

MYANMAR FINANCE REPORT

Legal, tax and regulatory developments on banking and finance

- ▶ **Which foreign loans may not be approved by the central bank of Myanmar?** *pg 3*
- ▶ **A practical perspective on foreign financing transactions in Myanmar** *pg 6*
- ▶ **Use of offshore bank accounts by Myanmar companies** *pg 9*
- ▶ **Financing telecom network infrastructure in Myanmar** *pg 10*
- ▶ **New banking law to shake up related party credit, leasing companies and profit distribution by banks** *pg 15*

Also featured:

- ▶ **DEAL: Myanmar non-recourse financing first explained** *pg 5*
- ▶ **Thoughts on the selection of foreign banks awarded with a Myanmar banking license** *pg 13*
- ▶ **Milbank & VDB Loi represent pan asia majestic eagle limited in first ever non-recourse, cross-border financing in Myanmar** *pg 14*
- ▶ **VDB Loi assists as aircraft financing transaction closes in the wake of cape town convention ratification** *pg 17*
- ▶ **Litigation firm U Aye Kyaw Associates joins VDB Loi to form disputes resolution practice in Myanmar** *pg 18*

VDB Loi in Myanmar

VDB Loi Myanmar, a leading Myanmar legal and tax advisory firm, employs over 40 lawyers and advisors in Yangon and its fully operational office in Nay Pyi Taw. The firm is a leader in foreign investment, M&A, telecommunications, energy, taxation, and real estate/infrastructure. Our experience includes a multibillion dollar telecom investment, the Thilawa Special Economic Zone, Hanthawaddy International Airport, the privatization of 3 SOEs, a US\$400M mixed-use real estate development and assistance to 3 of the oil and gas supermajors.

Ranked as a Tier 1 law firm in Myanmar (IFLR) and awarded for its M&A achievements (Finance Monthly "M&A Law Firm of the Year-Myanmar", Dealmakers "Myanmar Best M&A Law Firm", Acquisition International "Leading Advisor 2013-Myanmar"), VDB Loi is widely recognized for its transactional experience.

Partners



Jean Loi
Managing Partner
Jean@vdb-loi.com

Jean Loi is widely recognized as one of the regions most experienced professional advisors with a CPA background. She was formerly a partner with PricewaterhouseCoopers in Southeast Asia. As the managing partner of VDB Loi, Jean has extensive experience with licensing, energy, power, property and consumer product projects. Her Myanmar tax experience is unsurpassed. She lives in Yangon.



Edwin Vanderbruggen
Partner
Edwin@vdb-loi.com

Edwin Vanderbruggen is VDB Loi's partner responsible for Myanmar. Formerly with Loyens & Loeff and a partner at DFDL, Edwin lives full-time in Yangon, where he leads a team of approximately 40 lawyers and advisors. Edwin has advised banks and financial institutions on licensing, regulatory issues, strategic cooperation and financing transactions in Myanmar. He and his legal team advise commercial banks, development financial institutions, corporate borrowers and state-owned enterprises on financing transactions.

Our offices in Myanmar



YANGON

Level 8, Centrepoint Towers, No. 65
Sule Pagoda Road & Merchant Street,
Kyauktada Township



NAY PYI TAW

No. S-204, Tha Pyay Kone Ward,
Zabu Thiri Township

On Yaza Thingaha Road, driving from
Junction Mall to the Gem Museum, look for
signage on the right directing you to our
office

Contents

Which foreign loans may not be approved by the Central Bank of Myanmar?	3
A practical perspective on foreign financing transactions in Myanmar	6
Use of offshore bank accounts by Myanmar companies	9
Financing telecom network infrastructure in Myanmar	10
New banking law to shake up related party credit, leasing companies and profit distribution by banks	15
DEAL: Myanmar non-recourse financing first explained	5
Thoughts on the selection of foreign banks awarded with a Myanmar banking license	13
Milbank & VDB Loi represent pan asia majestic eagle limited in first ever non-recourse, cross-border financing in Myanmar	14
VDB Loi assists as aircraft financing transaction closes in the wake of cape town convention ratification	17
Litigation firm U Aye Kyaw Associates joins VDB Loi to form disputes resolution practice in Myanmar	18

Offices in the region



WHICH FOREIGN LOANS MAY NOT BE APPROVED BY THE CENTRAL BANK OF MYANMAR?

In the past six months, the Central Bank of Myanmar (CBM) has strengthened its grip over foreign exchange remittances which particularly affect foreign loans into Myanmar. The process started with a new circular letter addressed to Myanmar banks dated 3 July 2014 (the CBM Letter), which the CBM used to reassert control over foreign loans that are provided to domestic and foreign owned borrowers in Myanmar. In the CBM Letter, the CBM has clarified approval requirements and increased the accountability of Myanmar banks for foreign loans that are brought into the country. On 30 September 2014, the Letter was followed up with full-fledged amended regulations implementing the Foreign Exchange Management Act (FEMA) of 2012 (Notification 7/2014) (Notification 7).

Although Notification 7 addresses all types of foreign exchange remittances, foreign loans are a central issue.

Ever since the Foreign Investment Law (FIL) of 2012, the fate of foreign loans has always remained somewhat confusing. Although there is no doubt that loans from overseas are possible as a principle under both instruments, in practice clients often received conflicting information from bankers and advisors with respect to the approvals and process concerned. Unfortunately, this confusion that was not really cleared up with the first CBM Directive which implemented FEMA (the 2012 Foreign Exchange Directive).



Why the confusion?

Part of the problem is FEMA itself. In the text of the law, the crucial distinction that is made to allow foreign exchange remittances is that of “current account” versus “capital account”, concepts that are of course adopted from international financial law. In the Myanmar system, any payment that is a current account payment will not be restricted by the CBM. Certain capital

payments can be restricted by the CBM. So, it is crucial to know for any payment which category applies. First of all, the definitions are not ideally drafted in FEMA since there is only a very brief description of what comprises the “current account”, and “capital account” is basically defined as anything which is not in the “current account”.

MEET OUR TEAM



Thomas Edwin Hornby
SENIOR COUNSEL
Yangon

Tom is a solicitor qualified in England and Wales with 17 year corporate M&A and commercial experience. He has worked with a number of major UK law firms including Spratt Endicott and Denton's. He has extensive experience practicing in emerging markets, where he led capital market and financing transactions in a wide range of industries.



Nar Wah
SENIOR LEGAL ASSOCIATE,
Nay Pyi Taw

Nar Wah, a Myanmar-qualified lawyer, is an associate on VDB Loi's legal team. She has an exceptional educational and career background in both law and accounting. She spent more than seven years working in Singapore.



Aung Soe Moe
SENIOR LEGAL ASSOCIATE
Yangon

Aung is an experienced Myanmar qualified attorney with a Bachelor's of Law degree from Dagon University. He has unique and extensive experience in telecommunications, land and licensing issues in Myanmar.

Some of the confusion that has plagued foreign investors stems from the fact that payments on loans are mentioned in both categories, and without any clearly prescribed differences. In s.2 (l), a short-term loan can resort under “current account”, (without specifying the term of such a short-term loan). However, in s.30 reimbursement of loans in general is also mentioned in connection with the “capital account”. In other words, loans are straddling the two different main categories without clearly spelling out which characteristics would end up a loan in the one or in the other category.

But there is more. The Foreign Exchange Directive of 2012, loans are included under the “current account”, but it is unclear if only short-term loans are meant. Plus, the Directive only refers explicitly to loans approved by the MIC in its overview table and leaves upon the question what would happen with borrowers which are non-MIC.

Finally, s.17 of the Foreign Exchange Directive of 2012 specifies that Myanmar banks need to review the “purpose of transfers” to assess whether the transfer was really a current account payment. If it is not, the remittance may not be made.

To sum it up, the Myanmar regulation of the Loans are caught in seemingly overlapping local interpretation under FEMA which goes well beyond the classic “current account” and “capital account” bifurcation as a change of ownership in domestic assets, akin to what is found in international financial law. Moreover, Myanmar banks may have their own interpretation of the “purpose” of a transfer.

Difficult to implement

Obviously, the rather wide scope of this criterion in the CBM Letter may have posed some problems for Myanmar banks to interpret and apply. There is little to gain for a Myanmar bank by venturing out ahead of CBM approval, so the effect will often be that inward funds will not be released until the CBM has so approved based on a review of the information that must be collected under the CBM Letter.

To further clarify and regulate the issue of foreign loans as well as other remittances and foreign exchange issues, the CBM then prepared Notification 7, which was distributed to the local banks.

Is the business plan of the borrower appropriate?

The CBM Letter cleared up a few things, but also created a set of new challenges. The CBM Letter introduces a list of elements that Myanmar banks need to take into account when evaluating foreign loans, including:

- Size of loan and tenure, and loan contract
- Whether the interest rate is market-based interest rate
- Whether the business plan of the resident borrower is appropriate
- Type of the collateral and whether it is capable of being performed in accordance with the law
- Whether the repayment schedule is appropriate; and
- Other elements detailed in the CBM Letter.

The CBM Letter provides that “licensed banks trading foreign exchange shall

review the points contained [above] on the basis of the local business situation, the situation of the project to be executed with foreign loan and its expected income, capability to repay loan and profitability to the country and its people”.

The CBM Letter envisages a new reporting and approval system, where Myanmar banks will need to collect certain data, make an assessment about certain criteria, report information to the CBM, and receive an approval. It seems to us that the Myanmar bank would have to go through this new process for each loan, even loans that were already approved by the MIC. For a Myanmar bank not to go through the process and receive CBM approval, which is theoretically possible as there is no physical restraint on release of funds by a Myanmar bank, might engage its liability.



Central Bank of Myanmar

Whose permission is needed to obtain a foreign loan?

All foreign loans, including commercial loans, development loans and shareholder loans, need to be approved by the CBM. If the borrower has a permit under the Foreign Investment Law (MIC permit), the MIC will need to approve the loan and the security arrangements as well. In cases where the borrower has an MIC permit the process thus becomes seemingly more complicated and longer due to the extra level of approvals that is required. In reality, however, the MIC may play the role of facilitator, significantly helping to reduce red tape and improving communication where needed.

Finally, it cannot be excluded that another relevant Ministry is roped in by the MIC or the CBM, to give its view on the financing transaction. That might be the case with the Ministry of Electric Power, for example, on a financing transaction involving a company which has received a concession from the Government. Another case in point is the Microfinance Supervisory Board for the debt financing of microfinance institutions.

Which loans may be rejected?

Notification 7 is not very clear about the criteria that will be used to approve or reject a foreign loan. A number of information and documents are required to be submitted to the CBM for "prior approval" including:

- The purpose of the loan
- The interest rate
- All relevant agreements

Presumably, a loan for a purpose which the CBM deems inappropriate or even illegal will not be approved. For example, the financing of a business in Myanmar which does not have the required operating licenses may pose major issues.

We also understand that the CBM is keen to watch out for onshore remittances which are disguised as offshore transactions. For example, the CBM may be on the lookout for the reintroduction of undeclared foreign funds belonging to Myanmar citizens.

When we take into account the earlier CBM Letter as well as our own experiences with the CBM, various other factors also come into play, such as various key provisions of the financing agreements, the validity of the security, the role of any local Myanmar bank involved with the financing transaction, and the financing structure as a whole.

How long does it take to collect all required approvals?

It is hard to gauge how long it will take before CBM approval can be obtained. We have seen a few approvals that were as fast as a few days but other cases may take weeks or months. Note that we also see delays caused by submitting wrong or incomplete documentation, or delays associated with the local bank's own process.

As is often the case in Myanmar, more than one Government authority may be involved, which can add to the time needed. As was noted above, the MIC will need to approve the loan and the security arrangements as well if the borrower has a permit under the Foreign Investment Law (MIC permit). In cases where the borrower has an MIC permit the process thus becomes seemingly more complicated but it also plays the role of a facilitator helping to reduce delays.

Anything that is new, and that is just about everything when it comes to financing in Myanmar right now, may very well take much longer than both borrowers and lenders expect.

DEAL: MYANMAR NON-RECOURSE FINANCING FIRST EXPLAINED

This is written by Ashley Lee for IFLR, 31 October 2014 based on an interview with Edwin Vanderbruggen



Myanmar's first non-recourse financing involving international banks may open infrastructure financing in the frontier market.

The deal, which closed at the end of September, saw Pan Asia Majestic Eagle (Pamel) receive \$85 million in financing from DBS, ING, OCBC Standard Chartered and Sumitomo Mitsui Banking to support the construction of 1,250 towers for Ooredoo Myanmar, one of the two telecommunications companies that received a

telecommunications license in June 2013.

It signifies that lenders may now be open to infrastructure financing in Myanmar, even though its legal framework for aspects such as taking security are nascent – and in some cases, non-existent.

This has proven that a number of international banks and some of the biggest players in the region are comfortable taking risk in Myanmar, said Edwin Vanderbruggen, partner at VDB Loi who represented the borrower in obtaining registrations and approvals.

Taking security

Earlier this year Vanderbruggen completed the first registration of a secured interest in Myanmar assets for a foreign loan. While the country lacks a registry of debentures and secured interests, he believes he has perfected security in Myanmar by including a register of the security into the existing Directorate of Investment and Company Administration (DICA) paper-based system.

But he believes that this deal was more complex because of the assets registered. "I expect to see more deals but believe that others will be different from this one," he said.

This financing was harder than others because this was for a tower company with 1250 assets, and taking security of all of them is not easy, he added. In comparison a power plant would require taking security over just one asset.

But Vanderbruggen warned that there are still challenges registering security. "It's something we're still very much discovering," he said. "Mortgages on land – particularly the rights on leased land – haven't yet been explored."

And although the banks took a view on the legal risk, other lawyers in Myanmar aren't certain that this arrangement is valid.

What's next

Enforcement may be the next step forward for Myanmar. Vanderbruggen warned that it's a early to tell whether Myanmar courts will recognise and enforce foreign arbitral awards. "Although it does pose a number of challenges, I believe that the country will be able to fulfill its international commitments under the New York Convention," said Vanderbruggen.

But other challenges to projects remain. Land rights remain an important issue. Vanderbruggen predicted that a number of other projects that are in the pipeline for financing may become easier because there are fewer land issues.

"It's no secret that land rights and reform will be a concern for many years to come," he said.

"The legal status of 70% of the country's land is in transition following the Farmland Act of 2012."

In the meantime investors and lenders may need to accept these risks. It is important for banks in Myanmar to realise that it's still early days, and we are guided by what's actually feasible in Myanmar rather than what the laws say, said Vanderbruggen.

The material on this site is for financial institutions, professional investors and their professional advisers. It is for information only. Please read our terms and conditions and privacy policy before using the site. All material subject to strictly enforced copyright laws. © 2014 Euromoney Institutional Investor PLC. For help please see our FAQ.

<http://www.iflr.com/Article/3396324/Search/Results/DEAL%2%ADMyanmar%2%ADnon%2%ADrecourse%2%ADfinancing%2%ADfirst%2%ADexplained.html?ArticleId=3396324&PageId=201716&Keywor%E2%80%A6>

A PRACTICAL PERSPECTIVE ON FOREIGN FINANCING TRANSACTIONS IN MYANMAR

As is the case in many areas in Myanmar right now, there may often be a considerable gap between theory and practice when it comes to foreign financing and securities. To get a financing deal through, lenders and borrowers would do well not just to take notice of the applicable laws, but also to familiarize themselves with the actual practice of the authorities and other stakeholders.

What is more, as international lending is new in Myanmar, more often than not rules or precedents do not exist and one needs to work with the authorities and sometimes other stakeholders to find a way forward for each individual case. Typically, lenders and borrowers alike underestimate what it takes to get a financing deal through in Myanmar at the present point in time.

Which approvals are needed in Myanmar for a foreign loan and how long does it take?



All foreign loans, including commercial loans, development loans and shareholder loans, need to be approved by the Central Bank of Myanmar (CBM).

It may be useful to note a bit of background on the CBM's policy regarding foreign loans since the implementation of the Foreign Investment Law in 2012. Although the cornerstone legislation governing foreign exchange, the Foreign Exchange Management Act of 2012 (FEMA) has not been amended since its enactment, in reality the policy has shifted a few times since then.

Initially, say in the period immediately following the enactment of FEMA, the CBM relaxed particularly the inward remittance of foreign exchange. In 2013, the CBM became more concerned with the possible impact of debt financing connected with foreign investment, and began to recommend the investment regulator, the Myanmar Investment Commission (MIC), to demand a higher equity proportion on FDI projects. This culminated in mid-2014 in a fairly sudden tightening of the policy by the CBM, as it imposed new requirements upon the local banks before they release funds derived from overseas, particularly as loans.

Theoretically speaking, foreign loans are actually a bit in a legal limbo in Myanmar. Under FEMA, only "capital account payments"

require prior approval from the CBM and "current account payments" do not. Loans are mentioned to resort under both categories, "short term loans" (left undefined) resorting under the "current account". In addition, current account payments that are "unusual" or "significant" also require CBM approval, while both terms are again left undefined. But, the legal definitions hardly seem to matter. In reality, most local banks do not want to release funds for any inward loans unless with specific CBM approval. This means that they need an actual schedule of drawdown, reimbursement and payment of interest which are all approved by the CBM.

It is hard to gauge how long it will take before CBM approval can be obtained. We have seen a few approvals that were as fast as a few days but other cases may take weeks or months. Note that we also see delays caused by submitting wrong or incomplete documentation, or delays associated with the local bank's own process.

If the borrower has a permit under the Foreign Investment Law (MIC permit), the MIC will need to approve the loan and the security arrangements as well. In cases where the borrower has an MIC permit the process thus becomes seemingly more complicated and longer due to the extra level of approvals that is required. In reality, however, the MIC

MEET OUR TEAM



U Aye Kyaw
SENIOR COUNSEL
Yangon

The principal of specialized litigation firm U Aye Kyaw & Associates, which teamed up with VDB Loi in 2014, this former judge, magistrate and law lecturer has over 40 year of experience with litigation and arbitration in Myanmar. He also has extensive experience with real estate and construction issues in Myanmar.



Nishant Choudhary
SENIOR LEGAL ASSOCIATE

Nishant is an experienced lawyer qualified in India with an extensive background in finance and securities. He assists finance institutions navigate the emerging regulatory framework of foreign and secured lending in Myanmar. Nishant also advises on corporate M&A and restructuring in a wide range of industries.



Divyasree Damaraju
LEGAL ASSOCIATE,
Yangon

A qualified company secretary, Divya leads a team of compliance professionals to assist clients with all corporate matters such as incorporations, preparing and maintaining statutory books and registers, and all corporate filings.

may play the role of facilitator, significantly helping to reduce red tape and improving communication where needed.

Finally, it cannot be excluded that another

relevant Ministry is roped in by the MIC or the CBM, to give its view on the financing transaction. That might be the case with the Ministry of Electric Power, for example, on a financing transaction involving a company

which has received a concession from the Government. Another case in point is the Microfinance Supervisory Board (BOARD) for the debt financing of microfinance institutions.

Onshore or offshore borrower?

In many cases the lender and the borrower can choose between two fundamental options as far as the basic structure of the financing is concerned: (1) the Myanmar operating or project company (the MMCo) is the borrower and the foreign parent (which could very well be an SPV) may often be the guarantor; or (2) the foreign direct parent (the SPV) is the borrower and the MMCo is the guarantor. Other variations exist as well, of course, such as making both companies co-borrowers.

Either way, the lenders need access to the Myanmar assets of MMCo so that they can enforce in case of default.

Which one of these two fundamental options is preferred? There are pros and cons to both. Seemingly, option 2 (offshore borrower) is less burdensome

in terms of approvals because the facility is between foreign companies, and it is easier to enforce overseas. But, the assets are in Myanmar and some would argue that MMCo's guarantee is one more step removed from the lender.

One of the most important considerations is to figure out how the SPV will pass on the proceeds of the loan it has received from the lender to its subsidiary MMCo if one opts for option 2, the offshore route. Whatever happens, the lender needs to be assured that MMCo will be allowed to remit sufficient cash to service the debt. The required permissions and formalities will differ depending on the arrangement between SPV and MMCo. For example, if SPV uses the proceeds of its loan to raise the capital of MMCo, MMCo can't easily reimburse funds to SPV for SPV to service its debt because of

the restrictions and procedures connected with capital reductions in Myanmar. So, a trapped cash situation would be built into the structure in such manner, which is definitely to be avoided.

In our view, it would be mostly a mistake to think that in the case of option 2 there are less approvals needed. Capital contribution being largely off the table in most situations because of the trapped cash issue, SPV will have no choice but to supply MMCo with shareholder loans, which require the same onshore approvals as the third party facility anyway. Plus, would most commercial and development lenders not prefer to get the transaction and the documents signed off by the Myanmar authorities anyway? Option 2 does have its advantages, as does option 1, but in our experience the approval process is by and large the same anyway.

Tax optimal structure?

Particularly borrowers, who in reality bear the cost of all Myanmar taxes, will be keen to take on board the withholding tax implications of each structuring option. In that sense, at least with lenders not residing in a country that has concluded a double taxation agreement (DTA) with Myanmar, option 2 offers potential for withholding tax reductions. That is to say, the borrower's group can use an SPV in a country that has concluded a DTA with Myanmar – usually Singapore – to reduce Myanmar's 15% withholding tax on interest down to 10% under the Myanmar-Singapore DTA. Of course, borrowers would also need to factor in any tax implications in Singapore. Most notably, Singapore applies a 15% withholding tax rate itself on interest paid to non-resident lenders, so the Singapore route only makes tax sense in case the ultimate lender is Singaporean or qualifies for a (fairly rare) reduction or exemption under one of Singapore's DTAs. For example, under the Mauritius-Singapore DTA the withholding tax on interest is, as a principle at least, reduced to 0%.



However, in certain cases an indirect loan through a Singapore SPV actually creates higher tax liability than otherwise. Notably, in case the lender can benefit from a

withholding tax exemption in Myanmar under a multilateral convention, routing loan and interest through Singapore only serves to create an additional tax liability.

How long will it take to complete the CPs on the security package?

Registering or otherwise perfecting the security interests in Myanmar is one of the more difficult practical obstacles to the completion of financing transactions. Typically, the borrower can only drawdown the facility once a set of conditions precedent (CPs) are fulfilled, including CPs on the perfection of the security package. Signing the security agreements is not a problem provided the loan and the security agreements have already been approved by the CBM (and, if applicable, by the MIC), but getting the interests registered and perfected is a whole other story.

Historically Myanmar law provides the full repertoire of English law secured interests such as mortgages, fixed and floating charge, pledge, as well as guarantees and assignments. However, most of these have only very rarely been used in the last four decades. For example, Myanmar's Transfer of Property Act recognizes six types of mortgages, but in reality the "mortgage by deposit of title deed", which is not registered, is the only type that has been used with some regularity within the country.

At least two Government organizations

are involved in the registration of secured interests. The "Company Registration Office", essentially the Registrar, has only very recently resurrected its administrative process for registering charges by companies. Just a handful of registrations have been done, and there are still many misunderstandings and misconceptions associated with the process with all stakeholders. The "Office for the Registration of Deeds" (ORD), comparable to some type of land registry although they also have purview over other matters, would have to be involved for registering charges and mortgages over immovable property. It is fair to say that the ORD, which has limited resources, has some difficulty catching up with the tide of new transactions. The ORD is since before 2012 also supposed to register long term leases of land with foreign lessees, but has had trouble coping with the workflow. Other authorities may have to get involved as well depending on the circumstances, such as the Department of Civil Aviation or the Posts and Telecommunications Department.

How much time will be needed to register or otherwise perfect the secured interests depends first and foremost on the type

of secured interest that is sought. Some interests can in our experience now, since the way has been paved by the first few registrations, be registered within a reasonable timeframe. Even for those, however, one needs to be very careful not to trigger some "tripwires" in the agreements or in the structure that will cause additional scrutiny and delays. We try to stick as much as we can to the documentation we have already successfully used with the authorities before so as to not cause unnecessary delays. Nevertheless, given the inexperience with the issue it can never be excluded that the authorities want to take time to look into some aspect of the transaction or that they call in another regulator for approval, which might lead to delays.

In conclusion, one needs thus to take into account the evolving practice of the authorities before deciding which registrations can be CPs and which should be conditions subsequent (CS). This is even more problematic to plan for the deadlines of registration and stamp duty payment. The mismatch between statutory terms and the actual practice by the authorities is not easy to manage.

Recognition of VDB Loi



Language, originals and signatories

English being one of the official languages of the Union of Myanmar, there is no formal requirement to translate transaction documents into Myanmar language. But, that is just the theory. In reality, you will still need to convince various regulators that the documents are in compliance with Myanmar law and regulations. If translating the documents into Myanmar language helps, one should note that translating complex legal documents from English into Myanmar language may take weeks. There are no set rules yet whether an original is needed for registration of company charges, but registrations before the ORD usually do require an original, which has implications for the timing of stamp duty as well.

A final practical point concerns the persons that need to appear for the registration of secured interests. When documents are required to be signed before the official, this would have to be done in person only excluding proxies. That might pose problems in case documents must be signed by a person who cannot easily come to Myanmar.

CENTRAL BANK NEEDS TO APPROVE USE OF OFFSHORE BANK ACCOUNTS BY MYANMAR BORROWERS



*Myanmar Banking Update: Security on Shore Assets, Licensing of Foreign Banks and New Foreign Exchange Rules
The Westin Singapore, 19 September 2014*

While the 9 selected foreign banks are not yet ready to operate in Myanmar, particularly foreign-owned corporate borrowers prefer to have the disposal over bank accounts overseas. These “offshore bank accounts” can be used by Myanmar registered companies for a wide range of purposes, including paying foreign vendors and for facilitating financing transactions. The Foreign Exchange Management Act (FEMA) of 2012 explicitly allows Myanmar registered companies to open and use a bank account overseas for a number of purposes. S. 14 FEMA provides that:

“Persons residing within the State may open a foreign account in a foreign country and for the following purposes:

- (a) Transportation by land, sea and air, insurance, foreign tourism, migrant workers, to fulfill foreign contractual obligations.
- (b) **Settlement of debts for foreign loans.**
- (c) Opening of branch office or agent office abroad and operating foreign currency trade abroad with permission of the authorities concerned.
- (d) Engagement in businesses permitted by the respective governmental department, organization or the Central Bank as appropriate.

“Persons residing within the state” is defined in s. 2 FEMA as including “as per domestic law, legally established companies, organizations and offices, and as per foreign law, legally established companies, organizations and offices and its branch offices in the State”. Clearly, even a foreign-owned Myanmar registered company must be regarded as a “person residing within the state” for purposes of FEMA.

The text of FEMA itself does not provide that the use of a foreign bank account by a Myanmar company is subject to approval of the CBM. Nevertheless, a new Central Bank, Notification 7/2014 (Notification 7) has late 2014 introduced that condition in sections 11 and 12::

11. Persons residing within Myanmar shall seek the permission of the Central Bank of Myanmar to open a foreign currency bank account in an overseas country pursuant to section 14 of the Foreign Exchange Management Law.
12. A person who has a bank account in an overseas country shall furnish the Central Bank of Myanmar with monthly bank statements pursuant to clause 11.

The problem is, as the CBM sees it, that these bank accounts can also be used to keep funds of the account holder out of Myanmar. Just as well as FEMA allows offshore accounts, FEMA also obliges Myanmar companies to bring foreign exchange proceeds back to Myanmar: S. 12 FEMA provides:

Persons residing within the State shall repatriate any earnings in foreign currency to Myanmar in accordance with the regulations. These earnings shall be deposited into a bank account at an institution with the license to trade foreign currencies.

Therefore, based on our experience, the CBM policy with respect to the use of offshore bank accounts has, along with the supervision of capital account foreign exchange remittances, become significantly more restricting.

MEET OUR TEAM



Helen Sullivan-Looney

SENIOR LEGAL ASSOCIATE,
Yangon

Helen is a qualified attorney with a master's degree in international law and has worked in the legal field for the past 11 years. Her practice focuses on investment, corporate and commercial law. She lives in Yangon



Chris Sheridan

LEGAL ASSOCIATE, Yangon

A barrister and a solicitor admitted in Australia, Chris has a solid background in commercial practice for a wide range of sectors including financial services, resources and finance. At VDB Loi, Chris advises foreign investors on commercial and corporate law, M&A, real estate law and dispute resolution.



YuKi

LEGAL ASSOCIATE, Yangon

Yuki holds a Bachelor's degree in Law from the Yangon University and a Diploma in Business Law. She is currently studying in a Diploma in International Law.

FINANCING TELECOM NETWORK INFRASTRUCTURE IN MYANMAR

While at least three mobile network operators roll out their networks, a number of tower and fiber companies are reaching out to commercial lenders, mezzanine finance providers and development financial institutions for their financing needs. A number of deals have already been announced. Central in such financing transactions, which are among the first ever international commercial lending deals with security on Myanmar assets, are the network assets.



What are some of the typical land use right issues of tower companies and fiber companies?

In most places, telecommunications network assets and infrastructure is still in course of being deployed. It is fair to say that the regulatory framework of land use for network assets by foreign invested companies has not yet caught up with the needs of the operators. Although the Foreign Investment Law and the Telecommunications Act both provide in rules on land use, the implementation of these and existing land laws continues to cause delays and uncertainty. These are some of the issues we often encounter:

- The permission for the use of rural land will in nearly all cases require the authorization of local authorities. Leases are being signed with local land right holders, and it is in practice in our experience possible for tower companies and fiber companies in most cases to obtain local approvals (at village level) for the use of the site. It is sometimes unclear whether the particular authority that has supplied the approval in fact has that authority. For example, certain type of Village Land is destined for use by the village community, and it is unclear if the right of the person who signed the lease with the tower company falls into that category.
- In reality, we have seen very few leases processed by MAI to date. In practice, the Myanmar Investment Commission (MIC) is unable to approve leases on farmland or agriculture land without the approval of the MAI. This means that one of the key requirements of the FIL, notably the approval by the Myanmar Investment Commission (MIC) of any lease granted to a foreign invested company, is subject to delays. This delay
- With respect to the national authorities which administer farmland and agriculture land, which is in practice the most frequent type of land outside of urban areas, we have lobbied the President's Office, the Myanmar Investment Commission and the Ministry of Agriculture and Irrigation to argue that use of a small portion of farmland or agriculture land does not require a change of use under the Farmland Act. We lost that argument, and as a result approval from the Ministry of Agriculture and Irrigation (MAI) (which in reality oversees the National farmland Management Committee) is required for any lease of farmland or agriculture land.
- In many areas, the lessors do not have the required land title documentation yet to evidence their rights to the land. This is particularly the case with land under the Farmland Act, which provides in Farmer Certificates, which are essentially the land title for the lessor. These Farmer Certificates are issued on an area per area basis, and many areas have not been serviced yet. So, whether this is an issue depends on the geographical area which the tower company covers.

MEET OUR TEAM



Chen Xi

LEGAL ASSOCIATE, Yangon

Xi is a Chinese-qualified lawyer who graduated from Peking University's prestigious school of law. She has a master's degree in corporate and financial service law from the National University of Singapore. A fluent Japanese speaker, she spent 3 years with Mori Hamada & Matsumoto. She is an associate in our legal team focusing on investment and real estate.



Su Pyi Sone

LEGAL ASSOCIATE,
Yangon

Su is an experienced Myanmar qualified attorney with a Bachelor's of Law degree and an overseas MBA, formerly working in the legal field in Myanmar and overseas. Su has extensive experience in real estate law, IP and financial services. She is part of the team advising.



Khin Tha Zin Min

LEGAL ASSOCIATE
Yangon

Tha Zin has five years of experience as a lawyer for Daw Ohmmar Law Firm and U Aye Kyaw Law Firm. Khin holds a Bachelor of Law from the University of Dagon.

Can tower companies and fiber companies obtain construction permits?

Construction permits for towers and fiber are still problematic in many areas in Myanmar. In practice, less than 200 actual construction permits have been issued based on our information from MCD, YCDC and the Ministry of Construction. Most notably because in several regions there is no way to obtain a construction permit for a tower or the concept of a construction permit does not exist. We note that PTD, as the principal regulator, is reviewing prospective infrastructure sites.

In Myanmar, the laws and regulations governing the permit for the construction

of a building vary in function of the type of land as per its relevant land law. Only the major cities with Development Committees (CDC) have a clear legal basis for the authority to permit an actual construction permit (rather than a general use permit – see below) as in s.9 (t) CDC Law “granting permission for construction of private buildings within the Development Committee boundary limit and supervision thereof”. Only the CDCs have to some extent an actual process, an inspection, an evaluation. In practice, YCDC Notification 9/99 is the only comprehensive one in its kind currently in existence.

Outside the CDC areas, the only rule is that in very general sense, some type of permission for the use must be obtained from local regulators, not for the construction of the building in and of itself. These are the main types of land which are relevant for tower companies and fiber companies, and their respective rules on construction permits:

- With respect to “farmland” (and “garden land”), the Farmland Act and its implementing Rules do not provide in the permitting of a construction as such, but rather the use of such farmland for a building with a certain purpose. s.17 (f) Farmland Act of 2012 includes in the duties and authority of the Central Farmland Management Committee “to [...] scrutinize and approve the submission of the Region or State Farmland Management Committee in respect of using the farmland to be required for a school, health center, hospital, clinic, library, market, cemetery or other buildings to develop the social life of the rural population”. s.80 d) of the Farmland Rules provides that, for such “other use” it suffices that “the project is sanctioned by the relevant ministry and its funds are likely to be available”.
- With respect to “village land” the general principle exists with respect to buildings that are used as residences under s.17 of the Village Act of 1908 which states that “a person who is not a resident of a village-tract shall not build any house, hut or enclosure, or take up his residence in the village-tract without the permission of the village committee”. Most tower companies have already obtained this village committee approval in each case where it intends to use village land.
- With respect to “vacant, fallow or virgin land”, again, there is no actual construction permit provided in the relevant law, but rather a permission for a certain use only. s.10 (d) of the Vacant Fallow Virgin Land Act (VFVLA) provides that “The Central committee shall permit the following land area of Vacant, Fallow and Virgin Lands in relation to [...] Government allowable other purposes in line with law shall be permitted with the agreement and coordination with the Union Government of the relevant Ministry”. In addition, s. 12. states that “The Central Committee shall permit the right to use land in a case where application is made by Investors who have been permitted in accordance with Foreign Investment Law. Most tower companies and one fiber company already have both such permissions.



To the best of our knowledge, only few construction permits have been issued for rooftops or towers in urban areas, with significant differences from one city to another. In Mandalay we have noted significant progress, at least compared to Yangon.

For fiber companies, the problem is compounded by the fact that the authorities disagree whether facilities and stations accessory to fiber requires a construction permit.



Can a tower company create a mortgage on its immovable assets?

A foreign owned company in Myanmar is not ipso facto excluded from creating a mortgage on a tower site, including to the benefit of a foreign lender, but such requires the permission of the MIC and the Central Bank of Myanmar (CBM). This permission is currently in process for the first time.

Myanmar law recognizes six types of mortgages on immovable property, namely the simple, conditional sale, usufructuary, English, deposit of title deeds and the anomalous mortgage. Most of these are not used in current Myanmar practice. The “simple” mortgage seems to us most in line with international practice.

These are some issues we often encounter in connection with deployment of infrastructure:

- **Approval by the MIC:** A complicating factor is that foreigners are not allowed to “acquire immovable property by way of purchase, gift, mortgage, exchange or transfer” without special Government permission, which is granted by the Myanmar Investment Commission (MIC) after recommendation by the CBM.
- **Definition of “immovable property”:** One of the more comprehensive definitions of “immovable property” used in Myanmar law is found in the Registration Act: “immoveable property” includes lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass”. There is some conflicting case law of the Myanmar courts with respect

to the characterization of plant and installations as immovable property, but the definition of the Registration Act is often held to be determinative.

The Government has taken the informal position in a Stamp Duty case that fiber constitutes an immovable property in the sense of the Registration Act.

- **Leased land can in theory be mortgaged in Myanmar:** Foreign invested borrowers would normally have a 50-year extendable lease, it is in practice important to know that a leased property can indeed be the subject of a mortgage under Myanmar law. In fact, unless the lease agreement provides otherwise a lessor can by law mortgage his interest in the immovable property. However, in practice nearly all leases, particularly leases of Government land state that the lessee is not entitled to transfer or mortgage his interest without the express permission of the lessor.

The authorities have indicated that they will soon start with such registration, but without any fixed time frame.

- **Enforcement:** Security on any type of mortgage or fixed charge on immovable property can, as a matter of law, be enforced without the intervention of a court, subject to a number of conditions and restrictions. Most importantly, the mortgage deed must state the right of the mortgagee or chargee to foreclose without court intervention. In addition, a default must have occurred and have been notified to the mortgagor. Furthermore, the self-enforcement depends on the location of the immovable property in question. A mortgagee may foreclose on

immovable property situated in certain designated towns without intervention of the court (nearly all towns feature on the list). In other cases, if the mortgage money has become due without payment or deposit, the mortgagee may file a suit for foreclosure with the court.

- **Can the land (and thus the buildings) be mortgaged at all?** A major issue in actual cases is whether the land right holder has the right to mortgage this particular type of land under the land law that corresponds with the land in question. The right to mortgage a property depends on the provisions of one of a dozen land laws. For example the Vacant, Fallow and Virgin Land Act provides that cabinet permission is required to create a mortgage on land that resorts under this category. Needless to say that the due diligence should focus on this issue as early as possible.
- **Perfection:** The perfection of most types of mortgages on immovable property in Myanmar requires besides a registration of the charge with the corporate authorities, an additional registration with the Deed Registration Office. Although the laws and regulations to perfect a mortgage on immovable property may exist, these rules are largely untested in practice. At present, we are working with the authorities to arrange for the registration of the first long term leases and secured interests.
- **Stamp Duty:** A stamp duty of 1.5% applies to most mortgages of immovable property, but a 3% rate applies in case there is possession by the lender.

Fixed and floating charge on the rights and assets of a Myanmar company

Myanmar law recognizes fixed charges on a specific fixed-asset or class of fixed assets to repay a loan. Under the Myanmar Companies Act, a fixed asset can be created on (at least) immovable property, uncalled share capital, book debts, movable property and stock in trade. A floating charge can under Myanmar law be created on “the undertaking or property of the company”. It has a defined value which takes effect over a range of property but not over any specific property until the occurrence of a future event, typically a default by the chargor.

- **Approvals by MIC is always necessary, even if unrelated to immovable property:** It is unclear in the law whether the approval of the MIC is needed to create a fixed and floating charge. However, the MIC has recently advised that the entire package must be submitted for their approval.
- **Perfection:** Most charges need to be registered by the chargor with the Company Registration Office. We have successfully completed this procedure. It takes about 10 days in our experience, provided the CRO does not require any prior approvals from other Government agencies. In case the borrower has an MIC Permit, the MIC must first approve the registration of the charge.
- **Enforcement:** As a matter of law, the chargee of a fixed and floating charge can appoint a receiver to enforce his rights over the secured assets. As is the case in English law, creditors with a fixed charge have a higher rank than those with a floating charge in a winding-up situation.
- **Stamp Duty:** The stamp duty rates for loan instruments themselves and for security agreements range between a nominal fee to 1.5% or 3% on the secured amount depending on the specific definitions and categories in the Stamp Duty Act. For loan instruments, these include “bond”, “mortgage deed”, “promissory note”, “bill of exchange”, “marketable debenture”, and “memorandum of agreement”. For security agreements, the most relevant categories are “mortgage deed” (including a mortgage of movables), “pledge” and “mortgage by deposit of title deeds”.



*Banking Regulatory Update: Licensing of Foreign Banks, Mobile Banking, and Security on Onshore Assets
VDB loi Office, 29 July 2014*

Charge on an onshore bank account

Although possible in theory, in practice Myanmar local banks are not accustomed to charges on bank account and likely refuse to acknowledge a charge without blocking the bank account altogether. Foreign banks are not yet allowed to operate, although this is expected to change in 2015.

THOUGHTS ON THE SELECTION OF FOREIGN BANKS AWARDED WITH A MYANMAR BANKING LICENSE

The Government of the Union of Myanmar has announced that the following 9 banks will be allowed to provide banking services to foreign corporations and domestic banks:

1. Australia and New Zealand Banking Group Limited (ANZ)
2. Bangkok Bank
3. Bank of Tokyo-Mitsubishi UFJ (BTMU)
4. Industrial and Commercial Bank of China (ICBC)
5. Malayan Banking Berhad (Maybank)
6. Mizuho Bank
7. Oversea-Chinese Banking Corporation (OCBC)
8. Sumitomo Mitsui Banking Corporation (SMBC)
9. United Overseas Bank (UOB)

The license will include permission to grant loans and take deposits from both foreign corporations and domestic banks in international currency and Myanmar Kyats (“MMK”). The licensees are expected to contribute to the development of the domestic banking sector notably but not exclusively by participating in the interbank market, by lending to domestic banks to support their financing activities of domestic corporations and by engaging in foreign exchange.

The licenses, at this time, will not provide these banks with permission to conduct retail banking services. This is expected at a later date.

A few first thoughts on the selected banks:

- All three Japanese banks awarded: SMBC, Mizuho and Bank of Tokyo-Mitsubishi UFJ all were awarded. Remarkable, because these were the only Japanese banks that put in a proposal. In other words, all three candidates from Japan were selected.
- Bangkok Bank prevails: Bangkok Bank was able to beat Kasikorn, Krung Thai and SCB to the punch. SCB and Krung Thai made a marketing effort in recent weeks, but it was Bangkok Bank that was able to take the crown.
- From Singapore, both UOB and OCBC get the prize. Two licenses for traditionally well-capitalized Singaporean banks, but without DBS.
- Maybank prevails over the newly married CIMB and RHB: Maybank has been longer in Myanmar than the other Malaysian banks, which might have helped.
- ICBC is, as only Chinese bank submitting a proposal, not a surprise.
- ANZ is awarded a license, which was expected given its strong presence throughout Asia.
- No Korean banks: Three Korean banks submitted a proposal to the CBM, notably the Industrial Bank of Korea Kookmin Bank Shinhan Bank. None of them made the cut. We were expecting that at least one Korean bank would be able to clinch the license.
- Similarly, no Vietnam, Taiwan or India in the line-up, which is definitely a pity.
- A missed opportunity for Myanmar to bring in the only EU bank that submitted a proposal, BRED Banque Populaire.

How can the shares of a Myanmar company be pledged?

A shareholder can under Myanmar law provide a guarantee to a lender and can create a hypothecation or a pledge (assuming constructive possession can be assumed) on its shares in the company/seller. In practice, two layers of share pledges will often be called for, because sellers will frequently have a foreign holding company (more often than not in Singapore) which owns the shares in the Myanmar project company. It should be noted that enforcement, i.e. the transfer of the charged shares, will require approval from the foreign investment regulator, the MIC.

The legal title to a share is in Myanmar law transferred by the notation in the shareholder register by the board of directors. Under Myanmar corporate law, the directors have the right to refuse the transfer of shares from one shareholder to another in a number of circumstances.



Which authorities are involved for obtaining approvals and registrations for a security package?

By way of a quick overview of required approvals, permits and registrations, please refer to the below list:

- MIC: Security package, foreign exchange flows, assignment of shares (if any)
- Ministry of Communications and Information Technology (MCIT): MIC may request the recommendation from MCIT as this concerns a licensed activity
- Central Bank of Myanmar/Ministry of Finance: Foreign exchange flows
- Company Registration Office: Mortgage, fixed and floating charge (note: the register does not yet exist)
- Land owner (likely a Government agency, state or region; approvals are needed at local and at Union level): Approval of the mortgage
- Attorney General Office: May be asked to opine on the security documents
- Deed Registration Office: Mortgage, fixed charge on the leased land and buildings
- Internal Revenue Department (state and region offices): Payment of stamp duty

MILBANK AND VDB LOI REPRESENT PAN ASIA MAJESTIC EAGLE LIMITED IN FIRST EVER NON-RECOURSE, CROSS-BORDER FINANCING IN MYANMAR

SINGAPORE, October 14, 2014 – Milbank, Tweed, Hadley & McCloy LLP acted as international counsel to Pan Asia Majestic Eagle Limited (“PAMEL”), an independent provider of telecommunications infrastructure in Myanmar, in the first ever non-recourse, cross-border financing in Myanmar. The agreement provides US\$85 million of financing to support a roll-out of telecom tower site infrastructure in Myanmar. This first-of-its-kind facility was arranged by DBS Bank, ING Bank, OCBC Bank, Standard Chartered Bank and Sumitomo Mitsui Banking Corporation (the “Lenders”), who provided the financing directly to PAMEL, a Myanmar borrower. ING Bank in Singapore is acting as the Facility Agent and Offshore Security Agent and CB Bank in Myanmar is acting as the Onshore Security Agent.

The transaction is significant as Myanmar, formerly isolated from the global markets, re-establishes and modernizes its banking and capital markets presence. It is also expected to spur similar infrastructure development across Myanmar’s telecommunications sector, which is poised for rapid expansion.

PAMEL, headquartered in Yangon, was established in 2013 to serve as an independent provider of passive telecommunications infrastructure to support the rapid modernization of Myanmar. The focus of PAMEL’s current roll-out is the construction of over 1,250 towers for Ooredoo Myanmar, as part of Ooredoo’s provision of 3G mobile communications services nationwide across the country.

A leader in telecommunications and other project financings, Milbank has advised telecom companies and financial institutions around the world, with a particular focus on the developing markets of Southeast Asia, India, and Latin America.

Milbank’s Singapore-based team, led by partner Giles Kennedy, and associates James McFarlane and Leroy Langeveld acted as International Counsel to PAMEL and VDB-Loi’s Edwin Vanderbruggen acted as Local Myanmar Counsel to PAMEL.

NEW BANKING LAW TO SHAKE UP RELATED PARTY CREDIT, LEASING COMPANIES AND PROFIT DISTRIBUTION BY BANKS

In the wake of awarding licenses to 9 foreign banks, the Financial Institutions of Myanmar Law of 1990 (FIML), the key legislation on the licensing and operation of banks and other financial institutions, is set to be revamped. Judging from an advance draft of the “Bank and Financial Institutions of Myanmar Law” (Draft Law) which was released for comments, a long list of bank supervision legal provisions will be fleshed out in more detail, and in many cases extended, while a number of entirely new rules are also introduced. The Draft Law is now before the National Assembly.

One of the more eye-catching new provisions is the creation of a new category called “Non-Bank Financial Institution” (NBFi) comprising among other businesses finance companies, leasing companies and money services businesses. There is precious little regulation on NBFIs in the Draft Law for now, but businesses will do well to take note of the new requirement for leasing and renting companies to receive a license from the CBM, as is discussed in more detail below. We also noted that existing finance company licenses will have to be confirmed by the CBM to be valid, which raises the possibility that the CBM might change the conditions under which the license may be issued.

Provisions on related party transactions, payment of dividends to shareholders, advertising and rules on the acquisition or transfer of shares in a bank are also changed. Almost entirely new chapters on administratorship, rehabilitation and insolvency of banks have been created. In this note we provide a quick overview of some of the salient features of the Draft Law which caught our attention.

No more credit to a bank’s shareholders

The FIML provided in a relatively well articulated framework for related party transactions. Banks are allowed to do business with related parties as defined in the FIML, but the transactions need to be at arm’s length, must comply with any restrictions imposed by the CBM and must be first approved by a decision of the board. Principal shareholders and the companies they control, administrators and their families as well as the companies they have at least a 10% stake in, are all deemed “related” under the FIML.

The Draft Law largely restates the existing concepts, although there seems to be some confusion in the Draft with respect to “significant” or “substantial” interests. With respect to shareholders, the Draft Law introduces a new idea. Regardless of any board approval, the bank may not provide ANY credit to its own shareholders, or at least those shareholders holding at least 5% voting shares in the bank. The same goes for members of the board or other officer with voting right. Given that a number of Myanmar banks are a part of a wider business conglomerate, one might wonder why the specification “directly or indirectly”, often used throughout the rest of the Draft Law’s related party provisions, was not added here as well.

What about credit to the other companies of a bank’s shareholder?

Under the Draft Law, a bank may continue to provide credit to companies which are directly or indirectly owned by its shareholder or chairman. But, the Draft Law adds two important conditions which did not exist in the FIML: (1) the relevant Board approval, which already existed in the FIML, must be granted with a 2/3rds majority and not a simple majority and; (2) all credit must have collateral. The general requirements on internal policies and limitation on large exposure remain applicable as well, of course. For example, financial exposure on any one person or group is limited 20% of the core capital of a bank.

Although it is clear that the Draft Law indeed improves the protection of the consumer, the question remains if this is sufficient. A bank which is controlled by one major shareholder can easily arrange for a 2/3rds board decision. In addition, the nature and quantity of the collateral is not defined. One could imagine a scenario where a major shareholder extracts credit from his bank for a risky real estate venture and offers only the shares of the project company as collateral. In case the venture collapses, the shares will have little value. Perhaps the CBM might consider issuing additional requirements for related party lending, which is also foreseen under the Draft Law.

MEET OUR TEAM



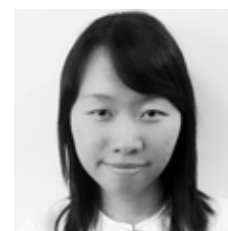
Shine Myat Khin
LEGAL ASSOCIATE
Yangon

Shine holds a bachelor’s degree in law from Dagon University and a master’s degree in law from International Islamic University Malaysia.



Thazin Ei
LEGAL ASSOCIATE,
Yangon

Tha Zin Ei worked as a junior lawyer for U Aye Kyaw Law Firm. Tha Zin holds a Bachelor of Law.



Kyawt Mon Min
LEGAL ASSOCIATE,
Yangon

Kyawt Mon has both a law and accounting background. She has an LL.B and a diploma in business law and is currently working on her master’s degree in banking and finance. Prior to joining us, Kyawt Mon was a lawyer for Win Mu Tin Intellectual Property Law Office and an accountant for Sea Wolf Marine Resources Co-op Ltd.

All leasing and renting will require Central bank license?

The booming business of equipment leasing and rental faces new challenges as the Draft Law introduces a completely new requirement to obtain CBM approval for carrying on leasing or rental business. These businesses must “within 6 months of the effective date obtain written acknowledgement of compliance from the CBM to carry on a non-bank financial institution business”.

It is unclear if it is the intention of the legislator to subject leasing businesses of each size to the new regulatory supervision by the CBM. We believe that the resources of the CBM are overstretched as it is, so presumably some type of threshold would be appropriate.

Furthermore, it is difficult to see why “letting” of equipment is explicitly put within the scope of activity requiring a license from the CBM. Financial lease is part of the core business of many financial institutions but renting is not. There is no doubt, however, that it is the intention of the legislator, at least based on the present Draft Law, to include renting of equipment in the scope of the financial laws. Leasing business is in the Draft Law defined as “the business of letting or sub-letting movable property on hire, regardless whether the letting is with or without an option to purchase the property”.

It is unclear what regulation the CBM has in mind for leasing companies. The Draft Law merely states for all NBFIs that “the CBM may impose such conditions as it sees fit” and may “issue necessary regulation and guidelines”. No mention is made of any specific conditions for leasing companies.

Including all types of leasing and renting into the scope of a law mainly written for banks is not an obvious way to go about it. As we speak, many companies are already active in this space and more are set to be established. Various suppliers, including manufacturers and vendors of rolling stock and equipment have an interest to get into this market. A new licensing requirement without protection in a transition phase, and which is left entirely undefined may cast considerable uncertainty on the future existing operators and contracts.

Existing finance company licensees need to re-apply

The Draft Law does not only raise interesting issues for foreign and local banks. The 1990 FIML did create the possibility for finance company business in Myanmar, but very few such licenses have ever been granted. The scope of activity of a finance company under the 1990 FIML was, according to s. 6 1990 FIML “primarily financing the purchase of goods or services”. Specific to finance companies is that they do not and are not allowed to finance their activities by taking deposits. Besides stating that, the 1990 FIML did not elaborate much on financing business. Given the reluctance of the CBM to license businesses for this activity, the whole matter attracted little attention.

That changed in 2013, when rumors circulated that the CBM was about to license a number of wholly Myanmar owned finance companies. It was a bit unclear how many companies indeed received the coveted license. In any event, the wave of new finance companies which was expected by at least some in the market did not materialize, but some licenses are indeed out there.

Back to the Draft Law. Now included in the group “Non-Bank Financial Institutions” (NBFI), finance activity receives much attention from the legislator. The Draft Law foresees that an NBFI can carry on (one or more of) the following activities:

1. finance company;
2. leasing;
3. factoring;
4. credit token;
5. money services;
6. any other credit services the Central Bank may prescribe;

The Draft Law does not reveal much on the regulatory framework of finance companies, or other NBFIs for that matter. It is clear that any existing finance companies must re-apply for a license under the new law within 6 months following of its effective date. Unlike as is the case for banks, the Draft Law does not set forth the documents required for applying for a NBFI finance company. In combination with the CBM’s past reluctance to license finance companies, we think that new finance company licenses might not be the highest priority for the CBM right now.



Myanmar Connect 2014
Nay Pyi Taw, 17 September 2014

Threshold for CBM approval of a transfer of shares in a bank is lowered

The Draft Law provides in a much more detailed organization of transfers in substantial interests. A substantial interest in the Draft Law means “owning, directly or indirectly, ten percent or more of the capital or of the voting rights of a financial institution or, directly or indirectly, exercising control over the management of the financial institution, as the Central Bank may determine”. By comparison, the FIML only stated that transfer of “a block of shares representing 15% of the capital” would require CBM approval.

The Draft Law thus differs in two major ways: (1) it lowers the threshold from 15% to 10% or more, and; (2) it adds the transfer of voting rights as a separate category of rights which may trigger the need for CBM approval.

The change is important. Changes in voting rights of preferred stock, or transfer in preferred stock may in and of itself trigger CBM approval. Of course, any change in the articles of association of a bank must be approved by the CBM anyway, which means that their involvement is required when classes of shares are created.

Banks may setup a subsidiary for insurance business and securities brokerage

There where the FIML was drafted under the basic principle that banking and insurance are separately regulated activities, the Draft Law creates a clear connection between the two. The Draft Law more or less assumes that banks will be permitted to engage in insurance business, even without stating explicitly that such business will require a separate license (although that might have been the intention). The Draft Law provides as follows:

“Through a separately incorporated subsidiary, a bank may engage in –
(a) insurance business;
(b) securities broking business;
(c) any other activity related to banking business as approved by the Central Bank;

The Draft Law continues to specify that “any such subsidiaries shall be subject to supervision under this Law to the same extent as the bank and the Central Bank may require any information otherwise required with respect to such bank and its subsidiary to be reported separately for each entity and on a consolidated basis”.

Deposit taking perhaps too widely defined?

As can be expected, taking deposits is one of the crucial issues of any banking law, and the Draft Law is no exception. In the Draft Law, a deposit means “a sum of money paid on terms under which it will be repaid or it is repayable, either wholly or in part, with any consideration in money or money’s worth and such repayment being either, on demand or at a time or in circumstances agreed by the person making the payment and the person receiving it”.

This catch all language may present a bit of a problem. There is no reference to the purpose of the deposit or the business of the deposit-taker. The definition of a deposit and the provision stating that “no person shall receive, take or accept deposits” (except if having been granted a banking license) are made on a purely objective basis. That is to say, any person taking a deposit as defined in the law, even just a commercial company, as a principle falls within the scope.

To be deemed a deposit within the Draft Law, it essentially suffices that the sum of money which is paid, is agreed to be repaid in time or subject to condition with a consideration.

There are, however, plenty of businesses which take a deposit as so defined. Persons engaged in trade with one another may agree that one pays a deposit to the other, which can be repaid with an interest. Individuals buying property might agree with the seller that their deposit is reimbursed with interest in certain circumstances.

It would probably be better to define the scope of a deposit a bit stricter, for example with a reference to transactions primarily aimed at generating a financial return on the deposited cash.

Changes to profit distribution and reserves

The Draft Law only slightly amends the rules on compulsory reserves, but more are expected to follow by the more appropriate medium of detailed regulations. A compulsory reserve equal to 100% of the capital, which under the FIML is to be funded through reserving 25% of net-profit after tax, is slightly amended by ordering 50% of net-profit after tax to be reserved up to 50% of the paid-up capital (and 25% up to 100% of the capital, as was previously the case).

VDB LOI ASSISTS AS AIRCRAFT FINANCING TRANSACTION CLOSES IN THE WAKE OF CAPE TOWN CONVENTION RATIFICATION

VDB Loi, a leading Myanmar law and advisory firm with offices in Yangon and Nay Pyi Taw, has assisted a foreign non-bank financial institution with a financing transaction involving a number of aircraft for use in several countries including Myanmar. The names of the lender and the borrower are not disclosed at this time. The firm acts as lender’s Myanmar counsel and was charged with, among other things, Myanmar law advice on the facility document and security package, the funding structure and due diligence. The firm is also charged with the registration and perfection of the secured interests in Myanmar.

The transaction comes in the wake of Myanmar’s implementation of the Cape Town Convention (CTC), a 2001 multilateral treaty acceded by Myanmar which regulates the creation and enforcement of international security interests on mobile equipment such as aircraft. Myanmar implemented the CTC through the enactment of a special law called “The International interests in Mobile Equipment (Aircraft Equipment) Law” (The 2014 Pyidaungsu Hluttaw Law No. 37) on 1, August, 2014 (the Implementing Law). Under the CTC and its Myanmar Implementing Law, an international security interest created and registered in accordance with the CTC will be recognized and enforceable in Myanmar. Under the Implementing Law, a supervisory authority will be formed in the framework of the Ministry of Transport’s Department of Civil Aviation.

The firm’s partner in charge of this assignment, Edwin Vanderbruggen, said “The ink on the Myanmar law implementing the Cape Town Convention is not yet dry, so as is often the case in Myanmar extensive consultations with the authorities were necessary for this ground breaking deal, one of the very first of its kind. The recognition and enforcement of an international interest on aircraft leased here in Myanmar will definitely increase the sense of comfort of foreign lenders and thus hopefully bring down financing costs for borrowers”.

Earlier, still in the financing space, VDB Loi was tapped to assist Pan Asia Towers with the first international non-recourse loan by a consortium of international commercial banks. The firm is also lender’s Myanmar counsel to an international development bank on a financing transaction in the financial services sector, and advises a number of foreign banks on their market entry in Myanmar following the awarding of bank licenses to 9 foreign banks by the Central Bank of Myanmar. VDB Loi also made news advising the Myanmar Government on the privatization of a number of state owned enterprises. Besides Myanmar, VDB Loi has additional offices in Cambodia, Indonesia, Laos and Vietnam, and liaison offices in Singapore and Tokyo.

In addition, the Draft Law introduces new restrictions on dividend distribution: "No bank licensed institution shall declare or pay any dividend or make any form of distribution to its shareholders–

- (1) until all its capitalized expenses, including preliminary expenses and other items of expenditure not represented by tangible assets, have been completely written off;
- (2) if, as a result thereof, the aggregate book value of its assets would be less than the sum of the book values of its liabilities and unimpaired capital funds;
- (3) as long as the bank licensed institution is in breach of a requirement imposed by or under a provision of this Law".

The text of the MCPA is silent as to which amount is allowed to be distributed as dividends. However, section 97 of the table A provides that directors can only declare dividends out from profits or any undistributed profits.

Term "Investment banking" may only be used by licensed banks

The FIML already provided, in general terms, that an "institution receiving deposits [...] shall be deemed to be banks. Such institutions only shall have the right to use the name bank. Other institutions shall be prohibited from using the name bank in their business name".

These rules are now more detailed. The Draft Law specifies that also "banker" and "banking" are prohibited from use by anyone except a licensed bank. Also translations of the term in other languages may not be used. Some exceptions are provided in the Draft Law, such as for associations of banks and for international organizations.

There are no general exceptions for use of the word "bank" in a non-financial context such as "blood bank" or "movie bank". Such organizations would be able to apply for a case-by-case exception, the Draft Law states. It seems there is no room for financial advisory companies to use the term "investment banking" unless when they are a licensed bank. This corresponds with the position of the CBM under the current law, by the way.



Control of advertisements by banks

Banks may not advertise whatever they like. Under the Draft Law, ads which are "false, deceptive or misleading" in the eyes of the CBM must be amended or withdrawn. Advertising is in fact also covered under the Law on Consumer Protection as well, which provides in additional remedies by consumers. Consumers are entitled to file any disputes with banks to the Consumer Dispute Settlement Committees (CDSC), a statutory body established by the Central Consumer Protection Committee (CCPC) for settlements. It is not specifically addressed which regulator would have priority in circumstances where advertising by a bank is deemed misleading. Presumably, both the CBM and the CCPC have their own proper authority. The CBM can have the add stopped, while the CDSC may initiate an investigation on the consumer's complains, and take administrative measures, such as warnings, order to compensate the consumers, and terminate licenses after liaising with other ministries. The Law on Consumer Protection further provides criminal penalties on banks where they soliciting customers by giving false information.

LITIGATION FIRM U AYE KYAW ASSOCIATES JOINS VDB LOI TO FORM DISPUTES RESOLUTION PRACTICE IN MYANMAR

VDB Loi and U Aye Kyaw & Associates, a specialized litigation firm in Yangon, are teaming up to provide dispute resolution services in Myanmar. The principal U Aye Kyaw is a former judge, magistrate and law lecturer with nearly 25 year experience in civil and commercial litigation and arbitration. He and his team of litigators have served clients in a broad range of industries with services since 1990. U Aye Kyaw regularly acts for clients in the property and construction sphere.

VDB Loi is a leading firm in Myanmar, boasting a team of 40 lawyers and advisers, and is mainly known for racking up high profile transactional mandates in TMT, power, oil and gas, real estate and consumer goods. Preparing its move into the disputes space, the firm recently made key hires of foreign lawyers with a litigation background. For example, Chris Sheridan is a solicitor with over 10 year experience in the legal field, including work as an insolvency litigator with Rigby Cooke in Australia.

"U Aye Kyaw and his team joining us and the new foreign hires are meant to get us ready for the disputes side of the legal market" explains managing partner Jean Loi. "In sync with Myanmar's economy, our focus has been mostly transactional for the past few years. Clients are investing now, acquiring assets and launching projects. There will be a need as well for assistance and advice in connection with litigation and arbitration. We want to make sure that we are well prepared for that", she continues.

Edwin Vanderbruggen, who heads the legal team in the firm's Yangon and Nay Pyi law offices notes: "A solid litigation capability is a not only attractive as such, it is also a strong support to our advisory work. We want to understand how matters would play out in the Myanmar courts when we advise on transactions or compliance".

Myanmar revamped its arbitration framework by adopting the New York Convention and is upgrading its Arbitration Act to be in line with the Uncitral Model Law. A recent arbitration procedure in a dispute between Myanmar Economic Holdings and Fraser & Neave with regard to Myanmar Brewery illustrates the need for dispute settlement services in connection with this newly opened Southeast Asian country.

OVERVIEW OF VDB LOI EXPERIENCE IN THE FINANCIAL SERVICES SECTOR

Highlights of our experience in the financial services sector:

- **Assisting Development Financial Institutions (DFIs) on a number of financing transactions in Myanmar**
- **Registered the first security for a foreign loan on an onshore asset in modern times**
- **Charged with securing all approvals and registrations for the first ever non-recourse commercial finance**
- **Secured licenses and approvals for Ooredoo, Nokia, Ericsson, Dagon City, Heineken**
- **Assisted on the first aircraft financing transaction post Myanmar's accession to the Cape Town Convention**

The financial services sector is poised for significant growth in Myanmar, but the challenges are daunting. Improving the capacity and regulatory architecture, and increasing foreign investment in certain areas are some of the Government's immediate policy objectives. VDB Loi has assisted clients with a wide range of issues regarding Myanmar's financial services sector. We have created a knowledge center for financial services law to meet client needs for transparency in the web of bank supervision regulations, foreign exchange rules and licensing of foreign investment in banks and insurance.

Foreign exchange regulations

In the increasingly liberalized context of Myanmar's foreign exchange management, clients are faced with questions and problems on a daily basis with respect to inward and outward remittances. Our clients are Myanmar state-owned and private banks, foreign investors and financial intermediaries. Foreign exchange is one of the area where the firm's nuts-and-bolts philosophy truly works.

Licensing

Our team often assists clients with advice and assistance in connection with securing business licenses in the financial sector, such as for finance companies, foreign banks, consumer finance, hire-purchase, Dedicated E-Money Issuers and mobile banking

Investment licensing by the MIC

As Myanmar is poised to admit access to foreign banks and insurance companies, our team advises clients on the investment licensing aspects of their market entry.

In order to meet clients' needs for a flexible, highly responsive team with interdisciplinary skills, we have formed core teams of foreign lawyers, financial specialists and local attorneys. Time is of the essence in Myanmar deals. To ensure an efficient licensing process, our partners personally drive the effort, from advising on the investment structure to less glamorous but equally crucial tasks such as document collection.

Regulatory

Our financial services team is often asked to advise on regulatory aspects including banking supervision regulations, foreign exchange rules, competition rules, and new areas such as mobile banking and issuance of e-money.

Secured lending

Our firm's team is at the forefront of the developments in relation to creating, perfecting and enforcing various types of secured interests including mortgages, fixed and floating charges, pledges and guarantees. As is often the case in Myanmar, it is not the theory but the practice which is of particular concern to clients. Our team works very closely with the authorities to implement secured interests in actual practice.

Banking

With over 30 foreign banks already present through representative offices, Myanmar is poised for significant growth as soon as the industry is opened to foreign investment. The country is a significantly underbanked market, where less than 20% of the population has access to basic financial services. Currently, there are four state-owned and 11 private banks in Myanmar, all locally owned. The country is seen as a major area of interest for regional and international banks. The central bank, which supervises financial institutions and manages currency, was made an independent institution in 2013.

Our clients seek us out for advice on market entry, banking regulations and financial laws.

Insurance

The nature of risk in Myanmar is constantly changing. Legal, political and economic dynamism make for a high risk, high reward environment. Insurance is a comparatively new concept in Myanmar, but it has a very important role to play. For insurance providers, this is a high-growth market with incredible potential. The state-owned insurance agency, Myanma, ended its monopoly in 2013 and already, numerous private insurance companies have opened for business. But with new laws and regulations continuously reshaping the market, a local ally is essential.

We can assist you in identifying these opportunities and guiding your investment into this sector. In the first few months of an open insurance market, we have already provided assistance to a North American insurance company entering the market. While this insurance sector remains small, VDB Loi has already positioned itself as a leader.

Microfinance

In emerging markets, microfinance forms a cornerstone of entrepreneurship, consumer spending and future growth. Myanmar is no exception. It has been estimated that demand for microfinance exceeds supply by as much as four times. The industry is still in its infancy, but the growth potential is tremendous.

Microfinance clients face unique risks in Myanmar, including a rapidly evolving regulatory framework and complex foreign exchange restrictions. Our professionals understand the microfinance sector in Myanmar and take the time to listen to our clients' needs.

The firm's financial services knowledge center ensures that we are always prepared to solve the practical challenges faced by our microfinance clients.

Whether the issue is obtaining a license, obtaining foreign financing or expanding your company, VDB Loi has the knowledge and experience to be a partner in the microfinance sector. With experience in the commercial and policy aspects of microfinance, as well as important tax issues, VDB Loi brings the same high standard of service to its microfinance clients, whether they be high-growth start-up microfinanciers or multinational microfinance institutions.

