



Lack of electricity generation and the growing demand in power supply have led the government of Myanmar to resort to short-term power rental projects to feed electricity into the grid as early as 2014 when the government awarded a number of power rental projects to companies such as Aggreko and APR Energy.

## AUTHOR



**Charles Magdelaine**  
Senior Legal Associate  
charles.magdelaine@vdb-loi.com

Charles is a lawyer qualified to practice in Paris educated in France, the United States and China. He has extensive experience in the documentation, financing and negotiation of energy projects.

## CONTACT



**Edwin Vanderbruggen**  
Senior Partner  
edwin@vdb-loi.com

Edwin is the responsible legal partner for the legal team. He has often negotiated for, and with, the Myanmar Government, whom he actually advises on a wide range of energy projects. He and his team are working on over 4,000 MW worth of generation in power projects.

## MYANMAR POWER BARGES: LEGAL AND TAX ISSUES

### Background

Lack of electricity generation and the growing demand in power supply have led the government of Myanmar to resort to short-term power rental projects to feed electricity into the grid as early as 2014 when the government awarded a number of power rental projects to companies such as Aggreko and APR Energy. Additional rentals were then awarded to other foreign players, notably Hong Kong-based V-Power.

In 2016, two power barge projects were also awarded to the National Infrastructure Holdings Company (“NIHC”) and Karpowership, following an international tender. Other onshore rental projects were then also awarded to V-Power and NIHC in 2018. In April, a 145MW rental project in Kyaukse started commercial operations using turbines provided by Wartsila.

In May 2019, the Ministry of Electricity and Energy (“MOEE”) announced that it would seek additional power barge rental projects for a total of 1,400MW in order to make up for the shortage in electricity production. Below are some local aspects that investors should consider in this sector.

### Typical features of rental power purchase agreements

Rental projects with the Electric Power Generation Enterprise (“EPGE”) are for a short-term period (between six months to five years) and on a Build Own Operate (“BOO”) basis. Options for project financing are limited (although not impossible), which in turn impacts the shape of project agreements. For instance, first drafts of the power purchase agreements provided by EPGE usually do not contain any provisions

### Highlights of this note

- ▶ Background
- ▶ Typical features of rental power purchase agreements
- ▶ Investment licensing and tax treatment
- ▶ Some issues around licensing requirements

relating to the financing of the project, and a specific concession agreement with the MOEE is not provided, as is expected for traditional independent power projects (“IPP”).

The timeline for implementation of these projects is relatively tight; parties usually have between six months to a year once the project has been awarded (i.e., notwithstanding the date of execution of the project agreements), failing which, liquidated damages for each day of delay will be due to EPGE (usually set at USD100 per MW). Construction requirements generally include building an interconnection facility to a nearby substation at the developer’s cost.

In terms of operational requirements, EPGE hires a facility that is fully available during the term of the project. In particular, we

VDB Loi will organize a seminar focusing on

**Power Barge Rental Projects in Myanmar** shortly.

Date will be confirmed.

Please book your spot in advance.

understand that the minimum required availability for a power barge will usually be its installed capacity. No planned or short-notice outages are allowed. If the declared availability is less than 95% of the installed capacity, the private company will be liable for liquidated damages.

The tariff structure is usually based on energy payments with a minimum take-or-pay. In the case of gas-fired rental projects, we have found that the usual minimum offtake is 90% of the minimum required capacity during the dry season and 50% during the wet season. Most of the previous power rentals to date have been denominated and paid in USD, although we have recently seen a push from EPGE for full MMK payments.

### **Investment licensing and tax treatment**

The possibility for power rental projects to receive a permit from the Myanmar Investment Commission (“MIC”) used to be unclear before the enactment of the Myanmar Investment Law 2016 (the “MIL 2016”), as the MIC took the position that short-term contracts on a BOO basis did not constitute an investment per se.

However, the MIL 2016 (section 40(e)) has clarified that investments also include turnkey contracts, which can include power rental agreements. So far, we are aware of at least one company that has received an approval from the MIC for a five-year rental power project in Rakhine state following the implementation of the MIL 2016.

This means that power rental projects can benefit from a number of tax exemptions. In particular, importation of machinery during the construction period will be exempted from customs duty, notably for the importation of the power barge. There would, therefore, be no need to apply for importation on a draw-back basis.

More importantly, rental projects are also eligible for an income tax holiday of three, five, or seven years depending on the location of the project after the beginning of operation, which can



represent most (or all) of the cycle of a rental project.

### **Some issues around licensing requirements**

Sponsors will find that licensing is key for power rental projects given the tight timeline afforded under the project agreements. This can potentially be an issue, as a power rental will have the same licensing obligations as a classic independent power project.

In particular, two regulatory approvals will prove to be a specific challenge for developers: environmental approvals from the Ministry of Natural Resources and Environmental Conservation (“MONREC”) and maritime approvals.

#### **Environmental approvals**

Depending on their size, power rental projects are required to conduct an Initial Environmental Examination (“IEE”) or an Environmental Impact Assessment (“EIA”), which must then be approved by MONREC. This has been a major hurdle for most infrastructure projects in the country due to extensive delays in receiving such approvals, as MONREC is experiencing an overflow of IEEs and EIAs to review as well as a shortage of manpower.

There are, however, mitigation strategies to take into consideration. Notably, we have successfully negotiated with EPGE for a power rental project in the

past; the negotiation concluded that non-issuance of an approval such as the environmental compliance certificate by MONREC constitutes a political force majeure event, which thereby relieves the developer from its obligations and triggers the payment of the deemed energy payments by EPGE.

#### **Maritime approvals for power barges**

As there are a number of uncertainties in the treatment of power barges under existing regulations, the possibility exists that a power barge may end up being treated like a port as well as a ship for regulatory purposes. In general terms, a facility will be designated as a port provided it is used to import goods by sea. The fact that such facility is used exclusively for the purposes of one company or project is irrelevant. Should it be the case, an official designation of the power barge as a port by the Union government would be required.

In addition, a foreign-flagged ship will only be approved for use of one port per visit, which is what the Department of Marine Administration (“DMA”) considers to be sufficient for trading on a limited basis. In the absence of clear regulations for foreign ships to receive a temporary Myanmar flag, an ad-hoc procedure will have to be negotiated with the DMA.

**Disclaimer:** *The information contained in this note is provided for informational purposes only and should not be construed as legal advice.*

## **CONTACT**

### **YANGON**

Level 10, Unit 01-05, Junction City Office Tower,  
Corner of Bogyoke Aung San Road and 27<sup>th</sup> Street,  
Pabedan Township  
T +951 9253752~756  
F: +951 9253758

### **NAY PYI TAW**

Nilar #2, Business Center, Park Royal Hotel Nay Pyi Taw,  
Jade Villa no. 13/14 Hotel Zone,  
Dekhina Thiri Township  
T: +95 678 106089  
F: +95 678 108 092