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## FINANCING A MYANMAR-BASED INTERNET SERVICE PROVIDER

The market for Internet Service Providers ("ISP") in Myanmar is stabilizing. Refinancing strategies, retooling and opportunities for expansion are fueling the need for new cash. Foreign financing remains one of the most obvious ways for ISPs to attract new funding.

To get you started, here are some of the key points to take into consideration when providing financing to a Myanmar-registered ISP.

### Official Approvals for a New Foreign Loan

Offshore loans need to be approved by the Central Bank of Myanmar ("CBM"). The main criterion for the approval is that the borrower is already sufficiently capitalized (equity). Parties will need to verify in advance whether the debt-to-equity ratio of the borrower meets current CBM standards (which are 3:1 to 4:1). If the borrower already exceeds this ratio, additional approvals will be needed, which are very hard to obtain.

Often, we encounter practical difficulties where the borrower believes some shareholder funding to be in the nature of capital (such as an interest-free shareholder loan) but the CBM believes it to be debt.

The telecom regulator at the Ministry of Communications and

### Highlights of this note

- ▶ Official Approvals for a New Foreign Loan
- ▶ Regulatory Regime of an ISP
- ▶ Due Diligence Issues for ISPs
- ▶ Rights Of Way And Licenses for Deploying Poles, Fiber Optic Cable
- ▶ Environmental Aspects
- ▶ Onshore Security

Transportation (the Post and Telecom Department or "PTD") must also be asked in advance for its approval on the loan and the security. A common problem here is that this approval may be delayed, especially when there are other issues affecting the relationship between the borrower and the regulator (for example, we've had an experience of a dispute in connection with a tower collapse delaying approvals for a loan).

Generally, technology (information, communications, etc.) with an expected value exceeding US\$20 million requires an investor to hold an MIC Permit. If the ISP indeed has an MIC Permit, it also needs MIC approval for the new loan. This is, however, a fairly standard approval if the CBM approves the loan first (it's a single-window process run by the MIC, normally).

### FINTECH IN MYANMAR



<https://goo.gl/2Ey7rf>

## Regulatory Regime of an ISP

ISPs in Myanmar may have one or several telecom licenses. Myanmar has 4 types of services licenses, and other licenses for related activities. You will find an overview in the textbox.

In theory, an AS License suffices to provide ISP services. But, in reality several ISPs have licenses of a higher order, such as an **NFS(I) License. International Gateway Services** Licenses are also often obtained by ISPs.

Below is a summary of the existing telecom licenses in Myanmar:

LICENSE	PERMITTED ACTIVITIES	EXAMPLES
Network Facility Service (Individual) (“ <b>NFSI</b> ”) License	<ul style="list-style-type: none"> <li>Construct, maintain, and operate network facilities</li> <li>Lease all or part of the licensee’s network facilities and capacity to Network Service (“<b>NS</b>”) or Application Service (“<b>AS</b>”)</li> <li>Provide any type of public or private telecommunication services, whether on an international or national level, to the public and/or other licensees</li> <li>Any telecommunication services authorized by NS, AS, and Network Facility Service (Class) (“<b>NFSC</b>”)</li> <li>Any International Gateway (“<b>IGW</b>”) services [Please note that pursuant to Telecom Licensing Rules 2014 and the Guidelines on IGW services 2016, if a NFS(I) license holder wishes to offer IGW services, it must apply to the PTD. So, as a rule, one must already hold an NFSI (I) license to apply for IGW services]</li> </ul>	<ul style="list-style-type: none"> <li>Terrestrial fixed-line transmission facilities</li> <li>Terrestrial radio transmission facilities</li> <li>Mobile base station facilities</li> <li>Submarine cable facilities</li> <li>IGW services facilities</li> <li>Satellite earth station facilities</li> <li>Other satellite facilities located in Myanmar providing capabilities for the transmission of telecommunication services</li> </ul>
IGW Services	<ul style="list-style-type: none"> <li>Any international transmission capacity, using any kind of network and any form of transmission technology, between places outside Myanmar and the relevant cable landing station or cross-border transit facility or radio communications facility in Myanmar</li> <li>Cable landing stations or cross-border transit facilities or terrestrial cable stations</li> <li>VSAT devices</li> <li>IGW facilities</li> <li>Facilities ancillary to the facilities required for provision of the IGW services, such as a customer support center, billing systems, or an intelligent network platform</li> </ul>	<ul style="list-style-type: none"> <li>IGW services which provide cross-border access to international terrestrial, submarine, and satellite systems</li> </ul>
NS License	<ul style="list-style-type: none"> <li>Lease transmission capacity directly from other licensees in order to provide public or private telecommunication services, whether on an international or national basis, to end users and/or another license (as set forth in the rules)</li> <li>Provide all services that are authorized by AS</li> </ul>	<ul style="list-style-type: none"> <li>Resale of wire line connectivity services</li> <li>Resale of terrestrial wireless connectivity services</li> <li>International and domestic network transport and switching services</li> <li>Resale of IGW services</li> </ul>
NFSC	<ul style="list-style-type: none"> <li>Construct, deploy, and maintain passive telecommunication network infrastructure and to lease such infrastructure to NFSI and others</li> <li>Construct, deploy, and maintain telecommunication networks solely for self-provision of telecommunication services and not for sale or rental</li> </ul>	<ul style="list-style-type: none"> <li>Towers</li> <li>Masts</li> <li>Ducts</li> <li>Trenches</li> <li>Poles</li> <li>Dark fiber</li> <li>Radio equipment installed to send, receive, and route communications for self-provision services</li> </ul>
AS License	<ul style="list-style-type: none"> <li>Lease transmission capacity directly from an NFS(I) Licensee and/or an NS Licensee in order to provide public or private telecommunication services on a national basis to end users and/or to other licensees (as set forth in the rules)</li> <li>Provide all services authorized by the AS License only</li> </ul>	<ul style="list-style-type: none"> <li>Public payphone services</li> <li>Public switched data services</li> <li>Audio text hosting services provided on an opt-in basis</li> <li>Directory services</li> <li>Internet service provider services</li> <li>Messaging services</li> <li>Private-line voice and/or data services</li> <li>Value-added services</li> </ul>

## Due Diligence Issues for ISPs

From a due diligence perspective, when looking at a borrower owning passive network infrastructure in Myanmar, based on our general experience, we would focus on a wide range of issues including:

- Pricing approvals: did the regulator approve the ISP's pricing of services (including discounts and promotions)? Based on our experience, there are often problems with this matter.
- For network assets that were deployed in cooperation with other operators, are there clear legal or contractual rules to identify the ownership rights of the borrower?
- Which Myanmar assets have already been granted security over? Under Myanmar law, the telecom regulator needs to approve the security package. Was this done (in our experience, often it was not)? Was this security registered?
- Transfers and lease of fiber-optic cores to the borrower's customers: transfers and leases require regulatory approval.
- Payment of licensing fees to regulators and fees payable to other operators: the calculation standards of the license fee and any profit-sharing mechanism with other operators are in our experience somewhat unclear, leading to uncertainty and perhaps even disputes in fee calculation.

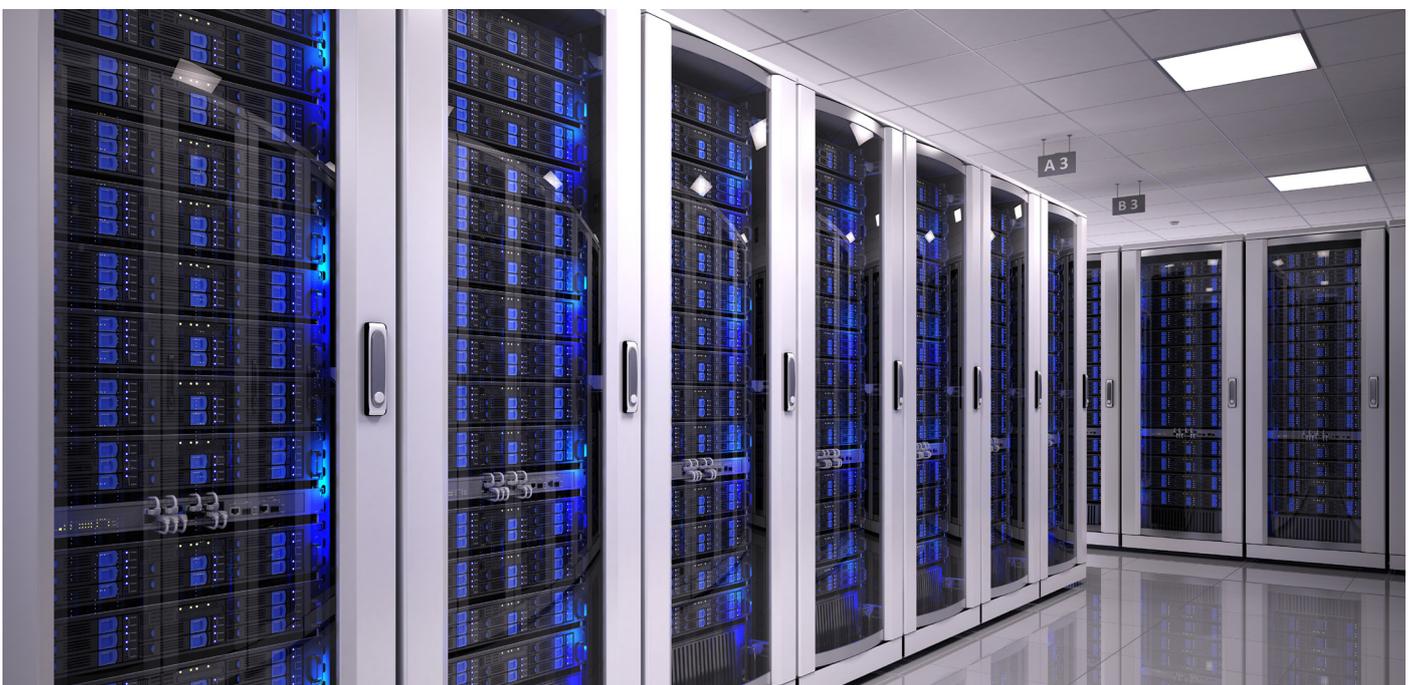
## Rights Of Way And Licenses for Deploying Poles, Fiber Optic Cable

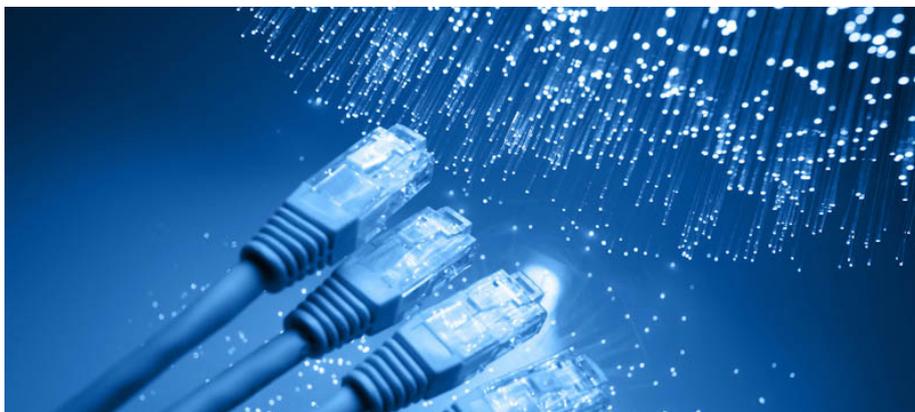
ISP's are likely to have different rights allowing the installation of their network depending on the type of grantor involved. Here is a non-limited overview:

- Rooftop telecom towers and poles are usually installed on the basis of licenses or sometimes contracts denominated as "leases" with building owners, which could be Union

Government actors (such as the largest apartment building owner in the country, the Department of Urban Housing and Development, or "DUHD"), local government actors (such as traffic and traffic police shacks owned by the Yangon City Development Council), or private companies (such as department stores or office buildings). In each case, different contracts are used, usually rudimentary many of which that do not allow for Frontier to assign its rights to a third-party/financier without additional approval.

- Fiber-optic cable is usually installed under license with the local government or with another operator such as Myanmar Posts and Telecommunications ("MPT"). Often the contracts with local government do not allow for assignment of rights without additional approval. We have also seen contracts that were technically already in default because of unfeasible covenants (such as the requirement to finish installation in a certain area by a certain date).
- Telecom towers are usually installed based on leases with the land (right) owner. Contracts are often made based on international templates; however, land (right) owners may not always respect their terms. In general, all these leases require MIC approval and approval by the managing land authority. As there are many types of land, the type of authority differs (for example, for lease of a portion of farm land to a towerco, a series of approvals is needed, including that of the Central Farmland Management Committee). These are notoriously delayed, and delays affect the possibility to register them properly. All leases exceeding one year must be registered under the Registration Act, which is seldom practically feasible.
- Radio equipment inside buildings is often placed with a license by the building owner. In our experience, as this is a competitive business, there are often problems with enforcement of such contracts.





## Environmental Aspects

### Initial Environmental Examination vs Environmental Impact Assessment

In order to harmonize Myanmar's development with environmental and social concerns, the government released in 2015 the Notification 616/2015 with the objective of evaluating what would be the prospected environmental impact of proposed projects and what would be the responsibility of the different stakeholders in the event an environmental or social disaster would occur during all phases of the project.

Under Notification 616/2015, an investment project can be classified under three categories:

- Initial Environmental Examination (“**IEE**”) project
- Environmental Impact Assessment (“**EIA**”) project
- Non-IEE/EIA project

Under Notification 616/2015, an IEE-type project is defined as a project:

- which is limited in scope and size
- which has well-known environmental and social impacts that, for the most part, are temporary, local, and reversible
- which has impacts that can be mitigated and managed by well-proven and available technology and practices but with respect to which specific controls, measures, and alternatives must be assessed, designed, and implemented

Under Notification 616/2015, an EIA-type project is defined as a project:

- which are judged by the Ministry of Natural Resources and Environment (“**MONREC**”) as being likely to have potential for adverse impacts, involving multiple components and various pollution sources and/or pollutant types requiring an integrated Environmental Mitigation Plan (“**EMP**”) to be tailored specifically to mitigate such pollution

- which are characterized by a high risk of significant, adverse environmental or social impacts
- which are of a type or size for which there is a lack of prior knowledge and experience as to what the potential adverse impacts may be, including their size or significance
- where the significance of the potential environmental or social impacts or the sensitivity/vulnerability of the recipients of those impacts requires a high level of environmental and social management expertise and skills, as well as continued strict control and supervision throughout the life of the project

In order to determine to which category the project belongs, the project company will have to submit its project proposal to MONREC for a screening process; MONREC will determine if the project is classified as a non-IEE/IEA project, which means there are no further actions to be taken with regard to environmental and social compliance under Notification 616/2015, or as an IEE/EIA project, which means the whole EIA process can start. The EIA process must be followed by both IEE- and EIA-type projects.

As of now, based on Annex A of Notification 616/2015, telecommunications projects do not seem to be classified as requiring either an IEE or an IEA as they are not specifically mentioned in the Annex. However, as telecommunications projects often include an infrastructure component, such as the building of



telecommunications towers or the necessary digging work involved in the burying of optic fiber cables, it is often required to go through an EIA process.

An Environmental Compliance Certificate (“ECC”) will be issued upon the completion of either the IEE or EIA report assessment after the MONREC is satisfied that the project will not have significant adverse impacts on the environment, or if the negative adverse impacts can be mitigated by way of MONREC-approved mitigation plans for the project.

### Onshore Security

We have prepared a table setting out different types of secured interests that are common for ISP/borrowers, with some notes on practicality.

Of course, the restrictive covenants of existing financing arrangements will also need to be verified in the due diligence, such as share transfers, change in control pursuant to enforcement of a share pledge is likely to be restricted. This will limit the effectiveness of security on shares.

### OTHER USEFUL MATERIALS BY VDB LOI

- ▶ [How does the new Companies Law Affect Group Financing?](#)
- ▶ [Myanmar Banking and Finance Update 2018](#)
- ▶ [Primer on foreign lending and security in Myanmar](#)

## CONTACT



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Edwin is one of Myanmar’s most prominent foreign legal advisers. He is widely recognized in Myanmar for his TMT experience, both on the transactional and regulatory fronts. He has advised 3 of the 4 telecom operators in Myanmar, including acting as local counsel for the licensing and market entry of a multibillion dollar greenfield telecom project. He advises 5 out of 7 tower and fibercos, and was the first to secure MIC permits for telecom systems vendors.

## TELECOM, MEDIA AND TECHNOLOGY TEAM

VDB Loi has created a practice team to support the partners comprising foreign and locally qualified lawyers and regulatory advisers work exclusively on Telecom, Media and Technology matters.



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Qualified both in China and in New York, Edith lives in Yangon where she assists our clients in the telecommunications industry. She has extensive experience with the regulatory, financing, and transactional aspects of the TMT space.

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## FINANCING AN ISP IN MYANMAR OPTIONS FOR THE ONSHORE SECURITY PACKAGE

In this table we provide an overview, as an illustration, of the different options in Myanmar law for the security package when financing an ISP company (Borrower).

NO.	ASSET	SECURED INTEREST OR RIGHT	HOW TO CREATE?	HOW TO PERFECT?	ENFORCEMENT CONSIDERATIONS
1.	<u><b>Site rights</b></u> (Mostly right of way, perhaps some leased land for non-fiber infrastructure)	<i>The ISP will typically have acquired right of way from building owners, individual land right holders, and local governments for the network. Alternatively, they have leased sites for other infrastructure.</i>			
		<b>1) English mortgage over</b> the right of way	Executing an agreement or a deed.  We cannot actually do this without the individual land owner's approvals, and this is not practical, except if the Borrower has already secured that approval in the right of way agreement.	English mortgages are perfected by filing it with the Company Registration Office (" <b>CRO</b> ") and Office of the Registrar of Deeds (" <b>ORD</b> ").	An English Mortgage does not require court intervention for enforcement.
		<b>2) Assignment:</b> Normally the Borrower is by law allowed to assign its rights under the right of way agreement.	Executing an assignment agreement or a deed.	The assignment is perfected by execution of an agreement.	When enforcing the assignment, we need the landowner and government's approval, and registration of the transfer of the land interest to the final acquirer would be required. No court intervention needed.
2.	<u><b>Network</b></u>	<i>The network can be secured through an assignment of the rights to the benefit of the lenders, and/or a fixed and floating charge or a hypothecation. In addition, by including the network in the securities on the land rights.</i>			
		<b>1) Assignment</b> This would be relevant during construction to the benefit of the lenders.	Executing an agreement or deed of assignment.	None required.	No court intervention needed.
		<b>2) Fixed and floating charge or hypothecation.</b>	Executing an agreement or deed.	Registration with CRO.	Court intervention is required for the FFC, not for hypothecation with proper powers provided.
3.	<u><b>Shares of the Myanmar Project Company</b></u>	<u><b>Share pledge</b></u>	Execute share pledge agreement, deliver shares to pledgee (certificates and shareholder registers).	None required. The pledge would be registered in the country of the shareholder, in accordance with the law of that country.	No court intervention required, but change of control must be approved by PTD, and share transfer needs approval from the MIC.
4.	<u><b>Rights under the agreements with customers</b></u>	<b>Assignment:</b> Assignment of all the rights of the Myanmar Project Company under agreements with customers/operators	Execution of an agreement or a deed of assignment.	None required.	No court intervention required.
5.	<u><b>Other assets and rights of the Myanmar Project Company</b></u>	<u><b>Fixed and floating charge</b></u>  To include other assets and rights in the FFC noted on assets row 2 above.	Executing an agreement or deed	Registration with CRO,	Court intervention required.