or place of arbitration is not specified or not determined, section 10, 11, 30, 31 and Chapter 10, shall be applicable.

(1) **Arbitration institution and place of arbitration**

Essential Point: Arbitration institution and place of arbitration

An arbitration institution is an institution which presides over an arbitration procedure under the arbitration institution's rules of arbitration. There are numerous arbitration institutions throughout the world, and the following are often selected in international transactions:

ICC： International Chamber of Commerce
SIAC: Singapore International Arbitration Centre
LCIA: The London Court of International Arbitration
HKIAC: Hong Kong International Arbitration Centre

The parties to a contract may select one arbitration institution.

The arbitration hearings will typically be held at the place of such arbitration institution, however, the parties may select another place. Although the major places of hearings include Singapore, Hong Kong, London, Paris and Geneva, there are no specific advantages or disadvantages for each place, and parties may select an arbitration institution and a place of hearings other than those listed up above.

(2) **Number of arbitrators**

The parties to a contract typically agree to appoint one or three arbitrators to the arbitral tribunal. If the parties do not set forth in their agreement the number of arbitrators, it will be determined according to the applicable arbitration rules. Further, if the parties agree to the number of arbitrators but not the arbitrator appointment procedures, the arbitrators will be appointed according to the arbitration rules.

Sample provision for cases where the number of arbitrators has not been agreed

9.1 A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators. (SIAC)

Sample provision for cases where there is an agreement regarding the number of arbitrators but the appointment procedures

11.1 If three arbitrators are to be appointed, each party shall nominate one arbitrator.
11.2 If a party fails to make a nomination of an arbitrator within 14 days after receipt of a party's nomination of an arbitrator, or within the period otherwise agreed by the parties or set by the Registrar, the President shall proceed to appoint an arbitrator on its behalf.
11.3 Unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the period agreed by the parties or set by the Registrar, the President shall appoint the third arbitrator, who shall be the presiding arbitrator. (SIAC)

(3) **Language**

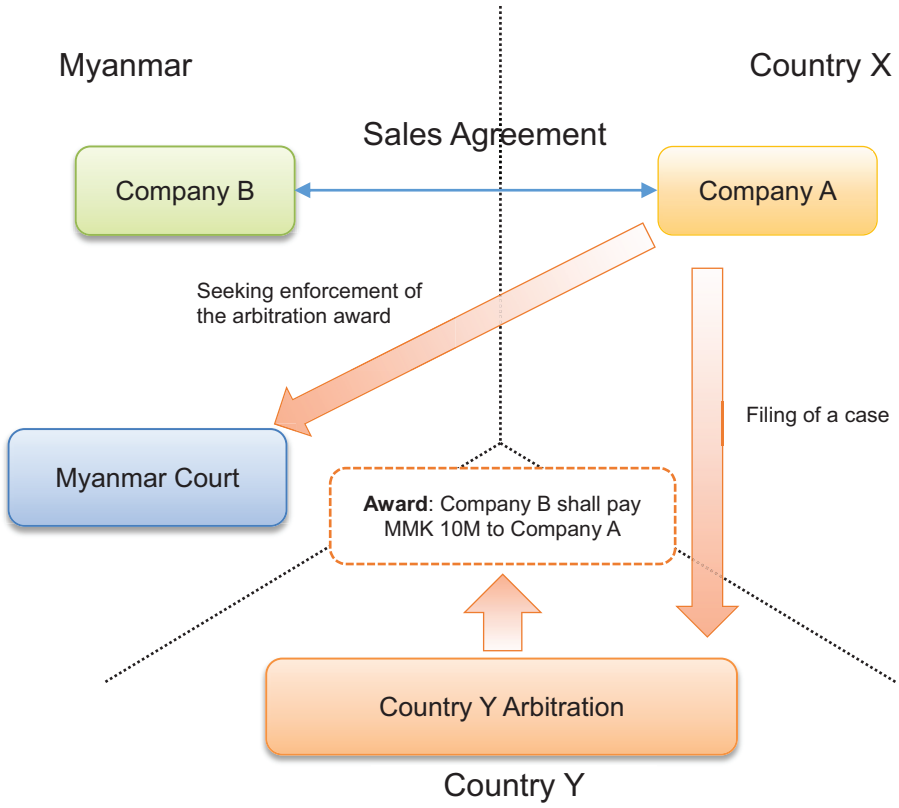
The parties may select to use any language for arbitration procedures. However, English is the most common selected language. If the parties do not agree to a language in the contract, the language will be determined according to the applicable arbitration rules, and is generally determined by the arbitration tribunal.

Chapter 17
Recognition and Enforcement of International Arbitral Awards

Case 17-a

Company A, a company of Country X, purchased a machine from Company B, a company of Myanmar, for use in its factory. Upon receipt, Company A conducted an inspection of the machine and discovered that the machine was defective and useless. Company A and Company B agreed in the sales agreement for the machine that any dispute between them would be resolved in an arbitration institution in Country Y.

Company A filed an application for arbitration with the arbitration institution in Country Y and claimed damages against Company B based on the breach of contract by Company B. The arbitration tribunal issued an arbitral award that ordered Company B to pay 10 million Myanmar Kyat to Company A. How can Company A enforce this arbitral award, which was issued in Country Y, against Company B in Myanmar?



The Republic of the Union of Myanmar is a signatory country of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the "New York Convention"), and the Myanmar Arbitration Law (2016) (the "MAL") is based on the New York Convention. Sections 10, 11, 30 and 31 and Chapter 10 of the MAL are applicable to cases where the arbitration was conducted in a place other than Myanmar.

Chapter 10 (Recognition and Enforcement of Foreign Arbitral Award) will apply to Case 17-a.

New York Convention

Article III
Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Myanmar Arbitration Law

Section 2 (Scope of Application)
If the place of arbitration is at any other country other than the Union, or the place of arbitration is not specified or not determined, Sections 10, 11 , 30, 31 and Chapter 10 shall be applicable.

1. **Application to Enforce Arbitral Award**

The party that wishes to enforce the foreign arbitral award must submit following documents to the court with the application to enforce the arbitral award (Section 45(a) of the MAL):

(1) the original award or a copy thereof, duly authenticated in the manner required by the law of the country that issued the arbitral award;
(2) the original agreement for arbitration or a duly certified copy thereof; and
Note: Generally, the agreement will be a transactional agreement that includes a provision that the parties will resolve the dispute through arbitration, and the parties will not execute a separate, individual document that merely states the parties' agreement to arbitration.
(3) any evidence necessary to prove that the award is a foreign award.

If any of the above documents is written in a foreign language, the party seeking to enforce the award must prepare an English translation and have the translation certified as correct either by the ambassador or consular of the country to which that party belongs or in a manner that satisfies the requirements under Myanmar law (Section 45(b) of the MAL).

Myanmar Arbitration Law

Section 45
(a) The party applying for the recognition and enforcement of a foreign award shall, submit the following documents to the court:
(1) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
(2) the original or duly certified copy of arbitration agreement; and
(3) evidence as may be necessary to prove that the award is a foreign award.

(b) Where the award or arbitration agreement required to be submitted under subsection (a) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by the ambassador or consular or certified translator or translator who makes a translation with affidavit of the country to which that party belongs or certified as correct in such other manner as may be sufficient under the existing law of the Republic of the Union of Myanmar.

2. **Recognition and Enforcement**

(1) **General rule**

Section 46(a) of the MAL provides that a foreign award shall be, in principle, enforced under the Code of Civil Procedure in the same manner as if it were a decree of a court.

Myanmar Arbitration Law

Recognition and Enforcement of Foreign Arbitral Award

Section 46

(a) Except in the case that the recognition and enforcement of the foreign arbitral award is refused under subsection (b) and (c), the court shall enforce the foreign arbitral award as if it were a decree of the court.

Definitions

3. (k) "foreign arbitral aw ard" means an award made in the territory of the New York Convention member states other than the Union in accordance with the arbitration agreement;

In Case 17-a, if Company A, the prevailing party, submits an application for the enforcement of the arbitral award made in Country Y ordering Company B to pay 10 million Myanmar Kyat to Company A, the award will be recognized and enforced in Myanmar except in the case described below where the court refuses to recognize the award.

(2) **Refusal to recognize or enforce a foreign arbitral award**

A court may refuse to recognize or enforce a foreign arbitral award in exceptional cases, such as cases where (1) the subject-matter of the dispute cannot be settled by arbitration under Myanmar law; or (2) the enforcement of the award would be contrary to the national interest (public policy) of Myanmar (Section 46(c) of the MAL). However, as the determination to resolve any disputes through arbitration is based on the mutual agreement of the parties, such intention of the parties must be respected and these exceptions will apply only if the court determines that, upon careful consideration, any of the exceptions apply.

Myanmar Arbitration Law

Recognition and Enforcement of Foreign Arbitral Award
Section 46

(b) The court may refuse to recognize and enforce the foreign arbitral award if the party against whom it is invoked can prove any of the followings:
  (1) the parties to the arbitration agreement was under some incapacity under the law applicable to them;
  (2) the said agreement is not valid under the law to which the parties to be complied with or, failing any indication thereon, under the law of the country in which the award was made;
  (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or the arbitral proceedings were not properly conducted, or was otherwise unable to present his case;
  (4) the arbitral tribunal's award with respect to a dispute is not contemplated by or not falling within the terms that may be submitted to arbitration, or it contains decisions on matters beyond the scope of matters that may be submitted to arbitration;
  (5) the composition of the arbitral tribunal or the arbitral procedures was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country in which the arbitration took place;
  (6) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(c) the court may refuse to enforce the foreign arbitral award if the court finds any of the followings::
  (1) the subject matter of the dispute cannot be settled by arbitration under the law of the Union; or
  (2) the enforcement of the award would be contrary to the national interest of the Union..

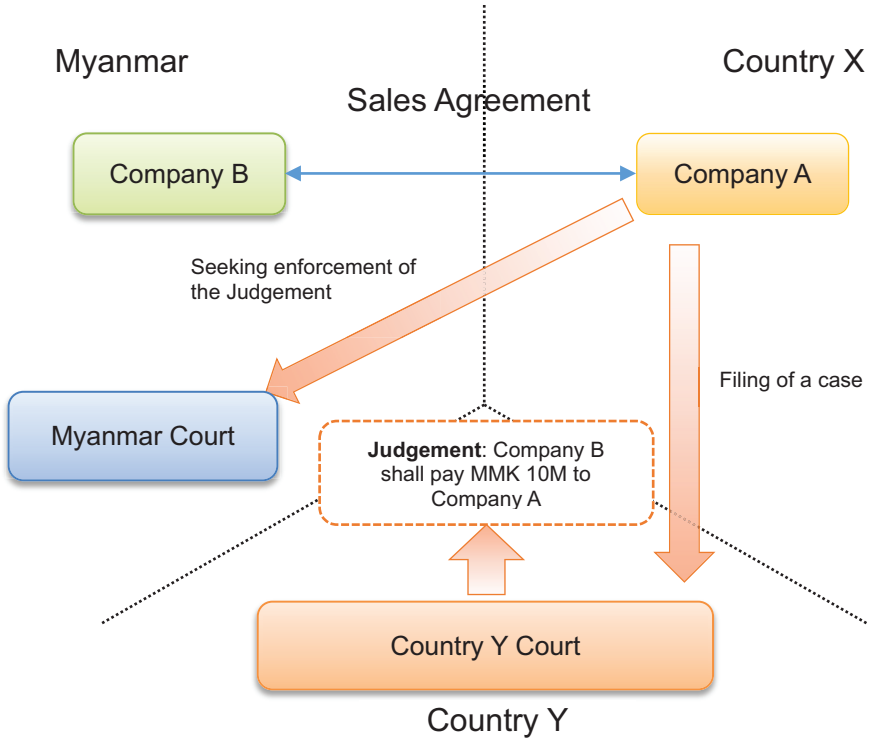
A party has the right to appeal an order to refuse a foreign arbitral award (Section 47(a)(3) of the MAL).

Chapter 18
Recognition and Enforcement of Judgment of Foreign Court

Case 18-a

Company A, a company of Country X, purchased a machine for use in its factory from Company B, a company of Myanmar. Upon receipt, Company A conducted an inspection and discovered that the machine was defective and useless. Company A and Company B agreed in the sales agreement that any dispute between them would be resolved in the court of Country Y.

Company A filed a lawsuit in a court in Country Y claiming damages against Company B for breach of contract, and the court rendered a judgment ordering Company B to pay 10 million Myanmar Kyat to Company A. How can Company A enforce this decision, which was issued by a court in Country Y, against Company B in Myanmar?



In Case 18-a, if Company B has assets in Country X, Company A may enforce the court decision in Country X. However, if Company B has assets only in Myanmar, Company A may prefer to also enforce the decision issued by the court in Country X in Myanmar.

Section 13 of the Code of Civil Procedure states that, except for certain cases determined therein, a foreign judgement will be conclusive in Myanmar.

Code of Civil Procedures

Section 13
A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them

claim, litigating under the same title, except in the case that:
(a) it was not issued by a court of competent jurisdictions;
(b) it was not issued on the merits of the case;
(c) it appears on the face of the proceedings to be issued based on any incorrect view of international law or refusal to recognize the law of Myanmar in which such law is applicable;
(d) the proceedings in which the judgement was obtained are opposed to natural justice;
(e) it was obtained by fraud;
(f) it sustains a claim founded on a breach of any law in force in Myanmar.

Section 14 presumes that with respect to Section 13(a) above, the jurisdiction of the foreign court which issued a decision subject to the submission of a certified copy of such foreign judgement is a competent jurisdiction.

Code of Civil Procedures

Section 14
The Court shall presume, upon the production of any document purporting to be a certified copy of foreign judgement, that such judgement was issued by a court of competent jurisdiction, unless the contrary appears on the record; provided, however, that such presumption may be displaced by proving a lack of jurisdiction.

Essential Point: The meaning of the word "conclusive "

(1) Prohibition of repeat disputes
If a party which does not prevail in a case filed in a court is allowed to bring and argue the same case in another court, the dispute will never be resolved, which will cause a significant burden on the parties and the courts involved in the dispute.
For this reason, if a dispute with respect to which a foreign court has already issued a decision is brought in the Myanmar court (usually brought by the non-prevailing party), the court must review the decision and determine whether there is any evidence that any of six (6) exceptions exist (and the court shall not investigate the substance of the dispute at such point in the procedure). If such exceptions do not exist, the court should determine that the party is not allowed to bring a dispute in the Myanmar court regarding the matter on which the foreign court made a decision.

(2) Enforcement in Myanmar of a decision given by a foreign court
A foreign judgement would not be a "conclusive" measure to resolve the dispute if it is not enforceable in Myanmar. Section 44A, which sets forth the rule that governs this matter, should be interpreted on a case-by-case basis regarding whether an enforcement of a decision given by a foreign court will be upheld. It shall be noted that if the court of country has a legal framework (i.e. India) similar to Myanmar, such judgment will be determined on a case-by-case basis and may be enforced.

In Case 18-a, except in the cases set forth in subsection (a) to (f) in Section 13 above, the decision issued in Country Y ordering Company B to pay 10 million Myanmar Kyat to Company A shall be effective in Myanmar as if a court in Myanmar issued the decision. As a result, Company B may not argue the validity of the decision issued by the court in Country Y in a court in Myanmar. In addition, Company A may be able to enforce the decision issued by the court in Country Y if permitted by the Myanmar court.

Chapter 19
Injunction

An injunction is a court order that prevents a person engaging in, or about to engage in, an illegal action from engaging such illegal action. There are two types of injunctions: a temporary injunction and a perpetual injunction.

In Myanmar, Order XXXIX of the Code of Civil Procedure sets forth the rules (requirements and effect) for a temporary injunction, and the Specific Relief Act sets forth the rules for a perpetual injunction.

In this chapter, we will explain temporary injunctions and apply a case study on a foreign order of injunction affecting Myanmar.

Case 19-a

Company X, a company of Country L, executed a distribution agreement with Company Y, a company of Myanmar, which appointed Company Y as an exclusive distributor in Myanmar of Smartphone A, a popular product manufactured by Company X.

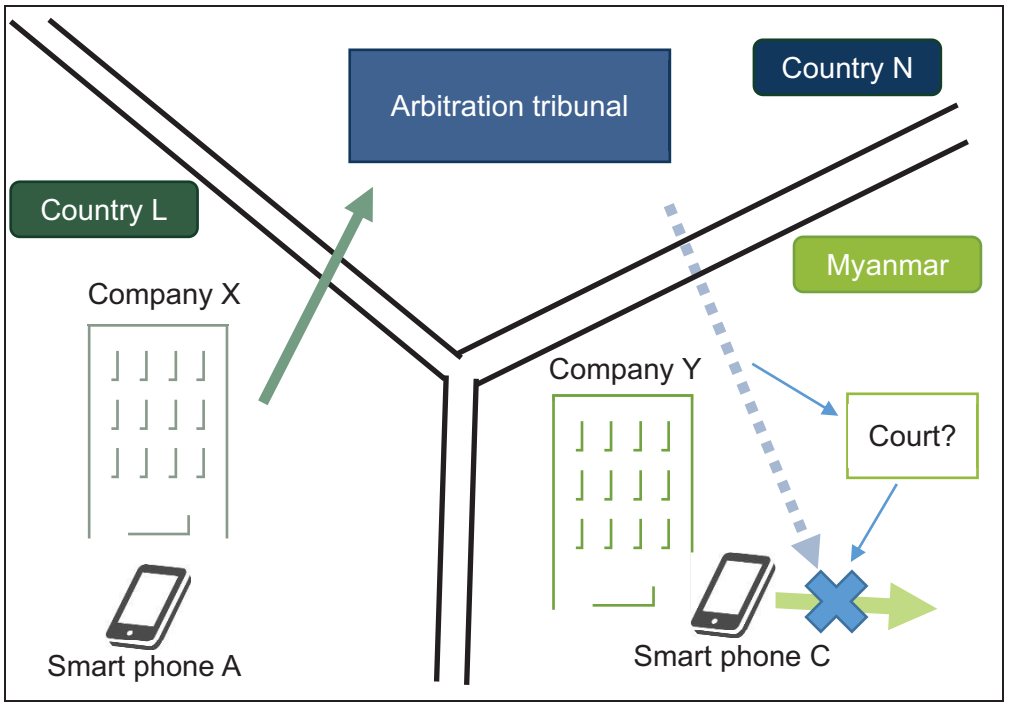
The distribution agreement included the following provisions:

- Company Y is prohibited from disclosing confidential information received under the distribution agreement
- Company Y is prohibited from using the confidential information except for the purpose set forth in the distribution agreement
- Any dispute between Company X and Y shall be resolved by arbitration in Country N, a third party country.

After the execution of the distribution agreement, the sales volume of Smartphone A substantially decreased. Company X conducted an investigation and discovered that the decrease was due to the simultaneous sale by Company Y of Smartphone C, which Company Y sold for a low price. Smartphone C was very similar to Smartphone A, and contained function B and other confidential information provided to Company Y by Company X.

Company X filed an application for arbitration in Country N, requesting a decision that required Company Y to cease the sale of Smartphone C. Company Y did not stop the sales. Company X then filed for a temporary injunction order , and the arbitral tribunal issued an order prohibiting Company Y from selling Smartphone C during the period until the final award was rendered. Company Y disobeyed such order.

Company X filed a request to a Myanmar court requesting that the court enforce the temporary injunction order issued by the arbitral tribunal.



1. **Temporary Injunction in Foreign Arbitration Procedures**

The arbitral tribunal is allowed to issue a temporary injunction order in arbitration procedures. For example, Singapore International Arbitration Center (SIAC) has the following rule, which grants interim relief to the parties, and may include injunctions.

Arbitration Rules of the Singapore International Arbitration Centre

Section 30.1
The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

In Case 19-a, the arbitral tribunal in Country N may issue an award to prohibit Company Y from selling Smartphone C until the issuance of the final award.

If Company Y does not comply with such award, Company X must take steps to enforce the award. If Company X files such a request to the Myanmar court, the Myanmar court must recognize such award in accordance with the Myanmar Arbitration Law. Please see Chapter 17 with respect to the details regarding recognition and enforcement of the international arbitral award.

2. **Enforcement of the Temporary Injunction Issued by a Foreign Court**

The courts may be required to enforce, in addition to arbitral awards in a foreign country, court orders for temporary injunctions. Please see Chapter 18 (Recognition and Enforcement of Decisions of Foreign Court) with respect to whether Myanmar courts may enforce these court orders.

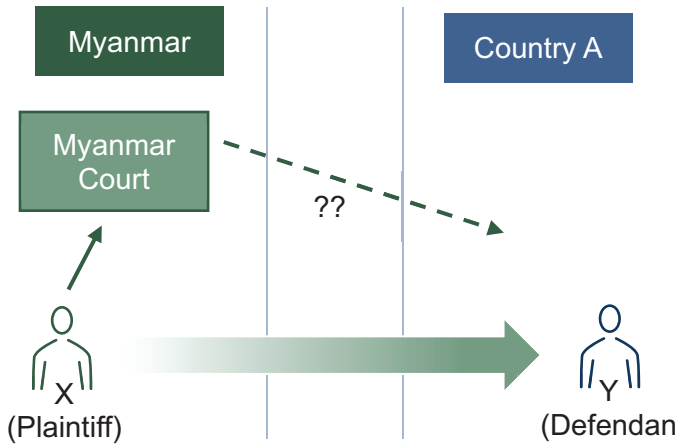
Chapter 20
International Service

1. Introduction

In order for a court to lawfully hear a case, judicial documents (e.g., complaint) must be lawfully served to the parties, and the court must have (international) jurisdiction over the case. This Section 20 explains the international service based on the following two cases.

(1) Case 1

X, a resident of Myanmar, filed a lawsuit in a Myanmar court against Y, a resident in Country A. The Myanmar court has international jurisdiction over the case. Myanmar and Country A have not entered into any treaties regarding international service. Can the Myanmar court serve a petition and a subpoena to Y? If yes, how should the court serve the documents?

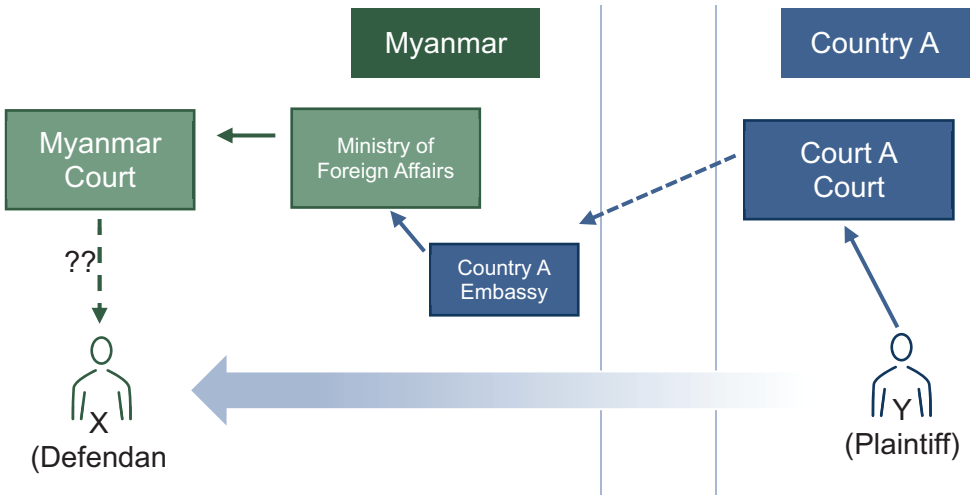


(2) Example 2

The Supreme Court of the Union of Myanmar receive a message from the Ministry of Foreign Affairs stating as follows:

The Ministry of Foreign Affairs received, from the embassy of Country A, a letter to the effect that Y, a resident in Country A, has brought a case before a court of Country A against X, which is a resident in Myanmar, and therefore the embassy requests that documents, such as a petition and subpoena, be served in Myanmar. A letter was also received requesting that the Ministry translate the petition, subpoena, and other documents into Burmese; and serve the petition, subpoena, and other documents sent from the court of Country A in a Myanmar court.

The court of Country A has international jurisdiction over the case. Myanmar and Country A have not entered into any treaties regarding international service. How should the Myanmar court respond?



2. **Consent to Service Abroad (Consent Based on Convention)**

Serving judicial documents (e.g., a complaint) by the court is an action of a nation state (i.e., exercise of national sovereignty). As a result, the court may not freely serve judicial documents in a foreign country without obtaining consent from the foreign country.

There are two methods for a country to consent to service abroad:

(i) General consent to service abroad in advance through a convention or other agreement (either a multilateral or bilateral convention)
(ii) Give consent to service abroad on a case by case basis

Generally, the important multilateral conventions are the Convention on Civil Procedure, and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. However, Myanmar is not a contracting state to any of these conventions.

Column
<Flow of General Procedures for Service Abroad Subject to Multilateral Conventions>

Plaintiff (Country X)
⇩
Court of Country X that Accepted the Petition
⇩
The Supreme Court of Country X
⇩
The Ministry of Foreign Affairs of Country X
⇩
Country X's Embassy in Country Y
⇩
The Ministry of Foreign Affairs of Country Y
⇩
Country Y's Body that Effects Service (e.g., Court)
⇩
Defendant (Country Y)

Further, Myanmar does not appear to have entered into many bilateral treaties with other countries with respect to service abroad. Thus, in many cases, for litigation between a Myanmar resident and a person who resides in a foreign country, the Myanmar court must obtain consent to serve judicial documents for each individual case.

3. **Consent to Service Abroad Where a Convention is Not Entered Into Between the Related Countries**

   If the related countries have not entered into a convention and there is no prior general consent between them, the requesting country must individually obtain consent from the other country through diplomatic channels for each individual case.

   (1) Example 1

   In example 1, since Myanmar and Country A did not enter into a convention on service abroad, Myanmar must obtain Country A's consent for each individual case. Each request to Country A must be made through diplomatic channels: the Courts of Myanmar should contact the Ministry of Foreign Affairs of Myanmar to request that the ministry to submit a request for consent to the ministry of foreign affairs of Country A through the Myanmar Embassy in Country A.

Myanmar Court that Accepted Petition
⇩
The Supreme Court of the Union of Myanmar
⇩
The Ministry of Foreign Affairs of Myanmar
⇩
The Myanmar Embassy in Country A
⇩
The Ministry of Foreign Affairs of Country A

Since each country each has different procedures and documents required for consent under law, it is necessary for the Courts of Myanmar to check Country A's regime for obtaining consent in each case. The following are examples of the documents required:

- Note from the Myanmar Embassy in Country A to the ministry of foreign affairs of Country A
- Letter of request from the Courts of Myanmar to the Court of Country A
- Translation of the letter of request into the language of Country A
- Document to be served
- Translation of the document to be served into the language of Country A

Generally, a considerable period of time (e.g., appropriately four months) is required to complete the procedures and make service. Accordingly, a date of subpoena must be set at a date by which service can be completed (e.g., six months later). Countries receiving requests will refuse to give consent if the period is too short.

Furthermore, Article 25 of the Code of Civil Procedure of Myanmar sets forth that in the case where a defendant resides outside Myanmar and there is no attorney in Myanmar authorized to receive service on the defendant's behalf, a subpoena can be sent by postal service to the address where the defendant resides if there is a postal communication service between the place of the court and the place of the defendant's residence. However, the universal practice is to effect service abroad through a competent court of a foreign country or through a consul of one's country stationed in a foreign country, and it is unusual for a country to allow a foreign court or other body to directly serve judicial documents to a resident of the country. Thus, it is never advisable for service abroad to be

naturally effected pursuant to the Code, and the Court must carefully research the receiving country's laws and regulations regarding service abroad.

(2) **Example 2**

In example 2, a request for consent in individual cases is made by Country A, a country with which Myanmar has not entered into a convention on service abroad through diplomatic channels. The country must reply to the request through diplomatic channels, so the Ministry of Foreign Affairs will be the contact; however, the ministry may ask the opinion of the Courts of Myanmar. In such case, the Courts of Myanmar should consider whether Myanmar should permit the service requested by Country A with consideration for the following main issues.

- Whether Myanmar has normal diplomatic relations with Country A (a country with which Myanmar does not have normal diplomatic relations may not exercise its national sovereignty in Myanmar)
- Whether a petition or a subpoena has a Burmese translation attached (it is likely that a defendant will not be able to understand its without a Burmese translation)
- Whether a date of subpoena is set at a point to allow sufficient time for the defendant to understand the contents of the petition and other documents and to prepare a pleading (litigation that sets a short period until the date of subpoena that does not allow the defendant time to prepare a defense is inappropriate.)

Please be aware that whether there are grounds for the litigation is a matter to be decided by a court of Country A; thus, the Courts of Myanmar do not need to, and normally should not, examine the petition or other documents to decide whether they are appropriate.

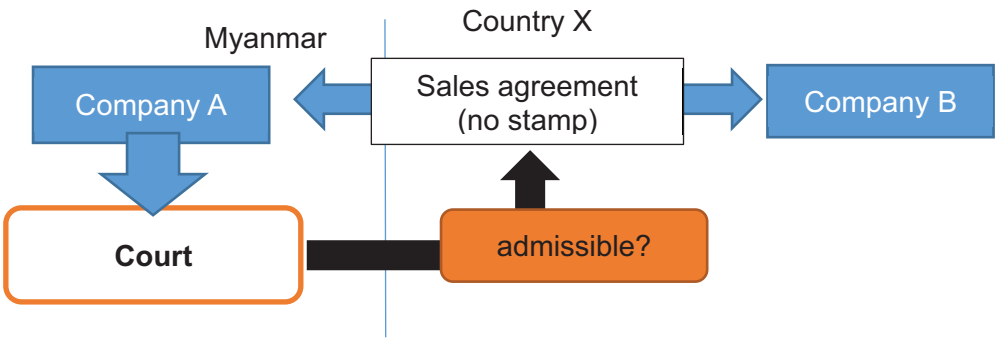
If the Courts of Myanmar decide that the requested service may be effected within Myanmar, a Myanmar court should effect the service in a manner generally accepted subject to the Code.

Chapter 21
Matters Related to Evidence

1. Written Agreement without Attachment of Revenue Stamp

Case 21-a

Company A (a Myanmar entity) executed a sales agreement in Country X with Company B (a Country X entity) to transfer to Company B machinery owned by Company A in Country X. The Country X courts allow written sales agreements without attachment of revenue stamp to be admissible in evidence. The machinery was delivered in Country X, but Company B did not pay Company A the price of the machinery, and Company A filed a lawsuit in a court in Myanmar to demand payment of the price. Company A submitted the written agreement as evidence, but Company B claimed that the written agreement was not admissible because it did not have a revenue stamp attached. How should the court decide the case?



Under the Myanmar Stamp Duty Act, if an instrument chargeable with stamp duty is not duly stamped, it may not be admitted into evidence (Article 35t).

Myanmar Stamp Duty Act Clause 35.

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, **unless such instrument is duly stamped**:
Provided that _ [intentionally omitted]

However, in some countries, (1) an instrument in question may not be chargeable with stamp duty, or (2) a written agreement not being affixed to stamp duty may still be valid and admissible as evidence.

In addition, as not all instruments are chargeable under the Myanmar Stamp Duty Act, the courts must carefully consider whether the instrument in question is chargeable with stamp duty in Myanmar.

Therefore, when a written agreement is submitted before a court in Myanmar as evidence, it is not appropriate to automatically deny its validity or admissibility simply because it is not duly stamped with a revenue stamp of Myanmar or another country.

Instruments Executed outside Myanmar

Under the Myanmar Stamp Duty Act, even if it is an instrument executed outside Myanmar, if it is related to any assets in Myanmar or if the obligation under the instrument is performed in Myanmar, and if it is received in Myanmar, such instrument is chargeable. (Clause 3(c) of the Stamp Duty Act)

Myanmar Stamp Duty Act Clause 3
Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments* shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefore respectively, that is to say,
……
(c) **every instrument (other than a bill of exchange or promissory note) mentioned in that schedule**, which, not having been previously executed by any person, is executed **out of the Republic of the Union of Myanmar** on or after that day, **relates to any property situate, or to any matter or thing done or to be done, in the Republic of the Union of Myanmar** and is **received in the Republic of the Union of Myanmar**.
*[*intentionally omitted]*

According to the rule set forth above, it appears that instruments not related to any assets in Myanmar, or not received in Myanmar even though it is related to some assets in Myanmar, are not chargeable with stamp duty in Myanmar.

In Case 21-a, as the subject matter of the sales agreement exists outside Myanmar, it must be carefully considered whether or not the written sales agreement is chargeable with stamp duty in Myanmar by confirming whether the obligation under the agreement is performed in Myanmar and whether the original written agreement is received in Myanmar.

2. Foreign Language Documents

Case 21-b

If the sales agreement submitted to the court as evidence was written in English, how should the court handle the sales agreement?

As the court and parties may not be able to read documentary evidence written in a language other than the official language of the court (Myanmar), all foreign language documents should be submitted to the court with an official Myanmar translation. The court may also need to confirm evidence which shows that the translation is accurate. The Court Manual provides the following provisions with respect to foreign language documents:

The Court Manual
Part II Chapter IV Section 57

When documents written in language other than the language of the Court are tendered for admission in evidence, the Court should see that they are translated into the language of the Court, and the evidence is taken to prove that the translation is correct.

There are several rules that appear to allow translators in the Court to translate the original language (The Court Manual, Part II Chapter VI Section 106, Paragraph 4 to 7);

however, it would be practically difficult for courts to prepare these translations. We understand that the party who submits documentary evidence in a foreign language should prepare its own Myanmar translation.

One of options to confirm the accuracy of a translation, the translation may be accepted as evidence if an affidavit prepared by the translator to declare the correctness which is notarized by a public notary is attached to the translation.

Such notarization does not need to be prepared by a public notary in Myanmar but may be prepared by a public notary in another country. If the document is notarized by a public notary in another country, the notarized document must be legalized by the Myanmar consul in the country of the public notary.

3. **Examination of Evidence for a Foreign Court**

The examination of evidence by a court is considered a form of execution of sovereign power, and a court is typically prohibited from conducting an examination of evidence in a foreign country. The court must obtain consent and cooperation from the officials of the foreign country in order to conduct an examination of evidence in such foreign country.

The Convention of 1 March 1954 on civil procedure and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters[21] are well-known conventions regarding the examination of evidence in a foreign country.

However, Myanmar is not a member of these conventions. Therefore, Myanmar must negotiate with each foreign country and comply with each rule of law in each foreign country to obtain consent and cooperation from a foreign country.

(1) **Examination of evidence by a foreign court in Myanmar**

Case 21-c

Consumer A (resident of Country X) made an offer for a package tour to Myanmar arranged by Company B (a Country X entity), a travel agency. When traveling in Myanmar, Consumer A was seriously injured while riding on a bus arranged by Company B. Consumer A filed a lawsuit in a court in Country X to claim damages against Company B. Both Consumer A and Company B made a request to the court in Country X to examine a witness, Driver C, the driver of the bus that rolled over.

The court in Country X, through the embassy of Country X in Myanmar, requested and commissioned a court in Myanmar to conduct the examination of the witness, Driver C. The request letter set forth the questions to the witness and the cost arrangement and also included a Burmese translation.

There is no statute in Myanmar that expressly determines the procedures to handle these types of requests. With consideration for Section 27 and other provisions in Order XXVI of the Code of Civil Procedure, if the High Court in Myanmar receives a request letter from a foreign court or a certificate signed by a consular officer of a foreign country, the examination of the witness may be conducted if the following three points are properly described in the request letter.

[21] In the relations between the Contracting States, this Convention replaces Articles 8 to 16 of the Conventions on civil procedure of 1905 and 1954

- A foreign court wishes to obtain the testimony of a witness
- The proceeding in the foreign court is of a civil nature
- The witness resides in Myanmar

The Code of Civil Procedure
Order XXVI

27 (1) If the High Court is satisfied -
(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,
(b) that the proceeding is of a civil nature, and
(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,
it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1) -
(a) by a certificates signed by the consular officer of the foreign country of the highest rank in the Union of Burma and transmitted to the High Court through the President of the Union, or
(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the President of the Union, or
(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

With consideration for Section 29 and other provisions in Order XXVI of the Code of Civil Procedure, it appears that the High Court must issue a commission for the examination of a witness to the local court where the witness resides, and such local court must conduct the examination of the witness.

The Code of Civil Procedure
Order XXVI

28 The High Court may issue a commission under rule 27 -
(a) upon application by a party to the proceeding before the foreign Court, or
(b) upon application by a law officer of the Government acting under instructions from the President of the Union.

29. A commission under rule 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where the witness resides within the local limits of the ordinary original civil jurisdiction of the High Court, to any person whom the Court thinks fit to execute the commission.

(2) **Examination of evidence by a Myanmar court in a foreign country**

Case 21-d

Consumer A (a resident of Myanmar) made an offer for a package tour to Country X arranged by Company B (a Myanmar entity), a travel agency. When traveling in Country X, Consumer A was seriously injured while riding on a bus arranged by Company B. Consumer A filed a lawsuit in a court in Myanmar to claim damages against Company B. Both Consumer A and Company B made requests to the court in Myanmar to examine a witness, Driver C, the driver of the bus that rolled over.

The court in Myanmar, through the embassy of Myanmar in Country X, requested and commissioned the courts in Country X to conduct the examination of the witness, Driver C.

With consideration for Section 77 and other provisions of the Code of Civil Procedure, it appears that if it is necessary to conduct the examination of the witness, a court must issue a commission and send it through diplomatic channels to a foreign country where a witness resides. Although the items that must be included in the commission will differ based on the regulations of the foreign country, based on Order XXVI rule 5 of the Code of Civil Procedure and the case of witness examination by a foreign court requested by a Myanmar court, the following items must be described in the request letter.

- A court in Myanmar wishes to obtain the testimony of a witness
- The proceeding in the court in Myanmar is of a civil nature
- The witness is residing in the country of the request
- The reason why the examination of the witness is essential
- Concrete questions to the witness

The Code of Civil Procedure
Section 77
In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within the Union of Burma.

Order XXVI
5 Where any Court to which application is made for the issue of a commission for the examination of the person residing at any place not within the Union of Burma is satisfied that the evidence of such person is necessary, the Court may issue such commission or letter of request.

REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 June 2008

on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters ([3]). The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme ([4]), adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([5]) (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ([6]).

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

([1]) OJ C 318, 23.12.2006, p. 56.

([2]) Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal) and Council Decision of 5 June 2008.

([3]) OJ C 12, 15.1.2001, p. 1.

([4]) OJ C 53, 3.3.2005, p. 1.

([5]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

([6]) OJ L 199, 31.7.2007, p. 40.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations [1] (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [2], regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by

[1] OJ C 334, 30.12.2005, p. 1.

[2] OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2008/10/EC (OJ L 76, 19.3.2008, p. 33).

whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'.

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([1]), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ([2]).

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems ([3]).

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ([4]).

([1]) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2008/18/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p. 42).

([2]) OJ L 280, 29.10.1994, p. 83.

([3]) OJ L 166, 11.6.1998, p. 45.

([4]) OJ L 18, 21.1.1997, p. 1.

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

(38) In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ([1]).

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

([1]) OJ L 178, 17.7.2000, p. 1.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;

(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;

(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(i) obligations arising out of dealings prior to the conclusion of a contract;

(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [1] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the

[1] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2008/19/EC (OJ L 76, 19.3.2008, p. 44).

parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

(a) the passenger has his habitual residence; or

(b) the carrier has his habitual residence; or

(c) the carrier has his place of central administration; or

(d) the place of departure is situated; or

(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another

person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ([1]);

(c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

([1]) OJ L 158, 23.6.1990, p. 59.

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance ([2]) shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

([2]) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services [1] and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is

[1] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

(b) those requirements cannot be derogated from by agreement.

Article 12

Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15

Legal subrogation

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to

claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17

Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18

Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III

OTHER PROVISIONS

Article 19

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of *renvoi*

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 22

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:

(a) a list of the conventions referred to in paragraph 1;

(b) the denunciations referred to in paragraph 1.

Article 27

Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

(a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and

(b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

FINAL PROVISIONS

Article 29

Entry into force and application

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	J. LENARČIČ

REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 July 2007

on the law applicable to non-contractual obligations (Rome II)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007 [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [3]. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme [4], adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [5] (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

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(1) OJ C 241, 28.9.2004, p. 1.

(2) Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

(3) OJ C 12, 15.1.2001, p. 1.

(4) OJ C 53, 3.3.2005, p. 1.

(5) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

(30) *Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [1].

[1] OJ L 178, 17.7.2000, p. 1.

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

Article 2

Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

Article 3

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

TORTS/DELICTS

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 5

Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 6

Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 8

Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9

Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER III

UNJUST ENRICHMENT, *NEGOTIORUM GESTIO* AND *CULPA IN CONTRAHENDO*

Article 10

Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11

Negotiorum gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12

Culpa in contrahendo

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Article 13

Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV

FREEDOM OF CHOICE

Article 14

Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V

COMMON RULES

Article 15

Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16

Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 17

Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

Article 18

Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Article 19

Subrogation

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 20

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

Article 21

Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

Article 22

Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER VI

OTHER PROVISIONS

Article 23

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

Article 24

Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 25

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 26

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 27

Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Article 28

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

CHAPTER VII

FINAL PROVISIONS

Article 29

List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:

(i) a list of the conventions referred to in paragraph 1;

(ii) the denunciations referred to in paragraph 1.

Article 30

Review clause

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1].

Article 31

Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32

Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
M. LOBO ANTUNES

[1] OJ L 281, 23.11.1995, p. 31.

Commission Statement on the review clause (Article 30)

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

Commission Statement on road accidents

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

Commission Statement on the treatment of foreign law

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.