

## Project finance in Myanmar: overview

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### MARKET OVERVIEW

#### 1. What types of projects make use of project financing in your jurisdiction? What have been the most significant project finance deals in the past 12 months?

The project finance sector in Myanmar is still under-developed, but has made significant headway in recent years. Common hurdles come in the form of regulatory approvals, a lack of regulatory guidelines and difficulty in perfecting securities. However, over time, many of these issues are being addressed and further improvements are underway.

#### Significant deals

There have been considerable levels of project financing in sectors such as power, telecoms, solar, and real estate. Recent key transactions have included the following:

- The 121 megawatt (MW) combined-cycle Ahlone gas-fired power project in Yangon, developed by Toyo Thai Power Corporation, was Myanmar's first international IPP following the country's opening up, and is one of the most advanced power projects involving international sponsors, with 80 MW already being dispatched.
- Irrawady Green Towers (IGT) arranged the first long-term financing through the Dutch Development Bank FMO for telecom towers in Myanmar. IGT is constructing a mobile communication tower network consisting of at least 2,000 towers, which will provide coverage to about 14 million people in Myanmar.
- In February 2016, telecommunications provider Ooredoo Myanmar secured US\$300 million in financing from the Asian Development Bank (ADB) and International Finance Corporation (IFC) to finance its telecommunications infrastructure roll-out across the country.
- A 300 MW solar power project agreement was signed between Yangon-based Won Toll and Thailand based Kamrai Panit. The solar plant will be constructed in Ayeyarwady Region and will be used to generate electricity for various industries in Myanmar.
- Thailand PV Developer Green Earth Power (GEP) is in the process of constructing a 390 MW solar power plant in Magway region in Myanmar in co-operation with Myanmar's Ministry of Electric Power. The EPC services for the four-phase installation will be provided by the China Triumph International Engineering Group.
- Domestic telecom infrastructure firm Pan Asia Majestic Eagle Limited (PAMEL) secured US\$85 million in financing in October 2014 from five major international banks (DBS, ING, OCBC, Standard Chartered Bank and SMBC) to help fund the roll-out of telecom towers in the country. Although not a true limited recourse project financing, it is a strong indicator of international lenders' appetite for financing in Myanmar. Being secured makes it a useful basis for assessing the extent of the

securities available in Myanmar in practice, as well as the practicalities and challenges of creating and perfecting security interests in the country.

- Singapore utilities developer Sembcorp is developing a 225 MW combined-cycle gas fired power project in Myingyan, Myanmar. This is the first IPP in Myanmar using MOEE's new form PPA, and when commissioned in 2018, will be one of the largest gas fired power plants in the country. The total project cost of about US\$300 million was funded by the International Finance Corporation, the Asian Development Bank and the Asian Infrastructure Investment Bank, as well as international commercial lenders Clifford Capital, DBS Bank, DZ Bank, and Overseas-Chinese Banking Corporation. The debt and equity political risk coverage for the project was provided by the Multilateral Investment Guarantee Agency and ADB.

### REGULATORY FRAMEWORK

#### 2. What regulatory framework governs project finance in your jurisdiction?

#### Regulatory framework

Laws that have been enacted in Myanmar can be divided into six main categories according to the period in which they were enacted:

- **Colonial Period Laws (before 1948).** The laws enacted during this period are called Acts. All the Acts enacted during this period and up until 1954, are compiled and were originally known as the Burma Code. They are now called the Myanmar Code, and are in 13 volumes.
- **Parliamentary Laws (1948 to 1962).** After 1954, enacted laws were published annually.
- **Revolutionary Council Laws (1962 to 1974).** Laws from this period have been compiled into a three-volume set.
- **Pyithu Hluttaw Laws (1974 to 1988).** The socialist legal system continued during this period. Laws enacted during this period were published annually.
- **State Law and Order Restoration Council Laws (1988 to 1997).** The socialist legal elements were abolished in 1988. Since then, a market-based economic system has been adopted. The legal system still has its roots in the common law system. The laws promulgated during this period were published annually.
- **State Peace and Development Council Laws (1997 to present).** The market-based economic system continues, and there is annual publication of laws enacted.

In addition to the reliance on codified laws, Myanmar courts follow the common law method of interpreting laws with reference to case-law precedent. In this process, Myanmar rulings are regarded as primary authorities, and Indian rulings as persuasive authorities.

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Throughout these periods, important judgments in connection with public policy and issues of law have had legal force as reported cases. However, not all judgments in Myanmar are reported. Where no law addresses a particular matter, courts may apply Myanmar's general law, which is based on English common law, as adopted and interpreted by Myanmar case law.

Where there is no relevant statutory or general law, Myanmar courts decide matters according to justice, equity, and good conscience.

### Regulatory authorities

There are various government ministries, departments and state-owned economic organisations under the relevant ministries, each with jurisdiction over 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 Myanmar Investment Commission (MIC).

To date, the majority of the large scale infrastructure projects in Myanmar have been financed by offshore lenders. The primary authority regulating offshore financing is the Central Bank of Myanmar (CBM). In accordance with the Foreign Exchange Management Law 2012 (FEML) and its implementing rules under Notification 7 of 2014, the CBM's prior approval is required for any offshore financing. In accordance with the Foreign Exchange Management Law 2012 (FEML), project companies must also have the CBM's prior approval before opening any offshore bank account.

For the purpose of implementing projects that receive offshore financing, the following government agencies and departments play a crucial role:

- Ministry of Electricity and Energy (MOEE), which has been formed recently following the merger of the former Ministry of Electric Power and the then Ministry of Energy. Among other responsibilities, the MOEE oversees the issuance of electricity-related permits.
- Electric Power Generation Enterprise (EPGE), which has also been formed recently. Among other responsibilities, it will act as the off-taker on power-related projects in place of the MEPE.
- Myanmar Oil and Gas Enterprise (MOGE) which, among other responsibilities, oversees the supply of natural gas to power-related projects.
- Ministry of Planning and Finance (MOPF), which has been formed recently following the merger of the former Ministry of National Planning and Economic Development and the then Ministry of Finance.
- Ministry of Commerce (MOC) which, among other responsibilities, oversees the importation of machinery, equipment and material into the country, and issues the relevant import licences.
- Ministry of Environmental Conservation and Forestry (MOECAF) and Ministry of Natural Resources and Environmental Conservation (MONREC), which, among other responsibilities, oversees compliance of power-related projects with environmental-related matters.
- Ministry of Agriculture, Livestock and Irrigation (MOALI).
- Ministry of Planning and Finance (MOPF).
- Myanmar Investment Commission (MIC).

### Material laws

The key laws governing project financing and power generation projects in Myanmar are:

- Arbitration Law 2016.

- Contracts Act 1872.
- Electricity Law 2014.
- Environmental Conservation Law 2012.
- Foreign Exchange Management Law 2012.
- Myanmar Investment Law 2016.
- Myanmar Companies Act 1914.
- Myanmar National Committee on Large Dams Law 2015.
- Public Debt Management Law 2016.
- Registration Act 1908.
- Stamp Act 1899.
- Transfer of Immoveable Property Restriction Law 1987.
- Transfer of Property Act 1882.
- Special Economic Zone (SEZ) Law 2014.
- State-owned Economic Enterprise Law 1989.
- Insolvency laws (Myanmar Act and the Yangon Act).

### International treaties

Myanmar has recently acceded to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). With UNCITRAL rules specified, the instances in which the local arbitration act of a jurisdiction would apply are very limited.

Myanmar has also entered into ASEAN Comprehensive Investment Agreement and various bilateral investment treaties. In addition, Myanmar has double taxation avoidance agreements with various countries.

## REGULATORY CONSIDERATIONS

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### 3. Are government approvals required before financing a project? Are fees typically paid for such approval?

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Depending on the type of project finance transaction, approval from one or more of the following entities may be required:

- The government.
- The MIC.
- The relevant government ministries (such as in relation to electricity, construction and the environment).
- The Central Bank of Myanmar (CBM).
- Local authorities.

No fee is payable for the approval of any project financing.

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### 4. Is there any requirement to file or register project documents with a regulatory authority or other government body?

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Any document which creates or purports to create a security interest in immovable property in Myanmar must be registered with the Office of Registrar of Deeds (ORD).

In addition to registration with the ORD, any security (other than a pledge of movable assets) created over the assets of a company to collateralise facilities must also be registered with the Company Registration Office (CRO).

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Generally, contracts, including mortgage deeds, can be created in English. Translation of the instruments into the Myanmar language, and notarisation or legalisation, can be required by the relevant government departments at the timing of filing the documents.

Before requesting registration, security instruments must be stamped, with duty in accordance with a prescribed schedule. The filing of the security instruments with the relevant authorities is subject to statutory thresholds (for example, for the CRO, this is 21 days after the creation of the mortgage and/or charge).

Stamp duty fees are becoming a major problem for large-scale financings due to attempts by the Internal Revenue Department (IRD) to maximise tax receipts across loan and security documents for some transactions. For example, stamp duties on security documents can be levied at 0.5% of the value of the underlying loan agreement. Alternative and creative solutions are possible, including the creation of security in the form of a hypothecation which is recognised in Myanmar case law and is not subject to stamp duty.

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## 5. Do any specific laws exist in relation to state ownership or state repatriation of assets?

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### State ownership

There are no laws requiring mandatory state ownership of or interest in a project or a project company. However, the government of Myanmar under the State-owned Economic Enterprise Law (SOEE) has reserved most key sectors for the union government. These sectors include exploration and production of oil and gas, associated products and metals, certain electricity generating services, telecommunication services, and banking and insurance services. Exemptions can only be granted when the government issues an applicable notice under the SOEE Law.

### State repatriation of assets

The Foreign Investment Law provides assurances and guarantees that an investment will not be nationalised or terminated by the government during the term of an investment. However, there are limited exceptions to this, such as where nationalisation is necessary for the interests of the country, in which case the acquisition must be carried out in a non-discriminatory manner, in accordance with applicable laws and with prompt payment of fair and adequate compensation.

## STRUCTURING THE FINANCING

### Main parties

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## 6. Who are the main parties in a project finance transaction?

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Project financing is still at a nascent stage. However, it is likely that the main parties to a project finance transaction are generally:

- The project company.
- The borrower (which is not always the project company).
- Shareholders.
- Sponsor(s).
- Government agencies and ministries (such as MOEE on a power project).
- Suppliers (such as MOGE as fuel supplier on a gas-fired power project).
- Off-takers (such as EPGE on a power project).
- Agents (administrative, collateral, facility).

- Construction contractors.
- Operation and maintenance contractors.
- Advisers and financing parties (such as commercial banks, multilateral agencies, and international financial institutions).

### Types of financing

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## 7. How are projects financed? What sources of funding are typically available?

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Projects in Myanmar can be financed through one or more sources, including:

- Debt.
- Equity.
- Mezzanine finance.
- Bond issues.
- Funding from multilateral agencies and international financial institutions.

## 8. What are the advantages and disadvantages of using project financing to structure a construction or infrastructure project?

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### Advantages

Advantages to using a project financing structure from the perspective of a sponsor or project company in Myanmar include:

- **Non-recourse or limited recourse debt.** This enables the implementation of a viable project in frontier markets such as Myanmar.
- **Off-balance-sheet treatment.** Project financing techniques can allow equity providers off-balance-sheet treatment of liabilities with respect to the project (including the debt).
- **Risk sharing.** Several risks are involved in a project finance transaction and these can be effectively spread across the project company, sponsors, lenders, contractor and operator.

### Disadvantages

The disadvantages to using project financing, from the perspective of a sponsor or project company, in Myanmar includes:

- **Complexity.** Project finance in Myanmar is typically more complex, time-consuming and document-intensive, especially since Myanmar's present peculiarities (for example, with regard to unclear regulations and issues concerning the creation of effective security) can make it a difficult process.
- **Higher levels of equity.** Lenders generally provide debt for around 60% to 70% of the project's costs, with the remainder consisting of sponsor equity investment. Higher levels of equity lead to more skin in the game for sponsors when compared to traditional corporate financing.
- **Higher interest rates.** To reflect their assumption of a higher level of risk, lenders typically charge the project company a higher interest rate on project finance loans when compared to corporate finance loans.

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## Corporate vehicles

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### 9. What corporate vehicles are typically used for financing projects? What are the considerations behind choosing these vehicles?

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The business structures of project companies available under the Foreign Investment Law are:

- Through a company with 100% foreign capital.
- Through a joint venture company formed by a foreign national and a citizen, or the relevant government department and organisation.
- A PPP.
- A foreign entity can also establish a branch office in Myanmar.

## Documentation

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### 10. What are the typical documents in a project finance transaction?

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The conventional documents in a project financed transaction in Myanmar are divided into the:

- **Project documents.** These include the:
  - concession or build-operate-transfer contract;
  - land lease agreement;
  - construction contracts;
  - operation and maintenance agreement;
  - technical services agreement;
  - off-take agreement;
  - supply agreement;
  - shareholders' agreement.
- **Financing documents.** These include the:
  - common terms agreement;
  - loan agreements;
  - inter-creditor agreement;
  - security documents (on and offshore);
  - equity contribution agreement;
  - subordination agreement;
  - project accounts agreement;
  - fee letters;
  - hedging agreements;
  - direct agreements;
  - letters of credit.

## SECURITY

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### 11. What forms of security are available to protect investments? How are they created and perfected?

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#### Forms of security

The types of security that are available in Myanmar include:

- Fixed and floating charges.
- Pledges of moveable property.
- Charges, trusts or pledges of bank accounts.
- Hypothecation.
- Assignments of contracts (such as leases, insurances or revenue generating contracts).
- Equitable mortgages or charges over shares.
- Mortgages of immoveable property.

#### Formalities

Creation of a security interest in favour of a foreign lender requires approval from relevant government ministries and the CBM. There are several relevant laws dealing with priority of debts that must be considered in connection with protection of secured assets from the borrower's general creditors. Under these laws, certain payments have preference over payments to creditors (see *Question 17*).

Also, as foreign companies cannot own any immovable property in Myanmar, they must enter into a lease agreement either with a relevant land owning ministry, or a third party Myanmar company/citizen. It is possible that these lease agreements may require prior approval from the relevant landlord before a security over the lease-hold right can be created in favour of a financial institution.

The following registration requirements apply in relation to the perfection of security:

- **Registration with the ORD.** Mortgages, charges and assignments over immoveable properties in Myanmar must be registered with the ORD within four months from the date of execution (if executed in Myanmar). Documents executed outside Myanmar must be presented for registration within four months after their arrival in Myanmar.
- **Registration with the Directorate of Investment and Company Administration (DICA).** Mortgages, charges, assignments by way of a charge and hypothecation must be registered with the DICA in Myanmar. These documents must be submitted to DICA for registration within 21 days of their execution.
- **Stamp duty.** In general, there is a 15% withholding tax on payments of interest to non-residents, which can be reduced by up to 8% depending on the double taxation avoidance treaty with Myanmar. Executed documents are generally subject to stamp duties at various rates. For instance, mortgage-leases are subject to 0.5% stamp duty on the value of the mortgage. Pledges are subject to stamp duty of 0.0065% of the value of the security.

There are no lawful means of deferring or minimising any such duties, taxes, fees or charges. However, it is possible to choose alternative security instruments, which can mitigate these expenses.

- **Registration fees.** Registration fees must be paid for the registration of security documents involving immoveable properties.

Security interests created over certain licences, concessions and agreements would also require prior approval from the grantor. Some examples are:

- **Telecommunication licences.** This includes licences such as a] NFS(I) licence, NFS(C) licence, NF licence and so on). Prior approval from the Post and Telecommunication Department (PTD) is required before such licences can be assigned in favour of a financial institution to secure a loan. However, investors have in the past experienced difficulty in obtaining responses from the PTD to such applications for approval. Most lenders in Myanmar recognise this issue and therefore often only require

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the application for consent as a condition precedent to drawdown, together with an undertaking by the borrower to procure the approval on a best effort basis.

- **Land leased from Ministry of Defence (MoD).** Most leases entered into with the MoD by any foreign company have explicit prohibitions on mortgage/charge/transfer over the leasehold rights for the purposes of financing or otherwise. In the event that a mortgage is being created over leasehold rights arising on MoD land, prior approval would be required to create such a mortgage.
- **Production sharing contracts (PSC) with Myanmar Oil & Gas Enterprise (MOGE).** Most PSCs entered into with the MOGE will contain a prohibition on assignment of rights to a non-affiliated third-party. Prior approval from MOGE is therefore required before security can be created over the PSC .
- **Power purchase agreements (PPAs) with the Electric Power Generation Enterprise (EPGE).** PPAs with EPGE contain a right to assign for the purpose of raising finance for the power producing company. There is no requirement of prior approval, although, prior notice to the EPGE has become a common practice, and should be adhered to.
- **Master services agreements (MSAs) between a tower/optic fibre company with telecommunication companies.** Most MSAs (with companies such as Telenor or Ooredoo) require that prior approval from telecommunication companies be procured when creating any security over the rights arising from the MSAs.

As a part of the approval process, the borrower must file the draft security document, along with a covering letter, detailing the terms of the agreement. The details should include the loan amount, term duration of the loan, interest rate, name of the lender and so on. The borrower must also submit their incorporation certificate and constitutional documents, licences, and relevant agreement over which the security is being created (if applicable).

In relation to approvals for special economic zones (SEZs), the SEZ Law requires prior approval from its management committee before any security can be created over the SEZ in favour of a lender. As a part of the application process, the SEZ company must provide a covering letter which includes details of the underlying transaction, the Thilawa SEZ prescribed Form MC6 (duly filled and executed), a draft copy of the security document and a copy of the incorporation certificate and SEZ permit. Management committees of SEZs also often require the lender to provide certain undertakings in favour of the SEZ (a "bankers' undertaking").

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## 12. What mechanisms are available to protect security interests against competing interests?

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If existing mortgages or charges have been duly registered with the relevant government departments, searches can, in theory, be performed by a creditor at the relevant government departments. Liens on certain types of immovable or moveable property are perfected only by control and not by a public filing. In this situation, the only possible way for a creditor to determine the absence of liens is by obtaining representations and warranties by the debtor or other relevant party to the agreement establishing control. Foreign investors can mortgage the land during the permit period after submitting the notice of such mortgage to the Myanmar Investment Commission.

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## 13. How is priority established?

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As a general rule, the first registered mortgage and/or charge takes priority over mortgages and/or charges registered

subsequently. However, certain claims will statutory priority, such as:

- Tax payments due to the central government and the local authorities.
- All wages and salaries of employees and labourers due in the last two months.
- Any compensation payable under the law.
- Dues related to any employee for a provident fund, pension fund, gratuity and so on.

Perfection of a pledge requires the pledged property to be delivered by the pledgor to the pledgee (or a third party on its behalf). A pledge of shares must be recorded in the pledgor's share register. The Myanmar Companies Act does not require pledges to be registered with the CRO. The CRO does not currently accept the filing of pledges for registration. Myanmar law enforces arrangements whereby debt is subordinated by way of a contractual agreement in both general civil cases and bankruptcy/insolvency cases. Intercreditor arrangements are common on project finance transactions.

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## 14. Can an agent or trustee hold security on behalf of a group of lenders?

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In a syndicated project finance loan, the lenders normally appoint one of the lenders as a security agent for the purposes of administering the security on behalf of each lender.

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, can 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 must be based onshore, with certain other conditions. The laws of Myanmar allow agents to delegate their functions to a third party, if certain conditions are met. As such, agents or trustees can 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 trustee or legal representative, and who can sue for a sale of the property, cannot initiate a suit for foreclosure.

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## 15. How can security interests be enforced? What steps can a lender take to enforce security?

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The manner of enforcement and requirements for court intervention will depend on the type of security being enforced. Generally speaking, the following rules will apply:

- **Mortgage.** The specific requirements under a given mortgage can vary in relation to initiating a suit for foreclosure or for sale, or a sale without the intervention of the court. There are also several rulings dealing with various issues based on different types of mortgages. In general, a lender needs a court order to enforce a security and cannot do so freely. However, under specific circumstances, a mortgagee can exercise its right of sale without the intervention of the court (see *Question 17*). A lender requires a court order and decree to enforce its security in connection with the sale of the mortgaged property. According to one Myanmar ruling, mortgagees (project lenders) cannot generally participate as buyers in the sale. According to another Myanmar ruling, a foreign national purchaser cannot bid on immovable property at auction due to the Transfer of Immoveable Property Restriction Law.

- **Pledge.** A pledge can be enforced without the court's intervention. In the case of a default by the pledgor, the pledgee may sue upon the debt and retain the goods as a collateral security, or the goods after reasonable notice of the intended sale to the pledgor. The pledgee may also file a suit for specific performance of the contract under the Specific Relief Act, along with an application for a temporary injunction under the Code of Civil Procedure.
- **Hypothecation.** A hypothecation cannot be enforced without the court's intervention. The hypothecatee may have to file a suit for specific performance of the contract before the court. A deed of hypothecation usually contains a provision authorising the lender to appoint a private receiver and sell the hypothecated property.
- **Charge.** A charge cannot be enforced with the court's intervention. The chargee may have to file a suit to cause the charged property be sold and the amount received be appropriated towards the debt. Subject to the ranking of charge provided in the deed, creditors with a fixed charge have a higher rank than those with a floating charge in a winding-up situation.
- **Assignment.** The court's intervention is required to enforce a right in the case of a default by the assignor. The lender may file a suit for specific performance of the contract under the Specific Relief Act, along with an application for a temporary injunction under the Code of Civil Procedure.

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## 16. Can a lender foreclose or appropriate against an asset?

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There are no legal restrictions (*see Questions 14 and Question 15*).

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## 17. How does the start of bankruptcy/insolvency proceedings affect a lender's ability to enforce its security?

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Following the commencement of bankruptcy/insolvency proceedings, 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 by a company of its property to trustees for the benefit of its creditors is void.

Certain payments have preference over payments to be made to the creditors. For example:

- Taxes, cesses, rates due to the government or to any local authorities.
- Debts owed to the CBM and state-owned financial institutions.
- Wages and salaries due to clerks, servants, labourers or workmen for services rendered to the company.

On default, the mortgagee can sell the mortgaged property without the intervention of the court if:

- The mortgage is a simple mortgage.
- The power of sale without court intervention is explicitly conferred on the mortgagee by the deed of mortgage.
- A written notice demanding payment has been served on the mortgagor.
- The mortgagor has defaulted in making payment of the principal amount after that notice, or interest remains unpaid for a period of three months.

A receiver can be appointed by a mortgagee in connection with a simple mortgage.

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

- Debts due to the government, wages and other accrued benefits owed to employees, taxes, debts due to state banks and the 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 (trade) creditors.
- Shareholders.

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## CONTRACTUAL PROTECTIONS

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### 18. What other forms of contractual protections are available to lenders to protect their investment?

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Lenders can protect their investment by:

- Incorporating restrictive representations, warranties and covenants in the finance documents.
- Requesting a comprehensive security package.
- Entering into direct agreements with the project company and project counterparties (thereby giving lenders the ability to step into the position of the project company in the event of a default under a project contract that might otherwise entitle the relevant project counterparty to terminate or suspend that contract).

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## INSURANCE

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### 19. What insurance arrangements are typical for projects in your jurisdiction? How do lenders protect their interests as regards project insurance?

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All economic organisations formed under the MIC permit must procure insurance with an authorised local insurance enterprise, including:

- Machinery insurance.
- Fire insurance.
- Marine insurance.
- Physical injury insurance.
- Natural disaster insurance.
- Life insurance.

Lenders on a project in Myanmar typically require the project company to take out:

- Insurance against physical damage and third party liability.
- Worker's compensation insurance.
- Employer's liability insurance.
- Delay in start-up and/or business-interruption insurance.
- Other project-specific insurances (such as automobile liability insurance).

Lenders typically protect their interests by:

- Becoming named insureds on the insurance policies.
- Obtaining a security assignment of the insurance and reinsurance policies.

- Noting their interest on the policy or incorporating a loss payee clause.
- Obtaining an endorsement to the policy, whereby the insurers agree to notify the lenders if they intend to cancel, amend, suspend or avoid the cover, or perform any act or omission that might invalidate all or part of any insurance or claim.
- Obtaining a letter of undertaking from the insured's brokers to inform the lenders of the endorsement.

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## 20. Are lenders named as co-insured or joint insured?

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Lenders typically seek to become co-insureds on the project insurance policies (and become direct beneficiaries of separate and independent policies) in order to:

- Perfect insurance security interests.
- Give them a direct contractual claim on the insurers.
- Have control over how insurance proceeds are applied.

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## 21. Are non-vitiation provisions common?

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Non-vitiation provisions are not common in Myanmar.

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## 22. How are insurance proceeds treated and applied?

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Insurance proceeds are treated as a capital account transaction. Therefore, prior approval from the CBM would be required before such proceeds can be remitted out of Myanmar to the lenders. However, there are no modern precedents in Myanmar to determine how the CBM approaches such a process from an approval perspective.

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## 23. Are there any restrictions on insurance over projects provided by foreign companies?

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All insurance coverage must be taken out with Myanmar Insurance under the MOPF. If a foreign company wishes to maintain insurance with a foreign insurance company, it can do so only with the permission of Myanmar Insurance. However the SEZ Law permits foreign insurance companies to conduct insurance activities in a special economic zone after receiving the relevant licences.

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## 24. Is reinsurance a feature of project financing in your jurisdiction? Are there any other aspects of project insurance that are particular to the jurisdiction?

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Reinsurance is a feature of project financing in Myanmar. However, only Myanmar Insurance (a state-owned insurance company) is allowed to offer reinsurance in Myanmar.

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## PROJECT RISKS

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### 25. What risks are typical in your jurisdiction and how are these mitigated or allocated?

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In addition to the typical risks any large-scale project would face (such as construction risk, off-take risk, approval risk and market risk), country-specific risks in Myanmar include political risk

(in relation to, for instance, protests) and currency risk. These risks can be mitigated by obtaining appropriate project insurances and entering into currency hedging arrangements.

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## PUBLIC PRIVATE PARTNERSHIPS (PPPS)/PRIVATE FINANCE INITIATIVES (PFIS)

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### 26. Has your jurisdiction enacted any specific legislation for enabling the use of PPPs or similar funding models such as PFIs?

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The government is formulating a policy document to develop the use of PPPs in Myanmar. The draft for consultation is available on the Myanmar government website for PPPs.

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### 27. Are there any limitations on the use of PPP or PFI transactions?

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See *Question 26*.

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### 28. How are projects involving PPPs or PFIs typically financed? How does this differ to other projects?

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See *Question 26*.

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### 29. Can security be given to lenders by a concessionaire over interests in PPP or PFI projects? Does this require consents?

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A security interest can be created in the cases of PPP or PFI projects. However, specific approvals from the relevant Ministry will still need to be obtained.

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## SOCIAL, ETHICAL AND ENVIRONMENTAL ISSUES

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### 30. What social and ethical issues are relevant to project financing in your jurisdiction?

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As with any other emerging economy, issues such as corruption and money laundering are key considerations for investors. Various statutes have been enacted in recent years to address these problems, including the Anti-Money Laundering Law of 2014, which was introduced to combat money laundering and the financing of terrorism in Myanmar.

The effect of international sanctions on investments into Myanmar are also a key factor for parties to consider.

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### 31. What environmental risks might be encountered? How is potential environmental liability assessed and how is liability allocated?

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Environmental risks occur in many types of projects and can exist in varying degrees throughout the project life cycle from pre-planning through construction to the operational phase (such as in relation to pollution, deforestation, contamination and flooding). Project companies and lenders typically appoint external environmental consultants to advise on environmental risks for a project. Potential mitigation measures can include:

- Conducting extensive due diligence and environmental impact assessments.
- Obtaining insurance.

- Incorporating restrictive provisions in the finance agreements.
- Allocating environmental risk to project counterparties in the project documents.

The parties to a project must comply with the legislative framework for environmental protection in Myanmar, which includes the:

- Environmental Conservation Law 2012.
- Environmental Conservation Rules 2014.
- Environmental Impact Assessment Procedures of 2015.
- Environmental Quality (Emissions) Guidelines of 2015.

Penalties apply for non-compliance with these laws.

## NATURAL RESOURCES AND MINERALS

### 32. Who has title to minerals or other natural resources? Can foreign companies acquire rights to such assets?

Title to natural resources is vested in the state.

Depending on the sector, there can be legal restrictions on project activities and the enjoyment of related rights. For example, rights to mineral resources can be acquired by foreign or local investors in the form of mining leases from the government. The mineral production permit holder must then strictly comply with the terms and conditions of the mining lease.

Large-scale mineral production mining lease permits are granted for a maximum period of 50 years. The mining permit cannot be transferred by the permit holder without the government's consent.

### 33. What royalties and/or taxes are payable on the extraction of minerals or other natural resources? How is the charge calculated?

Royalties vary on a sector-by-sector basis and are levied at the following rates:

- Gold, silver, platinum and other precious metallic minerals: 4% to 5%.
- Iron, zinc, copper, lead, tin, tungsten, nickel, antimony, manganese and other metallic minerals: 3% to 4%.
- Industrial mineral or stone: 1% to 2%.

For production sharing contracts, the royalty tax amounts to 12.5% of the available petroleum.

### 34. Are there restrictions, fees or taxes on the export of minerals or natural resources?

The export of certain natural resources requires approval from the relevant government ministries. For example, the export of timber requires approval from the MOECF and the MOC, and the export of minerals requires the approval of the MOM and the MOC.

Investors establishing a business involving export transactions must first register as an exporter and obtain a certificate of exporter registration from the MOC. After receiving the certificate, the registered exporter or importer must then apply for an export licence separately for every export.

The export of minerals or natural resources are subject to the following taxes:

- Special Goods Tax (similar to excise tax), payable at rates of 5% to 15% depending on the type of minerals or natural resources to be exported.
- Advance Income Tax, payable at 2%.

## FOREIGN INVESTMENT

### 35. Are there any incentives to encourage foreign investment in projects?

Incentives to encourage foreign investment in projects include:

- Income tax exemption for a period of seven years, five years and three years depending on the zone of investment in the promoted sectors.
- Exemption or relief from income tax on profits where the profits are maintained in a reserve fund and are subsequently reinvested within one year after the reserve fund is created.
- For the purpose of income tax assessment, the right to accelerated depreciation with respect to machinery, equipment, building or other capital assets used in the business, at the rate fixed by the MIC, to the extent of the original value.
- For the purpose of income tax assessment, the right to deduct expenses which were incurred for research and development relating to the investment businesses carried out in Myanmar and required for the economic development of Myanmar.
- Exemption from customs duty if 80% of the income expected to be earned from the investment is in foreign currency and from exports.
- Long-term lease of land for an initial period of 50 years extendable twice for ten years each.
- Exemptions or reliefs from customs duty or other internal taxes or both on machineries, equipment, instruments, machinery components, spare parts, construction materials unavailable locally, and materials used in the business, which are imported as they are actually required, during the construction period or during the preparatory period of the investment business.
- Reimbursement of customs duty or other internal taxes or both on imported raw materials and partially manufactured goods which are used to manufacture products for export.

### 36. Are there investment treaties that protect foreign investment in projects?

In order to protect foreign investment in projects, Myanmar has entered into the ASEAN Comprehensive Investment Agreement and various bilateral investment treaties. In addition, Myanmar has signed double taxation agreements with various countries.

### 37. What fees or taxes are payable on foreign investment in a local project company? Are payments of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions subject to fees or taxes?

Repatriation of funds from Myanmar is allowed only after the payment of all tax obligations imposed on the amount to be transferred. The payment of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions must be carried out in accordance with the rules and prior approval from the CBM and the Foreign Exchange Management Law.

Interest on offshore loans is subject to 15% withholding tax, subject to any reduction under any applicable double taxation treaty that



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Myanmar is a party to. Similarly, the withholding tax applicable on the fees charges under any project financing is subject to 2.5% of the fee, which can be reduced to nil in accordance with double taxation treaties.

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### 38. Can project companies establish and maintain foreign currency accounts, both locally and in other jurisdictions?

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The CBM allows project companies to maintain foreign currency accounts held in US dollar, Singapore dollars and euros. Accounts in any other currency will require the CBM's prior consent. The CBM also requires the project company to submit a monthly account report in respect of the approved overseas account.

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### 39. Are there any restrictions on the payment of dividend/repayment of shareholders' loans to a foreign parent?

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Foreign companies in Myanmar can repatriate dividends and pay shareholder loans through any bank with a foreign exchange-authorized dealer licence issued by the CBM. However, the loan must be taken out with the prior approval of the CBM and in accordance with the regulations in Myanmar.

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### 40. Are there restrictions on the importation of equipment from abroad for use in a project?

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Requirements to be fulfilled before the importation of project equipment include compulsory registrations and export or import licences, which are controlled and administered by the MOC.

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## CHOICE OF LAW AND JURISDICTION

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### 41. Will local courts recognise a choice of foreign law or jurisdiction in a project contract or financing agreement? Are there any mandatory rules that apply despite a choice of foreign law or jurisdiction?

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#### Foreign law

There is a lack of precedent in Myanmar concerning how agreements containing a choice of a foreign law will be dealt with by the Myanmar courts. However, a Myanmar court has accepted, in at least two cases, one of the principles of English private international law, that the intention of the parties must first be determined before deciding which law is applicable to their case. Therefore, theoretically, the governing law applicable to an agreement can be chosen by the parties.

#### Jurisdiction

The parties to a contract are not prohibited from submitting to the jurisdiction of foreign courts. However, an agreement absolutely restricting a party from enforcing its rights under a contract by the usual proceedings in ordinary tribunals is void.

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### 42. Are waivers of immunity enforceable?

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Sovereign immunity can be expressly waived by state-owned economic enterprises and government authorities. Waiver of immunity clauses are effective and enforceable.

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### 43. Will the courts recognise a foreign arbitral award or court judgment?

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Foreign court judgments are recognised in Myanmar, except for specific cases where a judgment is not conclusive (including where the judgment is deemed to sustain a claim founded on a breach of Myanmar law).

Myanmar is a signatory to the New York Convention. The Arbitration Law 2016 gives full domestic effect to Myanmar's accession to the New York Convention.

A party applying for the enforcement of a foreign arbitral award must do so before a court and produce the following documents:

- The original award or a copy, 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.
- Any evidence necessary to prove that the award is a genuine foreign award.

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

The court may refuse to recognise the foreign arbitral award if the party against whom it is invoked proves that:

- The parties to the relevant arbitration agreement were under some incapacity.
- The arbitration agreement is not valid under the law to which the agreement is governed.
- 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 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 any such agreement, was not in accordance with the law of the country where the arbitration took place.
- 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.

Similarly, 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.
- The enforcement of the award would be contrary to the national interest (public policy) of Myanmar.

To enforce a foreign arbitral award made in a contracting state of the New York Convention, the Chief Justice of Myanmar can 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.

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## REFORM

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### 44. Are there any recent or proposed legal developments affecting project finance?

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If implemented, the Draft Companies Law will affect project finance in Myanmar. The provisions state that the Transfer of

Immoveable Property Restrictions Act will not restrict the grant of mortgage or charge and its execution. The Draft also proposes to amend the definition of a Myanmar company, which will in turn ease the restrictions imposed on the ownership and lease of land. However, the provisions are not tested in practice as the law has not yet been enacted.

## ONLINE RESOURCES

### Ministry of Information

W [www.moi.gov.mm](http://www.moi.gov.mm)

**Description.** Maintained by the Ministry of Information. Provides newly enacted laws available in Burmese.

### Directorate of Investment and Company (DICA)

W [www.dica.gov.mm](http://www.dica.gov.mm)

**Description.** Official English language versions of some laws are available, including the Foreign Investment Law.

## Practical Law Contributor profiles



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**Professional qualifications.** England and Wales, Solicitor

**Areas of practice.** Project finance; power; infrastructure; South East Asia; Myanmar; Thailand; Laos.

**Non-professional qualifications.** LLB, with honours, University of Glasgow, Scotland

#### Recent transactions

- Advising the local and international sponsors on the development of the Deedoke 66 MW hydro power project, including providing detailed advice on the PPA, MOA and the project's hydrology risk.
- Advising the lenders to Sembcorp, the successful bidder with respect to the Myingyan 225 MW gas-fired power project, Myanmar's first internationally competitively tendered power project.
- Advising an investor on its proposed investment into a concession to develop a 300 MW solar power project across two sites in Nabuaing and Wundwin, Myanmar.
- Advising the lenders on the proposed development of a 300 MW temporary power project in Myanmar.
- Advised the ADB and IFC on loans to be extended to Ooredoo Myanmar Limited in connection with the expansion of its telecommunications network in Myanmar. The deal was awarded Debt Market Deal of the Year at the Asian Legal Business SE Asia Law Awards 2016.
- Advised Toyo Thai on all aspects of the development and financing of the Ahlone 121 MW combined-cycle gas-fired power project in Yangon, named one of Asian-MENA Counsel's Deals of the Year 2014. Redrafted Myanmar's standard PPA as part of the scope of work on this project.

**Languages.** English

**Professional associations/memberships.** The Law Society of England and Wales.

#### Publications

- *New Myanmar Investment Commission Announced*, Mayer Brown JSM In Brief, 23 June 2016.
- *Myanmar Enacts New Arbitration Law*, Mayer Brown JSM Legal Update, 16 February 2016.
- *Project Finance Country Reports for Thailand and Vietnam*, Mayer Brown JSM Article, 2 December 2014.
- *Powering Ahead: Challenges for Myanmar*, *The Asian Lawyer*, 1 July 2014.



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**Professional qualifications.** Solicitor, New South Wales, Australia; Singapore (Foreign Lawyer); High Court of Australia

**Areas of practice.** Project finance; power; infrastructure; South East Asia; Myanmar.

**Non-professional qualifications.** LLB, University of Queensland, Australia

#### Recent transactions

- Advising the local and international sponsors on the development of the Deedoke 66 MW hydro power project, including providing detailed advice on the PPA, MOA and the project's hydrology risk.
- Advising the lenders to Sembcorp, the successful bidder with respect to the Myingyan 225 MW gas-fired power project, Myanmar's first internationally competitively tendered power project.
- Advising an investor on its proposed investment into a concession to develop a 300 MW solar power project across two sites in Nabuaing and Wundwin, Myanmar.
- Advising the lenders on the proposed development of a 300MW temporary power project in Myanmar.
- Advised Glow Energy Public Company Limited in relation to the acquisition of the Ywama Power Plant, a 50 MW gas fired power plant located in West Ywama Ward, Insein Township, Yangon.
- Advised the sponsors in relation to the development of the US\$1.5 billion Hanthawaddy International Airport in Yangon.

**Languages.** English; Chinese, Cantonese

**Professional associations/memberships.** The Law Society of New South Wales, Australia.

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**Professional qualifications.** Member of the State Bar of California, State Bar of Nevada, State Bar of California International Law Section and the Inter-Pacific Bar Association.

**Areas of practice.** Corporate, transactional, finance and project finance and M&A throughout North American and Asia.

**Non-professional qualifications.** BA degree from the University of Oregon in Asian Studies with a minor in East Asian Literature; Juris Doctor from the University of San Francisco, California

**Professional associations/memberships.** Member of the State Bar of California, State Bar of Nevada, State Bar of California International Law Section and the Inter-Pacific Bar Association.

#### Recent transactions

- Advised Malaysian developers on corporate and financial structuring regarding a palm oil plantation.
- Advised Export-import Bank of Thailand on the financing to Italian-Thai Development Public Company Limited for the construction of the Mandalay Airport. The loan was to be guaranteed by the Myanmar Ministry of Transportation.
- Advising a Hong Kong-based property investor on the establishment of a project company in Myanmar, on tax matters related to property issues, and on the drafting of joint venture agreements with local partners in accordance with the new Foreign Investment Law and FI Rules (ongoing).
- Advising a Singapore-based property development company on the establishment of several project companies in Myanmar, on tax matters related to property issues and in relation to the impact of the new Foreign Investment Law and FI Rules on the proposed development and construction businesses the client proposes to carry on in Myanmar (on-going).

**Languages.** English, Mandarin, Thai, Bahasa Indonesian

#### Publications

- *Improvements in Myanmar's banking sector, South East Asia Infrastructure magazine, August-September 2016.*
- *Foreign Investment in Mobile Financial Services in Myanmar, Digital Business Global Guide, September 2016.*
- *Cambodia and Myanmar to ride 'OBOR' wave, Asia Business Law Journal, 12 July, 2016.*
- *Aviation Industry in Myanmar, Lawyer Issue, 30 March 2016.*
- *Investing in Myanmar and Lao PDR: With a focus on power and mining projects, China Business Law Journal, September 2015.*
- *ASEAN: Will the puzzle pieces fit?, Volume 13, Issue 1 2015, Asian-MENA Counsel magazine, 2 July 2015.*