

Slowly but surely, experience is building up with respect to project finance and international corporate finance for companies and projects in Myanmar. With the many different deals that we have completed, we prepared a quick overview of the key things to know. We also touch upon some of the remaining hot issues.

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FOREIGN LENDING AND SECURITY IN MYANMAR: OVERVIEW AND THE LATEST UPDATES

Legal framework for loans and security

Myanmar obviously shares a lot of its legal history with India including its codifications of English common law principles in relation to areas such as property (Transfer of Property Act), contracts (Myanmar Contract Act) and trusts (Myanmar Trust Act). Despite the relevance of English law concepts, one needs to keep in mind the importance of these statutes, which do not as such exist in English law. The local practice and case law may be different. Indian case law may also be persuasive.

Government approvals needed for foreign loans

The Myanmar Foreign Investment Law ("FIL") and the Foreign Exchange Management Act ("FEMA") and their implementing rules clearly establish the right of foreign investors or domestic parties to avail themselves of foreign loans subject to case-by-case regulatory approval by the Central Bank of Myanmar (CBM).

The CBM needs to approve the loan at the outset, before the moneys are disbursed. The CBM will typically review the following:

- The loan agreement
- The parties involved
- The interest rate
- The purpose of the loan

Highlights of this note

- ▶ Legal framework for loans and security
- ▶ Government approvals needed for foreign loans
- ▶ Main types of borrowers corporate security providers
- ▶ Frequently used types of commercial security and contractual comforts
- ▶ Stamp duty implications in connection with secured interests and contractual comforts
- ▶ Security per type of asset
- ▶ Internal approvals required for granting security rights
- ▶ Registration and perfection of security
- ▶ Prohibitions on providing financial assistance
- ▶ Insolvency risk periods
- ▶ Enforcement of security rights
- ▶ Priority of secured creditors in the event of insolvency
- ▶ Choice of governing law
- ▶ Existence of a trust or equivalent concept
- ▶ Exchange control on remittances
- ▶ Withholding tax ("WHT")

- The disbursement and reimbursement schedule; and
- The capital situation of the borrower, among other elements.

Requests are generally approved but delays and even rejections are possible in certain circumstances.

In case of an offshore loan structure (the borrower is the foreign parent company of the Myanmar project company) the foreign borrower would typically relend the funds to its Myanmar subsidiary, or use the proceeds of the loan to capitalize the subsidiary. An internal loan also requires CBM approval.

As recent as August 2016, CBM published the criteria for offshore loan. A borrower resident in Myanmar would require to furnish the following documents to CBM:

- An application which is addressed to "the Central Bank of Myanmar, Office No. (55), Nay Pyi Taw".
- Corporate documents (Company Registration Certificate, Form VI, Form XXVI, Memorandum of Association, Memorandum of Articles, etc.)
- If the company has been already established, financial statements for the current year and previous year as approved by an external certified auditor, who should be a Certified Public Accountant.
- Loan Agreement (Draft) including repayment schedule for the proposed loan and other relevant data.

- Bank Credit advices evidence of equity transferred to the company (borrower).
- Other documentary evidence.

The abovementioned documents would be scrutinized by CBM to ascertain the following:

- Whether the amount of equity capital of the applicant exceeds USD 500,000.
- Whether the applicant (borrower) has regular income in foreign currency in accordance with the provisions of Foreign Exchange Management Law and Foreign Exchange Management Regulations;
- Whether the borrower is able to make full repayment with an income in Myanmar currency and that there are measures to protect against potential changes in exchange rate in the event that the borrower does not regularly have an income in foreign currency;
- Whether the borrower has already transferred 80% of equity committed in MIC permit;
- Whether Debt to Equity Ratio is within a maximum of 3:1 and 4:1;
- Whether there are completion and correctness of terms and conditions mentioned in loan agreement and documents;
- Whether the loan tenure is medium-term or long-term, and loan repayment schedule is consistent with loan agreement or not.

CBM approval is also required for the Myanmar company to operate a bank account in a bank established overseas. This permission is not always granted.

Additionally, per the Foreign Investment Rules a company in Myanmar must have a foreign currency bank account to hold the foreign exchange remittances.

Further, depending upon whether the borrower has an MIC Permit, MIC approval of the facility may be required, and in the case of a loan granted to a microfinance institution, the Microfinance Business Supervisory Committee's ("MBSC") approval may be required.

Main types of borrowers corporate security providers

The corporate security providers in Myanmar are primarily Myanmar companies incorporated under the Myanmar Companies Act, 1914 ("MCPA"). These companies can be both private and public (but most are private), and either a company which is wholly-owned by Myanmar citizens or a Myanmar-incorporated (partially) foreign owned company. Note that shares in a company wholly owned by Myanmar citizens can administratively not be transferred to a foreigner, for example, in execution of a share pledge. Larger security providers may have an investment license ("MIC Permit"), which means the investment regulator's approval is needed for various transactions. Myanmar individual residents and citizens may also give guarantees.



Frequently used types of commercial security and contractual comforts

(A) Mortgage

It is noteworthy that in the case of immovable property being charged to a foreign lender, there is a requirement for an onshore security trustee (the services are provided by local Myanmar banks). Although there are six forms of mortgages possible under Myanmar law, in general practice, only three forms are used – English mortgage, simple mortgage or equitable mortgage. We briefly outline each of the three mortgage types below:

English Mortgage

An English mortgage can only be created by way of a registered deed, whereby the mortgaged property is absolutely transferred to the mortgagee with re-transfer upon repayment of the mortgaged amount as agreed. The mortgagor under an English mortgage is bound to repay the amount on a certain date. An English mortgage can be created with or without possession as well. This possibility of possession is a key difference with the simple mortgage. An important element of the English mortgage is the right to sell the mortgaged property upon default, wherever the property is situated, without any intervention by the courts. From that perspective, the English mortgage is the strongest form offered under Myanmar law.

The “absolute transfer of property” at the outset of the mortgage does not have

to discourage lenders from choosing for this option. Myanmar case law interprets this absolute transfer a highly functional manner, without transfer in fact:

“For the plaintiff it was contended that one who mortgages his property by an English mortgage has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest until the land is re-transferred to him by the mortgagee in fulfilment of the condition or proviso that this shall be done upon payment of the mortgage money. No doubt this contention would be correct if English common law were applicable to the case. But what has to be applied is the Transfer of Property Act 1882. Under this Act a mortgage is a transfer of an interest in specific immovable property for the purpose of securing (1) the payment of the money advanced or to be advanced by way of loan, (2) and existing or future debt or (3) the performance of an engagement which may give rise to a pecuniary liability. [...] Consequently, although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee the [Myanmar] law does not recognize that he does so in fact, and the mortgagor remains in [Myanmar] law owner of the property subject of course to the mortgage.”

Simple Mortgage

Under a simple mortgage, neither ownership nor possession of the

AN ASSIGNMENT IS WHERE ONE PARTY (“THE ASSIGNOR”) TRANSFERS OR AGREES TO TRANSFER ITS PROPERTY OR CONTRACTUAL RIGHTS TO ANOTHER PARTY (“THE ASSIGNEE”).



immovable property is transferred to the mortgagee. With a simple mortgage, the mortgagor keeps possession of the property and is bound to pay the amount secured by the mortgage. Upon a failure to pay the amount secured by the mortgage, the mortgagee has the right to cause the mortgaged property to be sold and to apply the proceeds towards payment of the debt owed.

Equitable mortgage

Also known as a mortgage by deposit of title deed, an equitable mortgage is completed by the deposit of the title deed by the mortgagor (or anyone duly authorized by the mortgage in



Myanmar LNG Briefing

28 September 2016, Sule Shangri-la, Yangon

this regard) with the mortgagee, with an intention to create a mortgage. Generally, there is no deed or agreement required for the creation of an equitable mortgage. The security can only be enforced through court proceedings.

The main disadvantages of the equitable mortgage are that (i) it only applies when there are title-like documents available for this land and (ii) it normally requires court intervention for enforcement. The main advantage is that it can be perfected without having to depend on registration with the ORD, which may be time consuming.

(B) Charge

A charge can be taken over fixed or current assets, intellectual property rights, receivables, bank accounts, assignment of rights under contracts, or any other movable property, whether tangible or intangible. There are two forms of charge under Myanmar law, in following of English law:

Fixed Charge: Such a charge is against a specific clearly identifiable and defined property. The property under charge is identified at the time the charge is created. The nature and identity of the property does not change during the existence of the charge. The company can transfer the property charged only after first paying the debt to the charge holder.

MYANMAR REGISTERED COMPANIES FREQUENTLY HAVE A VERY RESTRICTIVE COMPANY OBJECTIVE, WHICH ARGUABLY DOES NOT ALLOW FOR THE PROVISION OF GUARANTEES, PROMPTING AN "ULTRA VIRES" ISSUE.



Floating Charge: A floating charge covers property of a circulating or fluctuating nature, such as stock-in-trade, debtors, etc. It attaches to the property charged in the varying conditions in which they happen to be from time to time. Such a charge remains dormant until the undertaking charge ceases to be a going concern or until the person in whose favor the charge was created takes steps to crystallize the floating charge. Upon crystallization, a floating charge becomes a fixed charge.

(C) Pledge

A pledge of goods is where possession of the goods is handed over to the lender in order to secure payment, and if the borrower defaults, then the lender may take over the goods and sell them in order to satisfy the debt (similar to how a pawn shop works). It should be noted that a pledge may be used to secure other obligations besides a debt. Pledges are often created over shares in a company.

(D) Assignment

An assignment is where one party ("the assignor") transfers or agrees to transfer its property or contractual rights to another party ("the assignee"). Contractual rights are assigned by way of a "deed of assignment" that is signed by the assignee and the assignor (and the other original party to the contract, if required). In a legal assignment, the assignee can enforce its rights against the debtor without involving the assignor; however, in such a situation

the assignment must be absolute and comply with the requirements specified in the Myanmar Transfer of Property Act ("TPA") with regard to notice to the debtor, etc.

(E) Hypothecation

Hypothecation, although not clearly defined by Myanmar law but recognized in case law, is used to create a charge against the security of movable assets. However, the possession of the security remains with the borrower itself. Thus, in the event of default by the borrower, the lender (i.e. to whom the goods/security has been hypothecated) will have to first take possession of the asset and then sell it. Hypothecatees generally have the right to sue the hypothecator for the debt and proceed in execution against the hypothecated goods, if they are available.

(F) Guarantees

Both corporate and individual guarantees are commonly used in Myanmar. The legal rules pertaining to guarantees are set out in the Myanmar Contract Act. There are a number of reasons why a guarantee might not be valid, such as through misrepresentation by the creditor or his agents, explicit or implied release of security by the creditor or, it seems quite strictly, as the result of "any variance" in the principal contract.

Myanmar individuals may give guarantees to third parties, but customary Buddhist matrimonial law



would require that spouses agree to commit communal assets.

Myanmar registered companies frequently have a very restrictive company objective, which arguably does not allow for the provision of guarantees, prompting an “ultra vires” issue. There are other company law rules to take into account, such as directors with conflicts of interest, particularly in the case of public companies.

The CBM has not yet taken an official position whether guarantees in connection with a foreign currency must be approved in advance.

Stamp duty implications in connection with secured interests and contractual comforts

Myanmar has stamp duties on a wide range of documents under the Myanmar Stamp Act 1899 and its Schedule I. There is currently a lot of uncertainty as to the application of stamp duty for modern financing and security documents. Previously, a groundswell of opposition had arisen from banking associations, several lenders and Myanmar Investment Commission regarding an internal, non-published circular (“Circular”) from the tax authorities, subjecting all loan, security and guarantee documents to 1.5% duty (category for ‘bonds’ or ‘mortgage deeds’). However, in practice, the borrowers preferred to rely on the actual law, i.e. the Stamp Act and not on the Circular.

The recently published Notification 146/2016 from the Ministry of Planning

and Finance, levying a duty of 0.5% on ‘bond’ has not allayed the previous disconnect between the law and its interpretation. Therefore, the stamp authorities still persist in applying the stamp duty applicable to a ‘bond’, to a loan agreement and security documents. Our view is that 0.5%, which is the highest stamp rate, only applies to a very small and strictly defined group of instruments as per the definitions and requirements of the Stamp Act. To be taxable as a bond, for example, the instrument needs to be attested and the amount needs to be ascertained. Furthermore, the statutory definition for “bond” requires that there is an indebtedness to pay money, not just an agreement to lend money. There is case law which supports this interpretation. Our opinion is that a facility agreement or another agreement arranging for a credit line is in most cases not the same as a bond, since there is no indebtedness in and of itself in the instrument for a facility, which is required under the definitions of the Stamp Act. Instead of creating indebtedness in and of itself by the instrument (“the borrower is hereby indebted for the amount of x\$ to lender”), as a bond does, a facility merely sets a framework for a future indebtedness should the borrower indeed utilize.

Along the same lines, the duty for the security agreements cannot be set at 0.5%. This rate is reserved for “mortgage deeds” only, and although that concept is defined widely, it does require clearly under the law that there is indeed a “secured amount”. Case law confirms

that without a secured amount, an instrument that would otherwise be a mortgage deed is dutiable as a normal agreement at a nominal rate. So, again, because facilities have no fixed and determined amount, and because security instruments do not mention a specific amount, the better interpretation is that it is simply impossible to apply the 0.5% rate.

In Myanmar borrowers have the right to pay stamp duty in several ways. Traditionally, the “Government assessed method” was required, which means you take the instrument to the stamp office and they tell you how much the duty is. But legally, taxpayers can also buy the stamps of the applicable amount themselves and stick them on the instrument and devalue them. This is not done often because the stamps are not made available by authorities.

CASE LAW CONFIRMS THAT WITHOUT A SECURED AMOUNT, AN INSTRUMENT THAT WOULD OTHERWISE BE A MORTGAGE DEED IS DUTIABLE AS A NORMAL AGREEMENT AT A NOMINAL RATE.

Security per type of asset

Land and buildings

There are several categories of land in Myanmar, ranging from (rare) freehold to grant land, permit land, farmland, garden land, etc. Depending on the land type, some of the underlying documents include permission to mortgage, transfer or create any sort of charge, however, in the absence of such, prior case-by-case permission from the relevant authorities would be required. Generally, the two categories of land that are easily charged are freehold land and grant land. To secure a charge over any immovable property, a mortgage, charge or assignment is created. The most common form of mortgage in Myanmar is an equitable mortgage, as the applicable stamp duty is lower and there is no requirement to register with the land authorities ("ORD").

Movable property

Movable property is generally secured by way of a pledge, hypothecation or a charge. Generally, the definition of movable property in Myanmar includes plant and machinery, stock-in-trade, cash or cash equivalents, book debt/accounts receivable, bank accounts, intellectual property, etc. Any form of security over movable property of a company (other than a pledge of movable property) requires registration with the CRO.

Shares

The shares of a Myanmar company can also be pledged as security for financing in Myanmar. In the event of default, the

shares pledged are enforced, control of the company is relinquished to the pledgee. If the borrower is a company which is wholly owned by Myanmar citizens, and the lenders are non-Myanmar lenders/financial institutions, an onshore security agent would be required to enforce the pledge over the Myanmar company's shares or the articles of the company have to be changed first to allow for foreign shareholders. Transfer of shares in a company with an MIC Permit must be approved by the investment regulator, the MIC. Change in control provisions are typically found in Myanmar telecom licenses as well as certain other licenses and concessions.

Contractual rights

Contractual rights, such as concessions, are often assigned under Myanmar law, either by way of a charge or by way of an absolute assignment, which triggers only upon default. However, in many assignments of contractual rights, where such rights are derived from the government, prior permission to that affect is required from the relevant governmental authority.

Internal approvals required for granting security rights

Under Myanmar law, the creation of any security over the assets of a company in most cases requires a specific resolution from the company's board of directors. However, a due diligence is always recommended to look at the charter documents of the Myanmar company to ascertain ultra vires issues which are a real concern in Myanmar.

**ENFORCEMENT ACTIONS
IN MYANMAR ARE
INVARIABLY SUBJECTED TO
JUDICIAL PROCEEDINGS,
AS THE BORROWER TRIES
TO CREATE DIFFICULTIES
BY OBTAINING
INJUNCTIONS ETC.**

Registration and perfection of security

Broadly, the perfection requirements are two-fold in Myanmar, and differ on the basis of the security being granted. Any security over immovable property, other than a mortgage by way of a share pledge, can be perfected after registration of the underlying instrument with the ORD, and registration with the CRO within 21 days of the creation of security.

No security over the movables of a company requires registration with the ORD. However, all types of security, other than a pledge of a company's shares/movable property, would require registration with the CRO within 21 days of its creation.

Prohibitions on providing financial assistance

Myanmar law and regulations do not impose any general restrictions or



conditions on the provision of financial assistance, except for public companies and for private companies which are subsidiaries of public companies. As per the Myanmar Companies Act, no company limited by share other than a private company (not being a subsidiary of a public company) shall give, whether directly or indirectly any loan or any financial assistance for enabling the purchase of its own shares.

Insolvency risk periods

Myanmar does not have a bankruptcy law as such, but applies provisions from two insolvency laws (written for individuals but the rules also apply to corporates) and from the MCPA. The MCPA provides that where any dispute arises between the creditors and the company pertaining to the financial distress of the company or otherwise, the parties can enter into a compromise or arrangement to that effect. Further, such an arrangement or compromise has to be agreed to by three quarters of the company's creditors. Upon such agreement, an application to that effect is presented before the court for its sanction, which upon approval would be binding on all of the company's creditors. If they fail to reach a compromise, the company is subjected to winding-up proceedings.

In general, there are certain presumptions pertaining to any payment done by any insolvent company to be a fraudulent



preference if such a transaction would be deemed a fraudulent preference under the Insolvency Laws in respect to an individual. Section 54 of the Myanmar Act provides that any act done within a period of three months by an insolvent in a way to give preference to any creditor over others would be deemed fraudulent and void. This would mean for a company as well, the three-month period is applicable, and within such period any act done by the insolvent company or its officials that gives preference to one creditor over the other would be deemed fraudulent and void.

10 Enforcement of security rights

Securities such as English mortgages and certain simple mortgages can be enforced without a court's intervention. However, in the case of an equitable mortgage, a court proceeding is necessary to enforce the security. Similarly, a court's intervention is required to enforce all security over movable assets, other than a pledge. Also, where movables form part of a mortgage that can be enforced without a court's intervention, they would also allowed to be enforced without court intervention.

However, enforcement actions in Myanmar are invariably subjected to judicial proceedings, as the borrower tries to create difficulties by obtaining injunctions etc.

Priority of secured creditors in the event of insolvency

Myanmar law provides that secured creditors have priority over unsecured creditors. Furthermore, the hierarchy of payments is specified in the case of the winding-up of a company (whether insolvent or not). Tax payments due to the central government or local authorities, all wages or salaries of employees up to 100 rupees due in last two months, all wages of laborers, up to 500 due in last two months, compensation payable under the Workmen's Compensation Act, 1923, dues pertaining to any employee for a provident fund, pension fund, gratuity etc., shall have priority over any payments made to the creditors of the company.



Myanmar Global Investment Forum
13 September 2016, Nay Pyi Taw

Choice of governing law

Parties generally have the freedom to choose governing law, but given the enforcement may be subject to a Myanmar court, most choose Myanmar law.

Existence of a trust or equivalent concept

The use of private trusts is possible in foreign lending in Myanmar. The basic reason is that foreigners cannot hold title over immovable property in Myanmar, and therefore, security trustees are hired to protect and enforce the security in any offshore lending where immovable property is part of the security package. Specifically, Myanmar has the Trust Act, which governs the rights and obligations of a trustee and the functioning of a trust.

Exchange control on remittances

As per Notification 7/2014, there are two kinds of account payments permitted for transfers of money from Myanmar to overseas:

1. Current Account Payments: These

include payments for short-term bank loans, trade, services, money transfers for family expenses, etc.

2. Capital Account Payments: All payments that are not current account payments are deemed to be capital account payments.

Payments of the principal amount and interest would fall within the meaning of capital account payments, and payments of fees and expenses would fall within the meaning of current account payments.

Withholding tax ("WHT")

Payments of interest on loans to non-residents are subject to 15% WHT. Such rate may be reduced to 10% under an applicable double taxation agreement (for example, 8% to 10% for a Singaporean entity). The WHT liability in respect of the abovementioned payments will apply to payments made by corporate entities and branch operations registered in Myanmar. The liability for the WHT rests with the remitter. WHT is a final tax for non-resident recipients who do not file tax returns in Myanmar.

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Edwin is a prominent foreign legal advisor living and working in Myanmar since 2012. He frequently advises the Government on privatizations and transactions in the energy, transport and telecommunications areas. He and his team regularly act for international financial institutions and DFIs, including on their largest ever Myanmar financing. In fact, VDB Loi has worked on virtually every single project financing which closed in Myanmar, for borrower or the lender. Furthermore, in 2016, he helped setup a new foreign bank in Myanmar and obtained licenses for MFIs and a securities firm.

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VDB Loi has created a practice team to support the partners where foreign and locally qualified lawyers and regulatory advisers work exclusively on banking and finance matters.



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The banking and finance team is led by Jeffery Martin. Jeffery joined VDB Loi having previously worked for an international firm based in S.E. Asia. He has led the local counsel side of cross border secured financing in the telecom, real estate and in the financial sector. He has a unique grasp of local security option, perfection and regulatory matters affecting financing. Jeff also advises clients on related corporate finance and commodities financing issues. Jeffrey was called to the Law Society of British Columbia, Canada, where he practiced before relocating to Asia.

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