

# Project Finance

*Contributing editors*  
**Phillip Fletcher and Aled Davies**



2017

GETTING THE  
DEAL THROUGH 

GETTING THE  
DEAL THROUGH 

# Project Finance 2017

*Contributing editors*

Phillip Fletcher and Aled Davies

Milbank, Tweed, Hadley & McCloy LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2007  
Tenth edition  
ISSN 1755-974X

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. Although the information provided is accurate as of August 2016, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Overview</b>	<b>5</b>	<b>Mexico</b>	<b>103</b>
Phillip Fletcher and Aled Davies Milbank, Tweed, Hadley & McCloy LLP		Rogelio López-Velarde and Amanda Valdez Dentons Lopez Velarde SC	
<b>The US PPP market's growing pains</b>	<b>8</b>	<b>Mozambique</b>	<b>110</b>
Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP		Fernanda Lopes Fernanda Lopes & Associados	
<b>Angola</b>	<b>10</b>	<b>Myanmar</b>	<b>115</b>
Catarina Levy Osório and Irina Neves Ferreira Angola Legal Circle Advogados		Jaime Casanova, James Finch and Bernard Cobarrubias DFDL	
<b>Brazil</b>	<b>16</b>	<b>Netherlands</b>	<b>121</b>
Fabrizio de Oliveira Sasdelli and Felipe Eluf Creazzo Lobo & de Rizzo Advogados		Marieke Driessen, Andrea Chao and Camilla Molino Simmons & Simmons LLP	
<b>Cambodia</b>	<b>23</b>	<b>Nigeria</b>	<b>128</b>
Martin Desautels and Sambo Ly DFDL		Fred Onuobia, Oluwatoyin Nathaniel and Okechukwu J Okoro G Elias & Co	
<b>Canada</b>	<b>28</b>	<b>Panama</b>	<b>133</b>
Alison R Manzer and Charles Newman Cassels Brock & Blackwell LLP		Erika Villarreal Zorita Anzola Robles & Asociados	
<b>China</b>	<b>34</b>	<b>Portugal</b>	<b>140</b>
Andrew Ruff and Claude Jiang Shearman & Sterling LLP		Teresa Empis Falcão and Ana Luís de Sousa Vieira de Almeida & Associados, Sociedade de Advogados, SP RL	
<b>Colombia</b>	<b>40</b>	<b>Slovenia</b>	<b>145</b>
Bernardo P Cárdenas Martínez, Catalina Pinilla and Angela Botía Dentons Cardenas & Cardenas		Andrej Andrić, Blaž Merčun and Sašo Jovčić Odvetniška družba Andrić o.p. - d.o.o.	
<b>Dominican Republic</b>	<b>47</b>	<b>South Africa</b>	<b>150</b>
Fabio J Guzmán-Saladín, Alfredo A Guzmán-Saladín and Alberto Reyes Báez Guzmán Ariza		Eric le Grange, Kim Eichorn, Innes Du Preez and Calyb Soekoe ENSAfrica	
<b>England &amp; Wales</b>	<b>53</b>	<b>Sweden</b>	<b>159</b>
Andrew Petry and Rose-Anna Daukes Simmons & Simmons LLP		Peter Dyer and Andreas Lindström Foyen Advokatfirma	
<b>Hungary</b>	<b>62</b>	<b>Switzerland</b>	<b>164</b>
Zoltán Varga and Balázs Baranyai Nagy és Trócsányi		Thiemo Sturny and Stefan Scherrer Staiger, Schwald & Partner Ltd	
<b>India</b>	<b>69</b>	<b>Thailand</b>	<b>169</b>
Jatin Aneja Shardul Amarchand Mangaldas & Co		David Doran and Kraisorn Rueangkul DFDL	
<b>Indonesia</b>	<b>75</b>	<b>United States</b>	<b>177</b>
Emalia Achmadi, Robert Reid and Denia Isetianti Soemadipradja & Taher		Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP	
<b>Japan</b>	<b>85</b>	<b>Vietnam</b>	<b>182</b>
Naoaki Eguchi, Gavin Raftery and Yasuhisa Takatori Baker & McKenzie (Gaikokuho Joint Enterprise)		Hoang Phong Anh and Kristy Newby DFDL	
<b>Kyrgyzstan</b>	<b>91</b>	<b>Zambia</b>	<b>187</b>
Saodat Shakirova and Omurgul Balpanova ARTE Law Firm		Eustace Ng'oma Chibesakunda & Co Advocates	
<b>Laos</b>	<b>97</b>		
Walter Heiser, Senesakoune Sihanouvong and Agnès Couriol DFDL			

# Myanmar

Jaime Casanova, James Finch and Bernard Cobarrubias

DFDL

## Creating collateral security packages

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

The types of collateral and security interests available for secured transactions are real estate, buildings, leasehold interests, concessions, as well as moveable property including receivables, shares, securities, bank accounts and proceeds from investments. In principle, mortgages of immovable property are not generally available in connection with secured transactions if the lender is a foreign national, foreign company or foreign bank. This is a result of legal restrictions, discussed below, on acquisition of real estate interests by foreigners. In recent months, however, security packages for cross-border loans have been created using equitable mortgages of shares, receivables and personal property. They have also been created using fixed and floating liens over receivables and other assets.

Land owned by government departments or organisations that is leased to investors may be mortgaged only with the approval of the government.

Myanmar has enacted the Special Economic Zones Law of 2014 (SEZ Law) that indicate that property in the special economic zones (SEZs) will be treated differently to property outside SEZs with respect to mortgages, and that land therein may be assignable or mortgageable to create security for cross-border loans, but the practice in connection with such assignment or mortgage has not yet been developed.

The Restriction on Transfer of Immovable Property Law of 1987 (TIPL) prevents any foreign individual or company with even a single foreign shareholder to be a mortgagee over real property in Myanmar. Under the Foreign Investment Law of 2012 (FIL), however, a foreign investor may sublease or mortgage its leasehold interest in immovable property to another person with the prior approval of the Myanmar Investment Commission (MIC). Such sublease or mortgage must be done within the term of the business and, upon the type of land where it is done, certain other requirements must be met (eg, if the land is cultivable land, fallow land or wasteland, the approval of the Union of Myanmar (the Union) government will be required, too) Such a sublease or mortgage could be used to secure a cross-border loan, however, again the practice has not yet been developed.

### 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?

Mortgages and charges must be registered with the registrar of the Directorate of Investment Company Administration (DICA) within 21 days of creation. Otherwise, they will be void against the liquidator and other creditors of the company. The Registrar of the DICA is responsible for giving a certificate of the registration of any mortgage or charge, stating the amount thereby secured, and the certificate is conclusive evidence that the requirements as to registration of mortgage or charge have been complied with. Either a mortgagor or mortgagee may register the mortgage or charge with the DICA.

Mortgages on immovable property, including leaseholds, also need to be registered under the Registration Act of 1909, which gives a list of

documents that must be registered within four months with the Office of the Registration of Deeds (ORD).

Security interests in moveable property such as bank accounts and shares are made and created by way of a pledge or charge and are perfected by furnishing the secured party with control over such collateral. If operating under the umbrella of the FIL, the creation of a security interest requires approval from the MIC. There are a number of relevant laws dealing with priority of debts that need to be taken into account in connection with protection of secured assets from the general creditors of the borrower. Under these laws, certain payments have preference over payments to be made to creditors.

Stamp duties are applicable.

Registration fees apply for mortgage deeds. These are calculated according to the value of the right, title or interest affected, but at present these are not onerous.

There are no reported cases or rulings in Myanmar that could be used as guidance in dealing with the specific issue as to whether a corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party. In practice, one precedent has shown that a foreign corporate entity appointed as security agent on behalf of a foreign lender has to be based onshore under certain conditions. And, provided certain conditions are met, the laws of Myanmar allow an agent to delegate its functions to a third party. Thus, agents or trustees may change from time to time.

In general, a security trustee is not required to have any particular governmental licences. However, a mortgagor who holds the mortgagee's rights as his or her trustee or legal representative and who may sue for a sale of the property is not authorised to initiate a suit for foreclosure.

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

Assuming existing mortgages or charges have been duly registered with the DICA and the ORD, a search may, in theory, be performed by a creditor. If a lien is in a certain type of immovable or moveable property, collateral is perfected only by control and not by way of a public filing. The only possible way for a creditor to determine the absence of liens in practice, therefore, is via obtaining representations and warranties by the debtor or other relevant party to the agreement establishing such control.

### 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?

Specific requirements under each relevant mortgage vary in connection with initiating a suit for foreclosure or a suit for sale or sale without the intervention of the court. There are also a number of rulings dealing with various issues based on different types of mortgages. In general, a lender would need a court order for enforcement of its security and cannot enforce its security freely. However, under specific circumstances, a mortgagee may exercise its right of sale without the intervention of the court.

Foreign companies will be allowed to mortgage leases on land and buildings during the investment period and with the approval of the MIC.

The law also recognises pledges of moveable property in which it is stated that if the pledgor is in default in payment of the debt or performance at the stipulated time of the promise in respect of which the goods were pledged, the pledgee may bring a suit against the pledgor upon the debt or promise, retain the goods pledged as collateral security, or sell

the goods pledged on giving the pledgor reasonable notice of the sale. In this situation, the pledgee may either sue for the debt retaining the pledge as collateral security or may sell the goods pledged having given reasonable notice.

Apart from the foregoing, a lender would need a court order and decree to enforce its security in connection with the sale of the mortgaged property.

According to one Myanmar ruling, generally mortgagees (project lenders) may not participate as buyers in the sale. According to another Myanmar ruling, if the purchaser at the auction is a foreign national, he or she will not be entitled to bid on immoveable property because of the TIPL.

**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 (eg, tax debts, employees' claims) 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?**

Any transfer, delivery of goods, payment, execution or other act relating to property that would be deemed a fraudulent preference is invalid. Any transfer or assignment thereof by a company of all its property to trustees for the benefit of all its creditors shall be void.

Regarding preferential creditors' rights, certain payments have preference over payments to be made to the creditors.

The law provides for the winding-up of a company by a court if the company is unable to pay its debts.

The mortgagee has power to sell the mortgaged property in default of payment of the mortgage money, without the intervention of the court, subject to the condition that the mortgage is an English mortgage. With an English mortgage, the power of sale without court intervention is explicitly conferred on the mortgagee by the deed of mortgage when:

- a written notice demanding payment has been served on the mortgagor; or
- the mortgagor is in default in payment of the principal after such notice or if interest remains unpaid for three months.

Therefore, in connection with default under an English mortgage, a receiver may be appointed by a mortgagee.

There is some inconsistency in the various insolvency laws with regard to priority of payment of debts in a winding-up proceeding, but in general the order of priority, in descending order, is:

- debts due to the government, wages and other accrued benefits owed to employees, taxes, debts due to state banks and the Central Bank of Myanmar (CBM) (all ranking equally in priority over other debts);
- debts due under a registered mortgage of immoveable property;
- debts due under a registered fixed and floating charge;
- debts due to unsecured creditors (trade); and
- the remainder (if any) goes to contributories (shareholders).

**Foreign exchange and withholding tax issues**

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

Foreign currency exchange matters are mainly governed by the Foreign Exchange Management Law of 2012 (FEML).

The FEML is intended, among other things, to liberalise transfer payments relating to 'current account transactions', which include:

- remittances for trading, services fees and settlement of short-term bank loans;
- remittances for payment of interest on loans and net income from investments;
- instalment loan payments or depreciation on direct investments; and
- inbound or outbound remittance for family living costs.

Current account transactions shall not be restricted directly or indirectly to settlement or remittance out of the country. Therefore, any local or foreign company can in principle enter into a loan agreement with an offshore bank and service that loan without 'direct or indirect' restrictions. The rules published under the FEML, however, require that loans must obtain the prior approval of the CBM.

Payments must be arranged through any bank with a foreign exchange-authorized licence, which is issued by the CBM.

The FEML also regulates remittances and payments relating to 'capital account transactions', defined as 'capital account remittances other than current account remittances'. These would include:

- payment of dividends; and
- return of equity capital.

Regarding the above transactions, the CBM may:

- inquire whether the investment capital was actually brought into Myanmar as foreign investment in accordance with the law; and
- reject any request for permission to remit such payments if the investor cannot produce the required evidence of the original investment funds being brought in accordance with the law. Therefore, they are at risk of rejection by the CBM.

MIC approval is also required for remittances with respect to a company formed under the FIL.

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

Because of the transition between exchange laws, remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions may be made with the prior approval of the MIC, the CBM or the Ministry of Planning and Finance (MPF). If there is state participation in a joint venture or state funds are used to repay principal or interest in connection with loan agreements, the approval of the government or Trade and Investment Supervision Committee (TISC) is also required.

Under the Withholding Tax Notification, 15 per cent withholding tax is due on the interest payments if the recipient is a non-resident. There is no withholding tax on interest payments to residents.

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

Myanmar project companies are not required to repatriate foreign earnings. However, foreign companies in Myanmar can repatriate their profits and dividends through any bank with a foreign exchange-authorized dealer licence issued by the CBM. Prior approval(s) may be required.

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

Project companies may establish and maintain foreign currency accounts in other jurisdictions and accounts locally, although it requires notifying the CBM in advance and proving monthly reporting statements to the CBM.

Under the SEZ Law, businesses that are operated in foreign currency may:

- open foreign accounts;
- operate accounts;
- make payments and exchange; and
- transmit foreign currency within the SEZ.

**Foreign investment issues**

**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?**

Myanmar law specifies 12 economic activities that are allowed to be carried out only by the government. However, if it is in the interest of the state, the government may, on a case-by-case basis, by notification, specifically permit such restricted economic activities to be carried out through a joint venture with the government, or individually by any person or economic organisation, subject to unspecified conditions.

Depending on the economic activities to be carried out, approvals of the government and the MIC as well as relevant government ministries are necessary.

Special requirements apply in the SEZs, such as Dawei, Thilawa or Kyauk Phyu.

**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?**

It is a requirement that all insurance coverage be with Myanma Insurance (MI) under the MPF. If the foreign company wants to maintain insurance with a foreign insurance company abroad, it may do so only with the permission of MI.

Pursuant to the SEZ Law, foreign insurance companies and joint venture insurance companies will have the right to operate in the SEZ. Per current government policy in the Thilawa SEZ, which seems to differ from what the SEZ Law provides, prior to being able to apply for an insurance licence and operate in such SEZ, insurance companies need to:

- register a representative office outside the SEZ; and
- carry out its permitted activities (eg, marketing or research, or both) throughout a minimum period of three years.

Thereafter, the parent company of such insurance company may be allowed to apply for the incorporation of a subsidiary inside the SEZ and provide insurance coverage therein.

Further, all economic organisations formed under an MIC permit shall procure insurance with any authorised local insurance enterprise in respect of the specific types of insurance.

Other insurance policies may be required in accordance for specific projects and under the applicable laws.

Reinsurance must be transacted solely by MI. All programmes of reinsurance that are proposed by MI must be submitted to the Insurance Business Supervisory Board.

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

The employment of foreign experts and technicians by a company carrying out business investment under the FIL must obtain the approval of the MIC.

Under the FIL, 25 per cent of investors' appointments must be skilled citizen workers, technicians and staff within the first two years of the investment, rising to at least 50 per cent within the second two years and at least 75 per cent within the third two years, all counted from the year that the business commenced its operations.

Special rules exist in the SEZs also.

Work permits, stay permits and visas are applicable with respect to foreign employees.

All workers, including foreign workers, must have written employment contracts filed with the township labour authorities.

**13 What restrictions exist on the importation of project equipment?**

Requirements to be fulfilled prior to the importation of project equipment include compulsory registrations and export or import licences, which are controlled and administered by the Directorate of Trade under the Ministry of Commerce (MOC). Relevant duties and commercial tax apply; however, they may be exempted or reduced if operating under the umbrella of the FIL.

**14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

The FIL expressly guarantees that an economic enterprise operating under the MIC permit shall not be nationalised during the term of the contract or during any extended term.

**Fiscal treatment of foreign investment**

**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?**

**Incentives for foreign investors**

The FIL provides that incentives for foreign investors include:

- income tax exemption for a period of five consecutive years including the year of commencement on commercial scale to any business for the production of goods or services; moreover, in the event that it is beneficial to the Union, income tax exemption or relief for a suitable period depending upon the success of the business in which the investment is made;
- exemption or relief from income tax on profits of the business if they are maintained for reinvestment in a reserve fund and reinvested therein within one year after the reserve is made;
- the right to deduct depreciation from profits, at the rate stipulated by the Union, in respect of machinery, equipment, building or other capital assets used in the business for the purpose of income tax assessment;
- if the goods produced by a manufacturing business are exported, relief from income tax of up to 50 per cent on the profits accrued from the said export;
- the right to pay income tax on the income of foreigners at the rates applicable to citizens residing within the Union;
- the right to deduct expenses from the assessable income, for those incurred in respect of research and development relating to the business, which are actually required and are carried out within the Union; and
- the right to carry forward and offset the loss for up to three consecutive years from the year the loss is actually sustained or within two years following the enjoyment of exemption or relief from income tax for each business;
- exemption or relief from customs duty and other internal taxes on machinery, equipment, instruments, machinery components, spare parts and materials used in the business, which are imported as they are actually required for use during the period of construction of the business;
- exemption or relief from customs duty and other internal taxes on raw materials imported for production for the first three years after the completion of construction of the business;
- if the volume of investment is increased with the approval of the MIC and the original investment business is expanded during the permitted period, exemption or relief from customs duty and other internal taxes on machinery, equipment, instruments, machinery components, spare parts and materials used in the business which are imported as they are actually required for use in the business expanded as such; and
- exemption or relief from commercial tax on the goods produced for export.

In addition, investors in SEZs may be entitled to the following tax incentives:

- income tax holidays for the first seven years starting from the date of commercial operation in respect of those investment businesses operated in an exempted zone or exempted zone businesses;
- income tax holidays for the first five years starting from the date of commercial operation in respect of those investment businesses operated in a business promoted zone or other business in a promoted zone;
- 50 per cent income tax relief for investment businesses operated in an exempted zone or a business promoted zone for the second five-year period;
- for the third five-year period, 50 per cent income tax relief on the profits of the business if they are maintained for reinvestment in a reserve fund and reinvested therein within one year after the reserve is made;
- exemption on customs duty and other taxes for raw materials, machinery and equipment, and certain types of goods imported for investors in exempted zones; whereas, for investors in promoted zones, exemption on customs duty and other taxes for the first five years in respect of machinery and equipment imported that are required for construction starting from the date of commercial operation, followed by 50 per cent relief of customs duty and other taxes for a further five years; and

- carry forward of loss for five years from the year the loss is sustained.

For developers in SEZs, the following incentives may be granted:

- income tax holidays for the first eight years starting from the date of commercial operation;
- 50 per cent income tax relief for the second five-year period;
- for the third five-year period, 50 per cent income tax relief on the profits of the business if they are maintained for reinvestment in a reserve fund and reinvested therein within one year after the reserve is made;
- exemption on customs duty and other taxes for raw materials, machinery and equipment, and certain types of goods imported; and
- carry forward of loss for five years from the year the loss is sustained.

#### For lenders

There are no specific incentives for lenders, unless specifically granted (for instance, the World Bank group enjoys exemption from income tax on interest, among other benefits).

#### Applicable taxes on loans, mortgages, etc.

As mentioned above, in general, there is a 15 per cent withholding tax on payments of interest to non-residents. The documents executed are generally subject to stamp duties at various rates. For instance, a bond is subject to 1.5 per cent stamp duty on the value of the bond; mortgage leases at 1.5 per cent; and pledges from 1.5 to 3 per cent of the value of the security.

#### Applicable taxes on investments

Contribution to capital is not a tax event. But companies or branch offices engaged in business may be subject to 25 per cent corporate income tax, a general rate of 5 per cent commercial tax (an indirect tax) on the provision and import of goods and services, personal income tax on compensation to employees at the rate of zero to 25 per cent, among other taxes.

#### Government 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?

There are various government ministries, departments and state-owned economic organisations under the relevant ministries having jurisdiction with respect to specific project sectors. Depending on project sectors, the requirements to obtain approvals from relevant ministries vary in addition to obtaining prior permits or approvals from the government or the MIC.

With regard to doing business and investment in the different SEZs, approvals are also required as may later be determined from organisations such as the SEZ Central Body or management committee.

#### Regulation of natural resources

##### 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?

In principle, title to natural resources in the ground is vested in the state.

However, depending on the sector, project activities may be carried out and the rights thereto, including title to underground water as well as things growing on or living on land, may be enjoyed as permitted by law.

As alluded to above, under the State-Owned Enterprise Law of 1989, the state has a monopoly on natural resources. This monopoly may be waived by notification if the state enters into a joint venture or allows a foreign concern to exploit the natural resources. In practice only joint ventures are allowed.

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

Royalty rates vary from sector to sector.

However, the MPF may exempt any royalty payable by the holder of a permit, in whole or in part for such period as may be determined, and also defer payment of royalty due.

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

The export of certain natural resources requires approval of the relevant government ministries.

Investors establishing a business involving export transactions are required to first register as an exporter and obtain a certificate of exporter registration from the MOC. After receiving the certificate, the registered exporter must then apply for an export licence separately for every export. Unless there is an MIC permit in place and then only in accordance with the terms of such MIC permit, however, foreign companies are not allowed to undertake export activities under government policy at present.

The special commodity tax on exports is as follows:

Natural gas	8 per cent
Teak and hardwood logs, 10 square inches and above teak and hardwood timbers	50 per cent
Jade, ruby, sapphire, emerald, diamond and other precious gem stones	20 per cent
Jade, ruby, sapphire, emerald, diamond and other precious gem and jewellery finished products	5 per cent

In addition, commercial tax of 8 per cent applies on electric power exports and 5 per cent on crude oil exports.

#### Legal issues of general application

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

Depending on the types of project finance transactions related to investments, loans, operations, transactions and remittances by foreign parties or local companies, approval of one or several of the following – the government, the MIC, relevant government ministries, the CBM or the MPF, or both – is required and may vary in form. Under Myanmar law, the taking or enforcement of security of shares or assets of companies in the oil and gas, mining, electricity or telecommunications industries is subject to the prior approval of the foregoing authorities.

##### 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?

If the principal money secured is 1 million kyats or more, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. If the principal money secured is less than 1 million kyats, a mortgage may be effected either by a registered instrument signed and attested as mentioned above, or (except in the case of a simple mortgage) by delivery of the property.

Generally, contracts including mortgage deeds may be made in English. As for translation and notarisation, translation of the instruments into the Myanmar language and notarisation or legalisation may be required when asked by the relevant government departments at the time of filing the documents.

As stated above, project documents involving foreign investors must be registered with the MIC.

##### 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?

On 15 July 2013, Myanmar became the 149th contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') and with UNCITRAL Rules that specify the instances in which the local arbitration act of a jurisdiction would apply should be limited. This is a significant economic and legal reform with regard to foreign investment in Myanmar.

Myanmar deposited its formal instrument of accession to the New York Convention on 16 April 2013, and, 90 days later, Myanmar formally acceded to the Convention without making any reservations with regard

to its accession, such as with regard to reciprocity, which may potentially limit the number of reciprocal countries for the enforcement of the arbitral awards. In accordance with the New York Convention, Myanmar courts are obliged to give effect to foreign arbitration clauses and to enforce arbitral awards made in other member states of the Convention. Foreign investors will be able to choose a neutral offshore forum for resolution of disputes, insofar as the parties have agreed to arbitration.

The Arbitration Law of 2016 represents the enactment of the missing piece of domestic legislation in Myanmar in order to give full effect to accession to the New York Convention. Accordingly, a party who is applying for the enforcement of a foreign arbitral award shall do so before the court and produce the following documents:

- the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- the original agreement for arbitration or a duly certified copy thereof; and
- such evidence as may be necessary to prove that the award is a foreign award.

If the foreign arbitral award is not made in English, a certified translation will have to be produced. Such foreign arbitral award shall be enforced under the Code of Civil Procedure of 1909 in the same manner as if it were a decree of the court.

However, the court may refuse to recognise the foreign arbitral award if the party against whom it is invoked furnishes to the court proof that:

- the parties to the arbitration agreement referred to was under some incapacity;
- the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Likewise, the enforcement of the foreign arbitral award may be refused if the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the laws of the Myanmar; or
- the enforcement of the award would be contrary to the national interest (public policy) of Myanmar.

Finally, in order to enforce a foreign arbitral award made in a contracting state of the New York Convention, the Chief Justice of Myanmar may appoint, by notification, any officer from the Office of the Supreme Court of the Union or any person or any individual in charge of any organisation to certify or authenticate the copy of the arbitration agreement or arbitral award. Such notification has not been published yet.

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

The Myanmar authorities insist in virtually all contracts with the Myanmar government that the law of Myanmar is chosen as the governing law. The Contract Act of 1872 does not forbid the choice of foreign law; however, and in joint ventures between the government and foreign parties in some large energy and minerals deals, foreign law was allowed to be used without major hurdles (eg, in production-sharing contracts), and also, such choice of foreign law may be seen in loan agreements between the government

### **Update and trends**

In recent months, a number of legal firms have played a key role in advising on the Myanmar law aspects of the finance documents and in designing and creating the comprehensive Myanmar law security package, for security packages for cross-border loans created using pledges of shares, receivables and personal property. These may also be created using floating liens over receivables and other assets. Therefore, cross-border, non-recourse corporate loans into Myanmar are now possible, which is a substantial development that paves the way for the expansion of commercial bank financing in the country.

and foreign entities. It is likely in the present that state-owned enterprises would insist that a foreign investor or company uses Myanmar law.

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

The parties to a contract are not prohibited from submitting to the jurisdiction of foreign courts. However, under the laws of Myanmar, an agreement absolutely restricting a party from enforcing its rights under a contract by the usual proceedings in ordinary tribunals would be rendered void. A contract provision expressly excluding the courts from jurisdiction would, therefore, run the risk of rendering the contract void.

There is a lack of precedent in Myanmar concerning how Myanmar courts deal with agreements containing the choice of a foreign law forum. However, a Myanmar court has accepted, in at least two cases, one of the principles of English private international law (ie, the intention of the parties must first be determined before deciding what law is applicable to their case). It may, therefore, be concluded theoretically that the governing law applicable to an agreement may be chosen by the parties.

A judgment of a foreign court is recognised in Myanmar except for specific cases (specified by law) where a foreign judgment is not conclusive (including notably where the judgment is deemed to sustain a claim founded on a breach of any Myanmar law). Sovereign immunity can be expressly waived by state-owned enterprises and government authorities and waiver of immunity clauses are effective and enforceable.

### **Environmental, health and safety laws**

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

Depending on the project sector, there are various laws, rules, regulations, orders that must be complied with under Myanmar law.

The Environmental Conservation Law (ECPL) was enacted on 30 March 2012. Under the ECPL, the Union Government is required to form an environmental preservation committee with suitable members to conserve the environment of the Republic of the Union of Myanmar. The ECPL requires the Ministry of Environmental Conservation and Forestry (MECF) to form a committee to create and carry out specific policies and to accomplish certain objectives, such as establishing a system for monitoring pollution from industry, agriculture, and mining, and to monitor construction projects. However, the ECPL does not provide detailed, specific requirements. In short, it mainly gives the MECF the power to make policies. On 5 June 2014, rules on environmental impact assessments were published, and on 29 December 2015 rules on social impact assessment followed. Although the ECPL is binding for the government and the government projects, the MECF may be required to get permission from the government to enforce the ECPL on other ministries.

Notification 50/2014 under the FIL provides a list of which projects require a favourable environmental impact assessment prior to obtaining the permission from the MIC. These include, inter alia, mineral exploration and production, hydropower and other heavy electricity production method, construction of infrastructures, etc.



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

The business structures of project companies available under the FIL are:

- through a company with 100 per cent foreign capital;
- through a joint venture company formed by a foreign national and a citizen, or the relevant government department and organisation; or
- a public-private partnership, which would include BOT contracts and others.

A foreign entity may also establish a branch office in Myanmar that is capable of engaging in revenue-generating activities that are permitted as objects of the parent company. Branch offices are generally registered for foreign firms engaged in the services sector without an MIC permit, since the FIL does not overtly include branch establishment for company structures in the list above.

Non-revenue-generating activities in the insurance industry, for example, would be carried out via a representative office. Recently, nine foreign banks have been issued a licence to carry out institutional and commercial bank activities in Myanmar. Such foreign banks may be the financing source for project companies in foreign currency, while domestic loans in local currency may be sought from government-owned banks and private domestic banks, as permitted by Myanmar laws.

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

No.

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

Not applicable.

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

The formation of a joint venture between a state entity and a foreign participant, and the notifications conferring powers to certain economic organisations to carry out economic activities under the State Owned Economic Enterprises Law of 1989 issued by the government are commonly published in the Gazette. However, there has been no notice published in the Gazette regarding the existence of a partnership in connection with state projects.



**Jaime Casanova**  
**James Finch**  
**Bernard Cobarrubias**

**jaime.casanova@dfdl.com**  
**james.finch@dfdl.com**  
**bernard.cobarrubias@dfdl.com**

No. 134/A, Than Lwin Road  
 Golden Valley Ward (1)  
 Bahan Township  
 Yangon  
 Myanmar

Tel: +95 1 526 180  
 Fax: +95 1 548 835  
 www.dfdl.com

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Project Finance  
ISSN 1755-974X



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law