

Project Finance 2022

Contributing editor
Aled Davies



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between June and July 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2008

Fifteenth edition

ISBN 978-1-83862-705-8

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Project Finance

2022

Contributing editor**Aled Davies**

Milbank LLP

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



London

July 2021

Reproduced with permission from Law Business Research Ltd

This article was first published in July 2021

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Japan	73
Aled Davis Milbank LLP		Naoaki Eguchi, Pierre Chiasson and Kosuke Suzuki Baker McKenzie	
Covid-19: force majeure provisions in project contracts	6	Myanmar	81
Aled Davies and Justen Fleming Milbank LLP		Khin Cho Kyi, Takeshi Mukawa and Nirmalan Amirthanesan Myanmar Legal MHM Limited	
Angola	9	Nepal	89
Irina Neves Ferreira, João Francisco Cunha and Frederico de Távora Pedro ALC Advogados		Anjan Neupane Neupane Law Associates	
Australia	17	Portugal	96
Ben Farnsworth and Michael Ryan Allens		Teresa Empis Falcão and Ana Luís de Sousa VdA	
China	25	South Korea	103
Charles Wu Gao Kai Law Firm		Michael Chang, Sang-Hyun Lee, Mikkeli Han, Seok Choi and Na Yu Shin & Kim	
Cyprus	35	Switzerland	112
Stella Strati and Stylianos Trillides Patrikios Pavlou & Associates LLC		Thiemo Sturny and Roger Ammann Walder Wyss Ltd	
Dominican Republic	42	Taiwan	119
Fabio J Guzmán Saladín, Alfredo A Guzmán Saladín and Alberto Reyes Báez Guzmán Ariza		James C C Huang, Maggie Huang and Colin C L Wu Lee and Li Attorneys at Law	
India	51	Thailand	126
Santosh Janakiram and Ruchira Shroff Cyril Amarchand Mangaldas		Jessada Sawatdipong, Sarunporn Chaianant and Suphachok Saengarun Chandler MHM Limited	
Indonesia	59	United Kingdom	136
Emir Nurmansyah, Ammalia P Putri and Serafina Muryanti Hayu P ABNR		Mark Richards, Tom Eldridge and Alexander Hadrill Bryan Cave Leighton Paisner LLP	
Italy	66	United States	152
Giovanni Scirocco Legance Avvocati Associati		Armando Rivera Jacobo White & Case LLP	

Myanmar

Khin Cho Kyi, Takeshi Mukawa and Nirmalan Amirthanesan

Myanmar Legal MHM Limited

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Overview

Project finance has developed only recently in Myanmar, as it has opened to foreign investment and updated its laws relating to foreign investment and financing. In particular, Myanmar banks did not have the capacity to provide the services required to support major project financings. The Central Bank of Myanmar (CBM) has been liberalising restrictions on foreign banks participation in Myanmar. A state of emergency was declared in Myanmar on 1 February 2021, which might change project financings in Myanmar.

Myanmar comprises seven states, seven regions and five autonomous areas. It is important to be aware of the laws applying to projects at each level of government.

Myanmar's laws

Myanmar's legal system is lacking clear precedents to confirm the legal position in many areas. Its commercial laws comprise colonial-era statutes as well as modern legislation, which it has been rapidly developing since it opened to foreign investment in 2011. Many of these laws have only recently been implemented and the Myanmar government is still developing its understanding of, and administrative practices regarding, such laws. As a result, the guidelines or regulatory practices of Myanmar government agencies regarding the application of the law may conflict with the terms of the law itself.

For these reasons, it is not possible to obtain unqualified opinions in relation to project financing in Myanmar.

Types of security available in Myanmar

Security over immovable property

The 1882 Transfer of Property Act (TPA) permits the creation of six types of mortgages: simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgages.

Of these, English mortgages are the most widely used in other common law jurisdictions and offer the strongest protection to lenders, as they involve a transfer of the title to the property to the mortgagee. However, these are relatively uncommon in Myanmar. Simple mortgages, which grant mortgagees the right to judicial sale on default have been created in a number of recent transactions in Yangon. Mortgages by deposit of title deeds (called equitable mortgages in other common law jurisdictions) are the most common type of mortgage used in Myanmar for two reasons:

- the rate of stamp duty is nominal for mortgages by deposit of title deeds, while it can be considerable for other forms of mortgages; and

- it is the only form of mortgage not mandatorily required to be registered under the Registration of Instruments Law (Law No. 9/2018) (RIL). This can be important as there is a possibility that the Registration Office would not permit such registration in practice for mortgages by foreign lenders.

In the past, in practice, it was not possible for foreign citizens or companies with any foreign shareholding to create security over immovable property under the 1987 Transfer of Immovable Property Restriction Law (TIPRL). The TIPRL prohibits the transfer to or acquisition of immovable property by foreign citizens or 'foreign-owned companies', defined as companies that are not 50 per cent or more owned or controlled by Myanmar citizens. However, the Myanmar government's practice was to interpret this definition more narrowly with reference to the former 1914 Myanmar Companies Act (MCA), which defined a 'foreign company' as a company with any foreign shareholding. To navigate this requirement, foreign lenders have typically used a local Myanmar bank as a security agent to hold the security on their behalf.

Section 228(b) of the Myanmar Companies Law (Law No. 29/2017) (MCL), which repealed the MCA, provides that neither the grant of a mortgage or charge nor the exercise of rights by or on behalf of the mortgagee or chargee to realise the value of the property secured thereby will be taken to breach the TIPRL. However, views differ regarding the extent to which the MCL has changed the operation of the TIPRL, particularly in practice. A local security agent is generally still appointed (and such an agent may still be required where a mortgage other than by a deposit of title deeds is proposed, as foreign mortgagors continue to have difficulty registering mortgages in practice under the RIL).

Security over movable property

Security may be created in movable property by way of charge, pledge or deposit of title documents (other than for marketable securities). Typically, charges are created over movable property and actionable claims (including local and offshore bank accounts and receivables). It is also common to create security over contractual rights (such as under construction contracts and PPAs) through an assignment by way of security. Shares are typically secured by a pledge.

It is possible to create a floating charge over all of the assets of a company or a specific class of assets, for example, accounts receivable. Unlike under English law, a floating charge ranks equally with other security in a distribution on a winding-up.

Other security

In addition, guarantees are possible under the 1872 Contract Act. The Contract Act codifies and entrenches certain rebuttable default protections for guarantors under English common law. As such, caution is necessary in adopting forms of guarantee commonly used under English law.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Priority

Generally, as in other jurisdictions, the ranking of security is determined by the order in which it is created or notice is given (unless varied by a deed of priority).

Formality requirements

In the case of any type of mortgage other than a mortgage by deposit of title deeds, a written instrument signed by the mortgagor and attested by at least two witnesses must be executed under section 59 of the TPA. Section 58(f) of the TPA provides that a mortgage may be created by deposit of the title deeds, with the intent to create security over such documents. The TPA does not set out any formalities for the creation of mortgages by deposit of title deed; however, it would be advisable to document the intent to create security over such documents in writing and stamp it under item 6 of the schedule to the 1899 Myanmar Stamp Act (MSA).

There are no formalities or agreed procedures for guarantees or charges under the Contract Act. In particular, unlike under English law, a guarantee need not be in writing in Myanmar (although it would be advisable to reduce this to writing). Assignments of contractual rights and licences may be effected by a contract executed by the assignor and assignee.

A pledge is a form of bailment under Chapter IX of the Contract Act and requires the delivery to the pledgee of the pledged property.

Stamp duty

Stamp duty is required to be paid on project financing documentation on or before execution under section 17, or if it is executed outside Myanmar, within three months of being brought into Myanmar, under section 18(1), of the MSA. Proof of signing abroad is advised, by having the documents notarised and consularised at the place of signing.

In practice, it is advised by the authorities that loan agreements are subject to stamp duty at the rate of 0.5 per cent of the loan amount. The stamp duty applicable to mortgage instruments can range from 0.5 to 2 per cent in Nay Pyi Taw, or 0.5 to 4 per cent elsewhere, of the amount secured by the mortgage, depending on the type of mortgage and whether possession of the mortgaged property is given or agreed to be given. The stamp duty applicable to the document recording the intention to create security in connection with the deposit of title deeds described above is only 9,000 kyats, plus 650 kyats for every 10,000,000 kyats secured by the mortgage in excess of 100,000,000 kyats. Charges and assignments by way of security are required to be stamped at the rate of 0.5 per cent of the amount secured, and pledges are required to be stamped at the same rate as a mortgage by deposit of title deeds. Guarantees are required to be stamped at the rate of 300 kyats.

The application of the MSA is not settled in all cases. However, if the assessed amount is later found insufficient by a court, for the incorrectly stamped document to be admitted as evidence it will be necessary to pay the original duty payable together with penalties at the rate of three times the original duty payable. Where the application of the MSA is unclear, it is possible to seek the official view of the authorities pursuant to the adjudication process in sections 31 and 32 of the MSA. If that adjudication process is followed and the instrument is endorsed in accordance with that adjudication, it is deemed to be duly stamped.

Stamp duty can be minimised where more than one instrument is used in a mortgage or loan transaction, under section 4(1) of the MSA. If one document is stamped at the highest rate applicable to any of them, the remainder can be stamped at 100 kyats for each document under the same transaction.

Filing requirements

All mortgages and charges created over a company's assets must be filed with the companies' registrar (DICA) within 28 days of creation under section 229(a) of the MCL. Failure to do so will affect their enforceability against a liquidator or creditor of the mortgagor or chargor.

Mortgage instruments securing more than around US\$70 must be registered under the RIL. Failure to register such instruments will affect their validity.

Notice requirements

Under the TPA, a transfer of actionable claims, including pursuant to a charge, will only be enforceable against a third-party debtor under that claim who has received notice of the creation of such security and the details of the transferee.

Agents and trustees

Security may be held under a security trust pursuant to the 1882 Trusts Act (TA), or an agency structure, which may be created by contract under Chapter X of the Contract Act, in each case on behalf of lenders who may change from time to time. Security agents are more common in Myanmar; however, lenders should consider which structure is advisable in each transaction. In particular, under section 60 of the TA, trust property will be protected in the event of the trustee's insolvency, while the position regarding the insolvency of an agent is unclear.

Parallel debt clauses are not common in Myanmar.

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Under the MCL, any person may obtain an extract of the corporate information of a registered company from DICA's electronic register, called MyCo, on payment of the prescribed fee. DICA published Notification No. 57/2018 on 9 July 2018 setting out its filing fees, including the fees to request an extract of the corporate information of a company. The extract will list mortgages and charges created by the company.

However, due diligence continues to be a challenge in Myanmar, reflecting limited information available through public sources, poor record-keeping and compliance by Myanmar companies, lack of familiarity with due diligence and sensitivity to disclosing company information. There are limitations to the information available from DICA searches: for example, it shows only that security has been created, without further detail. In addition, apart from DICA, few regulators maintain electronic records, making searches difficult. Records, where available, may also be in the Myanmar language, and Myanmar's laws and regulatory practices are changing rapidly, underscoring the need for local advisers. Particular challenges include, for example, litigation searches, title deed searches and determining the transferability of land, and verifying compliance with stamp duty.

Enforcing collateral rights

4 | Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Three methods are available to enforce security under Myanmar law: civil suits, appointing a receiver or taking possession of the security. In practice, however, only civil suits are used to enforce security.

The Myanmar court system lacks transparency and there are few precedents regarding enforcement of collateral. The steps to initiate a case to enforce collateral include filing a civil suit at the court of competent jurisdiction for recovery of debts under the 1908 Code of Civil Procedure. After obtaining a decree, an application must be filed to the court that passed the decree for enforcement of the decree or order. Execution may be effected against either the person or property, or both, of the judgment debtor.

Receiverships are still possible in certain circumstances under Part IV of the Insolvency Law (Law No. 1/2020) (IL), which generally entered into force on 25 March 2020 under Order No. 50/2020 issued by the Office of the President of Myanmar. Typically, security documents will include a right of receivership; however, in practice, such rights have not yet been exercised in Myanmar.

In the case of security over movable property, it is theoretically possible for the lender to take possession of the secured assets; however, this has not been done in recent practice.

Enforcing collateral rights following bankruptcy

5 | How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Effect on enforcement

Myanmar's new IL has introduced an international standard insolvency framework to Myanmar. The IL affects the claims of foreign and local creditors in the insolvency of a company equally. The IL is a complex legal code that may present challenges to those who have to implement and administer it.

The IL introduces a corporate rescue and rehabilitation procedure to Myanmar. This procedure is largely intended to replace receivership, although, in any case, receivership had not been used in the past in Myanmar. Under this new procedure, a rehabilitation manager may be appointed either by the board of directors (if it is insolvent or likely to become insolvent at some future time), by a secured creditor who is entitled to appoint a receiver and holds security over all or substantially all of the company's assets, or by the court under section 43 of the IL to develop a plan to rescue a company. Such a plan must be developed and proposed to creditors within three months (under section 71(a) of the IL), called the rescue phase. During this period, the creditors are not permitted to enforce their security (section 56 of the IL).

If approved, the rehabilitation plan binds all creditors in respect of claims arising on or before the rescue phase (section 77(a) of the IL). During the implementation of the rehabilitation plan, security may be enforced by a secured creditor except where it is inconsistent with the rehabilitation plan and the creditor voted for it or where the court so orders (section 77(b) of the IL).

If the rehabilitation plan is not approved by creditors, the company transitions to a winding-up (section 88 of the IL). Under section 172 of

the IL, it is not possible to enforce security after the appointment of a liquidator except with his or her consent. A creditor must complete execution against secured goods or land or attach any debts due under section 175(c) of the IL prior to this. Generally, this will not be feasible except in the case of immovable property, when execution against land can be completed simply by appointing a receiver (this is only possible in the case of a written mortgage that grants a power to appoint a receiver, not a mortgage by deposit of title deeds). In all other cases, a secured creditor will need to prove in the winding-up of the company.

Adjustments of prior transactions (clawback rights)

Generally, upon the order of the court, the following transactions can be avoided:

- gifts and other undervalued transactions entered into within two years of commencement of the insolvency proceedings (four years if the transaction was with a related party, or five years if there was an intent to defeat, hinder or delay creditors being paid their claims) can be avoided under section 360 of the IL unless entered into in good faith for the purpose of carrying on its business and under the reasonable belief that the transaction would benefit the company;
- preferential payments within six months of commencement of the insolvency proceedings (or four years if to a related party) to an unsecured creditor can be avoided under section 361 of the IL;
- extortionate credit transactions under section 363 of the IL; and
- floating charges created six months before the commencement of the insolvency proceedings (or four years if for the benefit of a related party) under section 364 of the IL, except to the extent of consideration received by the company.

Priority of payments

Under section 205 of the IL, the entitlements of employees will be paid first in a winding-up. Secured creditors will be paid next, followed by the statutorily preferred debts described in section 196(b) of the IL (such as the expenses of the winding-up), unsecured creditors, and the residue will then be distributed among the members pursuant to section 195(c) of the IL. The super-priority granted to employees reflects a unique policy decision in the IL. It is also notable that tax liabilities have only the same priority as unsecured creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 | What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Cross-border remittances of funds to or from Myanmar are governed by the Foreign Exchange Management Law (Law No. 12/2012) (FEML). Under the FEML, remittances are classified as ordinary transactions (for example, short-term operational remittances or fees) or capital transactions (for example, loans or business investments). Generally, prior approval is required from the Central Bank of Myanmar (CBM) for capital transactions, but not ordinary transactions. However, the definitions of both categories in the FEML are unclear and the CBM's practice is inconsistent, so in reality, it is necessary to confirm with the CBM how to deal with each foreign remittance.

The rules under the FEML require prior CBM approval for disbursements of foreign loans in Myanmar. Under the CBM announcement of July 2016, updated on 29 January 2020, it will take into consideration matters relevant to the borrower, including the capital amount already brought into Myanmar, the terms of the loan agreement, the repayment schedule and the debt-to-equity ratio in granting such approval. Once the loan agreement and the repayment schedule are approved, it is

not necessary to obtain CBM approval for each subsequent remittance repaying the loan principal or interest.

Investment returns

7 | What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Loan repayment

Generally, there are no restrictions on payments of principal, interest or premiums on loans or bonds approved by the CBM under the FEML. Withholding tax may be payable on interest payments to non-residents as described below.

Investment returns

A permit is likely to be required from the Myanmar Investment Commission (MIC) under the Myanmar Investment Law (Law No. 40/2016) (MIL) for project financed projects. Sections 56 and 59 of the MIL permit remittances of investment returns in respect of such projects subject to payment of all local taxes on the returns. Such taxes include capital gains tax payable on capital income at the rate of 10 per cent in most sectors and 40 per cent for oil and gas assets.

Withholding taxes also apply for certain categories of corporate income, although since 1 July 2018 these generally do not apply to Myanmar-resident companies under Notification No. 47/2018 of the Ministry of Planning, Finance and Industry. Where applicable, residents can offset withholding taxes against their final end of fiscal year tax liability, while non-residents cannot. Under Notification No. 47/2018, the withholding amounts from 1 July 2018 are:

Category	Residents	Non-residents
Interest payments	0 per cent	15 per cent
Royalty payments	10 per cent	15 per cent
Payments by government and government instrumentalities under contracts for goods and services	2 per cent	2.5 per cent
Payment by the private sector under contracts for goods and services	0 per cent	2.5 per cent

The withholding rates can be reduced if a person not resident in Myanmar is a resident of a country that is party to a double tax treaty with Myanmar. Myanmar has double tax treaties with Bangladesh, India, Indonesia, Korea, Laos, Malaysia, Singapore, Thailand, the United Kingdom and Vietnam and it is in the process of finalising treaties with other jurisdictions (those with Bangladesh and Indonesia are not yet ratified). Under the double tax treaty with Singapore, the amount withheld on interest payments will be reduced to 8 per cent if the payment is to a bank or financial institution or 10 per cent if it is to any other person; and the amount withheld on royalty payments will be reduced to 10 per cent for patents, designs or models.

Foreign earnings

8 | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There is no requirement to repatriate foreign earnings. If foreign earnings are repatriated into Myanmar, they may be deposited in a foreign currency account, subject to the approval of the CBM.

9 | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Under the FEML and Notification No. 7/2014 of the CBM, Myanmar companies can also open offshore foreign currency accounts with CBM approval, provided they file monthly bank statements with the CBM. In practice, we understand the CBM has approved companies using such accounts for the purpose of obtaining foreign currency-denominated loans for project financing. The funds from the loans are transferred into Myanmar by the Myanmar project company itself.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Generally, for any investment in certain large-scale projects, a permit will be required from the Myanmar Investment Commission (MIC) under the Myanmar Investment Law (Law No. 40/2016) (MIL). This includes investments that are strategically important, capital intensive, have a large potential impact on the environment or local community, use state-owned land and other designated investments. Foreign investors will also require an endorsement from the MIC to have the right to enter into a long-term lease of land or to obtain certain tax incentives even where a permit would not be required.

The approval of the MIC will also be required for the direct (and technically, indirect) acquisition of a majority of shares or controlling interest in a company with an MIC permit or endorsement, or the acquisition of 50 per cent or more of the assets of a company with an MIC permit. The MIC has advised recently that indirect transfers of shares in companies with MIC permits or endorsements do not need to be notified to it; however, a prudent approach would be to seek a view from the MIC on a matter-by-matter basis.

Sectoral foreign investment approval may also be required. Notification No. 15/2017, entitled List of Restricted Investment Activities, issued by the MIC on 10 April 2017 in relation to section 42 of the MIL (MIL Notification), is intended to comprehensively list the types of investments that are restricted to foreign investment, require approval of a Myanmar government ministry or may only be made through a joint venture. Among others, it requires approval from the Ministry of Electricity and Energy (MOEE) for power projects producing more than 30 megawatts. While the MIC updated the MIL Notification during 2018 (eg, on 9 April 2018, it updated the criteria for approvals from the MOEE for energy sector projects), as Myanmar’s laws evolve, the MIL Notification will become dated, and investors are advised to obtain advice on the particular approvals applicable at the time of their investment. Generally, there is no foreign investment restriction to investment in a company engaging in projects such as power or infrastructure projects.

Projects in a special economic zone in Myanmar will be subject to the Myanmar Special Economic Zone Law (Law No. 1/2014).

While Myanmar’s investment treaties (including the ASEAN Comprehensive Investment Agreement) give protections to investors, Myanmar has provided such protections for foreign investors under the MIL.

Insurance restrictions

- 11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Where a permit is required under the MIL, section 73 of that law requires that insurance be obtained for the project from an insurer licensed to carry on an insurance business in Myanmar. Myanmar's insurance sector is currently undergoing significant growth with the introduction of foreign competition. Under a liberalisation of the sector announced by the Ministry of Planning, Finance and Industry on 2 January 2019, it issued licences to five foreign life insurers and three life and three non-life foreign-local joint ventures on 28 November 2019 to conduct insurance businesses in Myanmar. Insurance is therefore likely to be more accessible in future for Myanmar projects.

Section 12(c) of the Myanmar Insurance Law (Law No. 10/1993) permits Myanmar Insurance (a state-owned insurance company) to reinsure inside and outside of Myanmar, and insurance policies obtained from private insurers in Myanmar may be reinsured pursuant to Directive No. 4/2020 issued by the insurance sector regulator, the Insurance Business Regulatory Board, on 12 May 2020.

Insurance policies over project assets are payable to foreign creditors who are listed as a beneficiary of the policy or where the policy has been assigned to the creditor.

Worker restrictions

- 12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

It is difficult at the present time for foreign nationals to enter Myanmar due to restrictions on entry introduced in response to covid-19.

More generally, it continues to be difficult to employ unskilled foreign labourers in Myanmar. Section 51(c) of the MIL provides that investors shall appoint only Myanmar citizens in unskilled positions, and the Myanmar government has a strong preference for local employment in such positions.

Most foreign employees work in Myanmar under a business visa. If they intend to stay in Myanmar for longer than 90 days, they are required to also obtain a stay permit and foreigner registration certificate under the Foreigners Registration Rules of 1948. The Directorate of Investment and Company Administration may be able to assist investors with stay permits and visa renewals. For companies with an MIC permit, the permission of the MIC is required to appoint foreign employees to senior management, or as technical experts or consultants under rule 206 of Notification No. 35/2017 of the MIC.

Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

Generally, a company needs to register as an importer with the Ministry of Commerce (MOC) under the Export and Import Law (Law No. 17/2012) and an import licence may also be required for particular goods required for construction works for projects. Under Notification No. 69/2015 of the MOC, an automatic licence applies to some imports and a non-automatic licence to other imports. In practice, the MOC previously permitted only Myanmar citizens to register as an importer and obtain import licences. However, it relaxed this practice in 2016, permitting foreign-local joint ventures to import construction materials under Notification No. 56/2016 dated 7 July 2016, and finally permitted wholly foreign-owned companies to import construction materials under Notification No. 36/2017 dated 12 June 2017. As a result, it is

now possible for wholly foreign-owned companies to import construction materials.

Nationalisation laws

- 14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The MIL contains an express guarantee against expropriation, as well as nationalisation, with exceptions set out in the law, including for public interest. Although the MIL may be amended like any other law, no such amendment is expected at the time of writing.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

- 15 | What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Under the Myanmar Investment Law (Law No. 40/2016) (MIL), the Myanmar Investment Commission (MIC) has discretion to grant company tax exemptions for three, five or seven-year periods to investments in 'promoted sectors', depending on the designation of the place of investment in Notification No. 10/2017 issued by the MIC on 22 February 2017. The promoted sectors are set out in Notification No. 13/2017 (Classification of Promoted Sector), issued by the MIC on 1 April 2017. They include, in particular, infrastructure investments, including road, rail, port and power. Investors may obtain these exemptions by applying for an MIC permit or endorsement and making a tax incentive application.

Under section 77 of the MIL, the MIC is also authorised to grant exemptions from customs duties and other taxes on the import of construction material for the construction of a project for which a permit has been granted by the MIC.

GOVERNMENT AUTHORITIES

Relevant authorities

- 16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Myanmar has a number of central and regional regulators. Generally, the Myanmar Investment Commission and the companies' registrar will be relevant to projects generally, while the Ministry of Electricity and Energy regulates oil and gas and power projects, the Ministry of Natural Resources and Environmental Conservation regulates mining sector projects, and the Ministry of Transportation and Communication regulates transportation, port and telecommunications sector projects. Wastewater management is generally within the purview of regional governments and city development committees, such as the Yangon City Development Committee.

REGULATION OF NATURAL RESOURCES

Titles

- 17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The state is the ultimate owner of all lands and natural resources above and below the ground, above and beneath the water and in the atmosphere under clause 37(a) of the Constitution of Myanmar. Under section 3 of the State-Owned Economic Enterprises Law (Law No. 9/1989), the Myanmar government has the sole right to undertake certain economic activities, including the exploration, extraction and sale of oil and gas, petroleum and precious stones, power generation, broadcasting and telecommunications services, and banking and insurance services. However, the government can invite private enterprises to participate in such activities under a joint venture.

In practice, its preference has been to permit private participation in the resources sector under production sharing contracts (PSCs). In the case of major infrastructure projects such as port and airport projects, typically the government grants a concession to the project company that sets out the fees payable by the project company to the government during the term of the concession.

Royalties and taxes

- 18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Generally, the terms of royalties, and the threshold above which production is split between the government and private investor, and other payments will be set out in the terms of an applicable PSC for a particular project.

The rates of royalty payments in the case of mining sector projects are set out in the Mines Law (Law No. 8/1994), as amended by the Law Amending the Myanmar Mines Law (Law No. 72/2015). These rates range from 2 to 5 per cent, depending on the mineral.

Dead rent is typically payable in respect of land held under a permit for the extraction of certain natural resources at prescribed rates (eg, dead rent is payable under the Mines Law at the rates published by the Ministry of Natural Resources and Environmental Conservation (MONREC)).

The main taxes applicable to foreign investments are company tax, commercial tax and special goods tax (which are analogous to value-added taxes) and stamp duty.

Export restrictions

- 19 | What restrictions, fees or taxes exist on the export of natural resources?

Export restrictions may apply under the Ministry of Commerce's (MOC) regulations under the Export and Import Law. Particular restrictions may apply to foreign exporters. For example, under the MOC's Notification No. 8/2018, foreign–local joint venture companies may export only 22 value-added mineral products produced by them or purchased from local manufacturers, including refined minerals, and under MOC's Notification No. 24/2019 foreign companies and foreign–local joint ventures may export a further seven categories of commodities purchased from local manufacturers, subject to obtaining a permit from the MONREC.

Specific sectoral requirements may also apply. For example, on 15 November 2017, the MONREC issued an Announcement of the Procedures to Export Tin Concentrate and Other Mixed Concentrate governing exports of tin.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

- 20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Typical project finance projects will require a Myanmar Investment Commission (MIC) permit for the project as well as sectoral permissions, which depend on the particular project (which may include entering into a production sharing contract (PSC) or obtaining a concession from the government).

More generally, foreign lenders should be aware that other than for intracompany loans, a licence is in principle required from the Central Bank of Myanmar (CBM) under Chapter V of the Financial Institutions Law (Law No. 20/2016) to lend money in Myanmar in connection with taking security, as this will be considered a banking business. The CBM has advised that this licensing requirement does not apply to entities located offshore; however, given the terms of the legislation, it would be advisable confirm this position with the CBM for each transaction.

In addition, an offshore entity is not permitted to carry on business in Myanmar without registering as an overseas corporation under the Myanmar Companies Law (Law No. 29/2017) (MCL). While lending money or creating security over property may not in itself amount to 'carrying on business' for the purposes of the MCL under section 43(b) (vi), this will depend on the circumstances of the offshore entity's business in Myanmar.

Registration of financing

- 21 | Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Governmental registration and filing requirements may apply based on the type of document. In particular, all mortgages and charges created over a company's assets must be filed with the companies' registrar in accordance with the MCL, and mortgage instruments securing more than around US\$70 must be registered under the Registration of Instruments Law (Law No. 9/2018). Failure to register such instruments will affect their validity.

Arbitration awards

- 22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Myanmar is a party to the New York Convention and has implemented the Arbitration Law (Law No. 5/2016) to provide for the enforcement of foreign arbitral awards. This law generally follows the UNCITRAL Model Law on International Commercial Arbitration. The arbitration law in Myanmar is in a nascent stage and there is very limited jurisprudence. As a result, it is not yet certain that the courts of Myanmar would consistently implement the legislation and enforce any such foreign arbitral awards. It has been reported by the law firm acting on the case that a Myanmar court has enforced a foreign arbitral award in 2020.

There are no specific restrictions on providing for arbitration in Myanmar, including requirements for domestic arbitration. In practice, the Myanmar government favours dispute resolution to be either by Myanmar courts or by domestic arbitration. However, in our experience, the government has gradually begun to be comfortable with permitting

dispute resolution outside of Myanmar, and it would be advisable to propose arbitration at an international institution such as the Singapore International Arbitration Centre.

Law governing agreements

- 23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Under Myanmar law, parties are free, in principle, to choose the governing law of an agreement, subject to the operation of any applicable mandatory principles.

In practice, state-owned enterprises and Myanmar government agencies will rarely agree to a choice of foreign governing law, and Myanmar private parties also prefer that Myanmar law applies to the transaction agreements. For agreements that are subject to scrutiny under the Myanmar Investment Law (Law No. 40/2016), the MIC will generally require a choice of Myanmar law. In addition, we understand that, in practice, a Myanmar court may not accept jurisdiction over a contract governed by foreign law.

Submission to foreign jurisdiction

- 24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

In principle, submission to a foreign court will be effective but it would be advisable to agree the forum for disputing in the contract.

In relation to sovereign immunity, there is limited available case law and no directly applicable statute. In principle, it is possible for suits to be brought against the Myanmar government and government-related parties under section 80 of the Code of Civil Procedure.

Section 8 of the State-Owned Economic Enterprises Law (Law No. 9/1989) provides that state-owned companies formed under that law may sue and be sued. Based on this, at least in principle, suits against such state-owned entities are possible in Myanmar.

It would be prudent to include a waiver of immunity clause in contracts with Myanmar government parties, including state-owned entities.

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

- 25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The primary environmental legislation in Myanmar is the Environmental Conservation Law (Law No. 9/2012) (ECL) which requires certain businesses, workplaces, factories and workshops to obtain a permit from the Ministry of Natural Resources and Environmental Conservation (MONREC) prior to conducting their business. The MONREC has issued Notification No. 616/2015 under section 42(b) of the ECL to prescribe the Environmental Impact Assessment Procedure (EIAP). The EIAP sets out when prior permission is required and the process for obtaining it through conducting an environmental impact assessment. Such permission is typically likely to be required for project financed projects.

No Myanmar bank has to date adopted the Equator Principles developed internationally with respect to managing environmental and social risks of projects.

On 15 March 2019, Myanmar enacted a new Occupational Safety and Health Law (Law No. 8/2019), which applies to oil and gas, port, communication, transport and other businesses under section 4(i) of that law. However, this law has not yet been fully implemented.

PROJECT COMPANIES

Principal business structures

- 26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

As in other jurisdictions, foreign investors may structure their investment as either a Myanmar subsidiary company or branch. It is typical for foreign investors to use a subsidiary structure, as branches will not be able to obtain certain important permits or approvals such as a permit from the Myanmar Investment Commission.

Loan finance is generally obtained offshore. However, the International Finance Corporation has been engaged in a project to develop a local bond market in Myanmar, and the Central Bank of Myanmar has been liberalising barriers to foreign investment in Myanmar's banking sector, improving financing for Myanmar projects.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

- 27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

There is no statutory framework governing PPP projects in Myanmar. The Office of the President of Myanmar issued Directive No. 2/2018 on 30 November 2018 proposing to establish a 'Project Bank' in which projects open for private investment are listed. Certain projects such as PPP projects may be registered in this bank for a public tender. Whether or not listed in the project bank, unsolicited projects (projects proposed by a private investor) should in principle be subjected to a Swiss Challenge tender. The Project Bank website is <http://www.projectbank.gov.mm>.

A Law on Public Procurement and Asset Disposal was being considered by Myanmar's legislature in 2020 but was not passed into law.

PPP - LIMITATIONS

Legal limitations

- 28 What, if any, are the practical and legal limitations on PPP transactions?

Owing to Central Bank of Myanmar instructions to state and regional governments to only accept payments, and directions to private businesses to undertake local transactions, in Myanmar kyat, government parties often propose payment in kyat although the amount is calculated in US dollars. This can raise bankability issues because of the low convertibility of the kyat, which raises significant foreign exchange risks for foreign currency-denominated loans. There are limited options to hedge currency risks in Myanmar. It is advisable to deal with this issue at the outset with government partners when considering projects in Myanmar.

Myanmar currently does not have a regime to control long-term fiscal obligations and every spending commitment by the government needs to be enacted as a Union Budget Law each year. This potentially poses risks for investors seeking long-term fiscal commitments by the government. Government guarantees are another issue. These have rarely been given to date and Directive No. 2/2018 issued by the Office of the President of Myanmar on 30 November 2018 states that a government guarantee will only be given to projects subject to a public tender.

PPP – TRANSACTIONS

Significant transactions

29 | What have been the most significant PPP transactions completed to date in your jurisdiction?

Significant recent PPP transactions include Myanmar's airports, in particular the international airports in Yangon and Mandalay, and major highways in Myanmar, as well as the Myingyan IPP. Major recent project financings include the Yetagun gas pipeline, Shwe gas and oil pipeline, MPRL E&P office building, Rosewood Yangon Hotel and Myanmar Fibre Optic Communication Network.

UPDATE & TRENDS

Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

A state of emergency was declared on 1 February 2021 under Order No. 1/2021 of the Office of the President (Pro Tem) (State of Emergency Order), in response to alleged fraud regarding voter lists in the 2020 general elections and the Myanmar Union government's decision not to postpone opening Myanmar's parliament. The state of emergency is expressed to apply across Myanmar for a period of one year. According to the State of Emergency Order, it is issued under article 417 of Myanmar's Constitution and transferred the legislative, executive and judicial powers of Myanmar's government to the Commander-in-Chief of Myanmar's armed forces under article 418(a) of the Constitution.

On 7 May 2021, the Central Bank of Myanmar (CBM) issued Directive No. 6/2021 reducing the minimum reserve that banks are required to maintain (which was already reduced from 5 per cent to 3.5 per cent of total deposits in April 2020 due to covid-19) to 3 per cent. It also issued Directive No. 7/2021 permitting banks to include 100 per cent of the value of treasury bonds irrespective of their value in calculating their liquidity (previously banks had already been permitted to include 90 per cent of the value of bonds with a maturity of at least one year from April 2020 due to covid-19, up from 50 per cent). The easing of these requirements reflects the current fragility in this sector.

Prior to this, the further liberalisation of restrictions to foreign investment in the banking sector was a significant development in 2020. The CBM issued the first two subsidiary licences to the Myanmar subsidiaries of South Korea's KB Kookmin Bank and Industrial Bank of Korea in December 2020, permitting them to engage in onshore retail banking (as well as providing wholesale banking services to foreign-owned companies and Myanmar banks, currently permitted to be provided by the licensed branch offices of foreign banks in Myanmar). Further subsidiary licences were issued in January 2021 to Mega International Commercial Bank Co, Ltd., Korea Development Bank, Cathay United Bank Co, Ltd. and Siam Commercial Bank.

The development of the Project Bank remains a significant development. It is a platform to facilitate the effective, coordinated and transparent identification and financing of major investment projects in Myanmar. It is an open, interactive, web-based platform designed to highlight investment projects.

MYANMAR LEGAL MHM

Khin Cho Kyi

kckyi@mlslyangon.com

Takeshi Mukawa

takeshi.mukawa@mhm-global.com

Nirmalan Amirthanesan

nirmalan.amirthanesan@mhm-global.com

Level 16, Nos. 16-01/02
Junction City Tower, No. 3A
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
Tel: +95 1 925 3650
www.mhmjapan.com

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Restrictions to movement within, and to, Myanmar related to covid-19 may affect the operation of, and investment in, projects in Myanmar, as in other jurisdictions.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)