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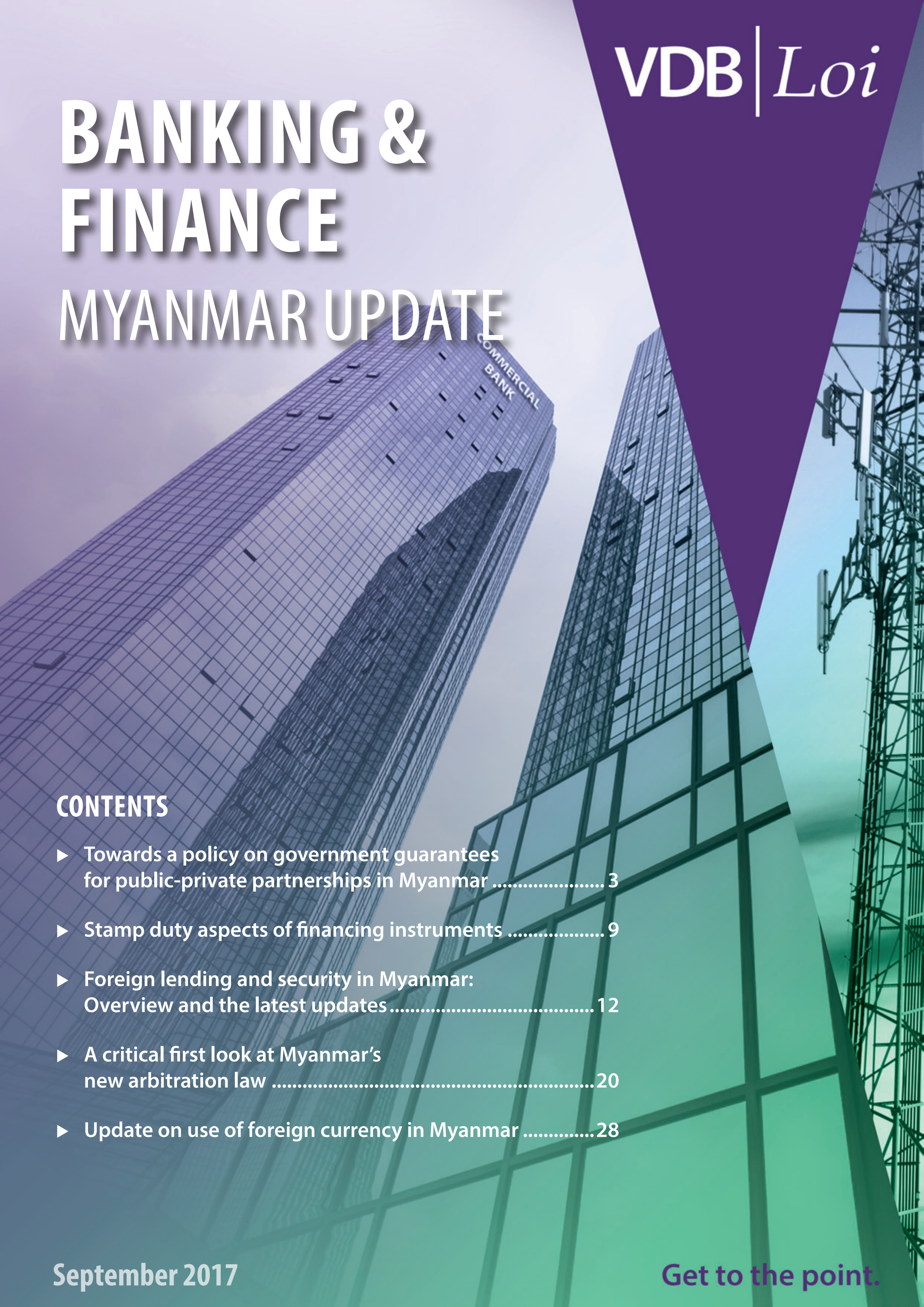
MYANMAR UPDATE



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September 2017

Get to the point.

MYANMAR PRACTICE OVERVIEW

We are known for providing the ultimate in ground connectivity to our clients. We believe that specialization, along with tenacity, is necessary to achieve this. Therefore, in 2016, we ramped up our headcount and the number of our senior advisors, and we converted to a system of exclusively dedicated practice teams in Myanmar.

We have created 4 general practice teams (Corporate M&A, Banking and Finance, Licensing and Disputes) and 4 specialized teams (Energy, Telecommunications, Infrastructure, Real Estate & Construction and Taxation).

Each practice team comprises a team leader, who assists a partner to manage the team, and minimum 4 to maximum 10 advisers who are exclusively dedicated to only one team. All team members are, just like partners Edwin Vanderbruggen and Jean Loi, residents of Myanmar.

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TOWARDS A POLICY ON GOVERNMENT GUARANTEES FOR PUBLIC-PRIVATE PARTNERSHIPS IN MYANMAR

By way of introduction, we should note that under Myanmar's Public Debt Management Law 2016 ("PDML"), a Government guarantee ("GG") for a debt is also considered a Government debt (2. k and m PDML).

Furthermore, the PDML states that the Ministry of Planning and Finance ("MOPF") may provide guarantees for loans to persons or organizations but "in accordance with such terms and conditions as may be approved by the Government and the [National Assembly]". The annual State Budget Laws have usually provided that the MOPF may "furnish guarantees for the taking of loans". The same law usually states that "the Government may avail itself of loans by issuing loan agreements […] guaranteed by the Union […]" but "for the purpose of projects or for expenditures contained in the estimated Union Budget", and with the approval of the National Assembly (e.g. s. 7-10 State Budget Law 2012).

The PDML provides that the annual report by the MOPF to the National Assembly will cover "government guarantees" and will include "a list of all guarantees given by the State" (s. 37 PDML). The PDML requires that the Government draft a debt management plan for at least a three-year period to be submitted to the National Assembly for approval. This plan shall include "the policies and guidelines for […] granting government debt guarantees" (s. 11-13 PDML).

General principles

Why public-private partnerships?

In a public-private partnership ("PPP"), a private sector investor ("the Sponsor") will invest equity and raise financing to build and operate infrastructure for public use under a long-term agreement with the Government.

- Private sector investment to create public infrastructure allows the Government to get more projects built.
- Private sector efficiency and advanced technology may be beneficial to many projects as compared to management by the public sector.
- In a PPP, there is a transfer of risks from the public to the private sector.

Nearly all countries in the region have a PPP law, regulation or unit, and all have a track record of PPP projects. Myanmar and Bhutan are the sole exceptions.

We recommend that the Government implement the "Myanmar Public-Private Partnership Policy Document", proposed by UNESCAP, drafted with assistance by VDB Loi. This is a roadmap to legal and regulatory reform to implement PPPs in Myanmar.

Why Government guarantees?

In any particular project, there may be risks that are not possible for the private sector to take. In these cases, the Government must take responsibility. Often, this can be done through a GG.

These are some of the benefits for the Government to provide a GG for certain risks, for certain projects:

- It accelerates the implementation of infrastructure projects, needed for a "catch-up" effect.
- It allows the Government to gets assets built without spending public money upfront.
- It reduces project costs, e.g. by lower credit risk and longer debt tenors, thus improving value for money.
- It is expected by donors (free funding) or for concessional loans (loans from development institutions at better terms than the open market).
- It enhances Myanmar's competiveness in attracting investment: Nearly all countries in the region have some form of GG program. For Myanmar to be the only country not providing a GG in cases where most others do, sends the wrong signal.

Most countries in the region provide GGs in at least some situations, including Vietnam, India, Thailand, Cambodia, Indonesia, the Philippines.

In certain cases, the Government should grant GGs in connection with PPP projects. We recommend creating a regulation detailing the Government's policy on GG for PPP projects (see discussion below).

Budgetary aspects

Regulation setting out the budgetary process and conditions for GGs

The PDML requires that the Government draft a debt management plan for at least a three-year period to be submitted to the National Assembly for approval, which must include "the policies and guidelines for […] granting government debt guarantees" (s. 11-13 PDML).

Vietnam and India have specific regulations setting out a detailed policy for GG in general and for guarantees in a PPP context.

We recommend that the MOPF prepare a regulation in accordance with s. 13 PDML to provide a policy on GG entitled the "Regulation on the Provision and Management of Government Guarantees" ("RPMGG").

Budgetary approval process

As was explained above, Myanmar law requires that GGs are issued only by the MOPF. Furthermore, there must be "terms and conditions set by the National Assembly" which both provides this authority to the MOPF and imposes restrictions.

It seems that this National Assembly approval need not be per GG, but can be provided on a multi-year basis.

The Preparation and Presentation of the Budget Law 2015 ("PPBL") provides that "guarantees for foreign loans borrowed by union ministries and state-owned economic organizations […] shall be issued by the Ministry of Finance on behalf of the State only with the approval of the [National Assembly] and the total amount of such foreign loans shall be described in the draft budget law" (s. 17 PPBL). It is noteworthy that the PPBL only talks about GGs for loans taken up by public entities. The PDML, on the other hand, also addresses GGs for loans provided to other persons.

The PDML does prescribe that the MOPF "shall evaluate the risk associated with the guarantee before a government guarantee is issued or while such government guarantee is still in force" (s. 31 PDML).

In Myanmar practice, all significant projects are in fact presented for approval to the (economic committee of the) Cabinet.

In India, the Budget Office collects lists of priorities from different Ministries before 30 April each year. From these lists, the Budget Office creates an overall list of projects that may be considered for a guarantee during the year. There is a mid-course review in December.

In France, the Government created a US$10B facility, approved by an inter-ministerial committee. The scheme is managed by the French PPP unit.

In Vietnam, the application dossier is prepared by the Ministry of Finance after an appraisal, and a report is made to the Prime Minister. The Minister of Justice reports to the Prime Minister as well. After the Prime Minister approves it, the letter of guarantee is drafted, negotiated and issued.

We recommend that the RPMGG prescribe the following process for budgetary approval of a GG:

1. The relevant Government project owner submits an application dossier to the MOPF
2. The MOPF evaluates whether the application meets the conditions set out in the RPMGG
3. The MOPF uses independent experts in this process (many countries specify the need for specialized outside advice)
4. The Attorney General's Office issues its comments as to the legal aspects and on the draft letter of guarantee;
5. If the amount and the project are within the terms and conditions already approved by the National Assembly, the Cabinet confirms or denies the application upon recommendation by the MOPF;
6. If the amount and the project are not within the terms and conditions already approved by the National Assembly, the Cabinet will initiate such approval procedure.
7. After obtaining approval under 5 or 6, the MOPF executes the GG.

Budgetary maximum limit on the total of all GGs?

There are no general caps prescribed in the PDML or the Budget Laws in terms of a debt ceiling. It is only provided that the Government stay within what was approved by the National Assembly.

Vietnam's National Assembly decides on debt safety norms as compared to GDP and in-principle approval for key national projects.

India's budget rules of 2004 impose a cap of 0.5% of GDP in any year.

We recommend that the MOPF use the annual medium-term debt management plan (s. 11 PDML) to set limits on the total amount of guaranteed obligations.

Reflection of GGs in the State budget and annual report

The PPBL provides that "guarantees for foreign loans borrowed by [public entities] […] shall be described in the draft budget law" which is submitted to the National Assembly. The PPBL does not seem to require that any cash reductions or reservations are made for GGs, no matter the likelihood that the Government will have to make a payment on the GG. Note that guarantees for loans where the borrower is not a public entity are not mentioned (s. 17 PPBL).

The spirit of disclosure without cash provision is also found in the PDML, which states that it is the duty of the MOPF to "publish information and documents on the Government's guaranteed debts" (s. 40 c PDML). The PDML also provides that the annual report by the MOPF to the National Assembly will cover "government guarantees" and will include "a list of all guarantees given by the State" (s. 37 PDML). This time, GGs granted to all persons are meant.

This is not surprising. Myanmar's budget is on a cash basis, at least for now. In a cash accounting system, GGs tend to not be reflected at all until they are payable. In an accrual accounting system, at least some part of the obligation is recognized before the GG is payable. This usually means an assessment has to be made of the Government's risk, both at the outset and during the life of the GG. These assessments are often made with the help of specialized advisors. International accounting standards provide that if the likelihood that the GG will become payable is more than 50%; it should be recorded as a liability.

Under the PDML, a Government-guaranteed debt is deemed to be the same as a Government debt (s. 2 PDML). There is however no guidance on how to value a debt which is only payable depending on a future event. In our view, the MOPF, which has the authority to issue rules implementing the PDML with the approval of the Government (s. 44 a PDML), can prescribe rules about this.

The RPMGG should also set out the rules on the recording of GGs.

As long as Myanmar follows a cash accounting system, GGs are included as items in the annual State Budget Law, and they require National Assembly approval as such. However, the amount of the GG is not recorded as an actual cash reduction in the budget.

When Myanmar changes to an accrual system, a specialized advisor will have to evaluate the risk for the Government in consultation with the Auditor-General, and on that basis an accrued liability will be recorded in the budget, which will be updated from time to time.

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Jean is one of the region's most experienced tax and regulatory specialists with more than 12 years of experience in Indochina, Myanmar and Singapore.

She has advised on a large number of project transactions and tax disputes in the specialties of structuring, power plant projects and oil & gas.

As the managing partner of VDB Loi, Jean has extensive experience with projects related to the market entries of companies in the infrastructure, telecommunications and financial services industries in the region, as well as with supply chains. She lives in Yangon.

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Edwin is the senior partner of VDB Loi and a leading foreign legal advisor living in Myanmar since 2012. A frequent advisor to the Government on transactions and privatizations in energy, transportation and telecom, he is widely recognized for his "vast knowledge" (Legal 500) and his ability "to get difficult things through the bureaucracy" (Chambers, 2016). He advised international financial institutions on their largest Myanmar transactions so far, oil and gas supermajors, a greenfield multi-billion US$ telecom project and the Japanese Government on the Thilawa SEZ. He assisted two newly licensed foreign banks setup in Myanmar, acted for the sponsor of an 800MUS$ urban infrastructure PPP project and worked on 5 out of 7 power deals inked in 2016.

Projects for which GGs are allowed

Types of projects

To date, Myanmar has only granted some guarantees for projects.

The PDML does not contain any indication of the nature of a project that may receive a guarantee. Earlier, the annual State Budget Laws contained language indicating that a loan would have to be included in the National Assembly's approved budget to receive a guarantee.

Many countries use either a limited list of conditions in terms of type of project, or a case-by-case approach, or both.

India:
- Public projects by Government entities
- Enable public sector companies to lower interest rates
- Concessional loans
- Vietnam:
- Projects decided by the National Assembly
- Hi-tech, energy, minerals, export services
- In regions eligible for investment incentives
- Partially donor-funded

In Vietnam a list of eligible projects is created by the Ministry of Finance and the Prime Minister.

We recommend that the RPMGG provide a general list of acceptable project types, such as those specified below, as well as allowing for the case-by-case approval of a project:

1. Projects for public purposes included on the priority project list established by the Government and approved by the National Assembly
2. High priority projects undertaken by Government departments and state-owned economic organizations ("SOEs") for public purposes, which have been so approved by the Cabinet
3. High priority projects by sub-sovereign authorities approved as such by the state/ region Government and the Union Government
4. Projects where a guarantee is required by bilateral/multilateral institutions

Conditions

It will be necessary to evaluate the financials and the risks of the project before deciding whether to provide a GG. This is explicitly required by s. 31 PDML. Some requirements to consider are as follows:

Qualitative

- Sound financial planning of the project
- Some countries require a solid financial track record of the project company or they will require Sponsor recourse (shareholder guarantee)
- Credit rating is required by some countries

Quantitative

- Minimum capital/equity required from the investors (Vietnam requires a 20% capital investment for an eligible project)
- Payment of a guarantee fee (this is required in Myanmar by s. 32 PDML. The rate is "specified by the Minister") (the guarantee fees in Vietnam do not exceed 1.25% per year on the guaranteed debt)
- Minimum size of the loan (in Vietnam, guarantees must be for foreign loans in the amount of at least US$50M.

We recommend that the RPMGG require the following:

1. The MOPF should evaluate the financial feasibility of the project and the risk for the Government with the help of specialized advisors at the expense of the GG applicant.
2. The capital contributed by the investors (by means of registered and paid-up capital and/ or subordinated shareholder loans) must be at least 30% of the total project cost, except if this requirement has been waived or reduced by the Government on a case-by-case basis, due to national urgency.
3. The investors must demonstrate successful financial project completion, overseas or in Myanmar, of at least two projects of the same or larger investment amount, and demonstrate a history of compliance with World Bank performance standards on environmental and social responsibility.
4. The project company is liable for paying the guarantee fee set out in the RPMGG, unless waived by the Government.
5. The project company must comply with all other conditions and rules set out in the RPMGG.

To who is the GG issued?

The guaranteed person could be:

- The project company
- The lenders
- A foreign institution guaranteeing the lenders

The PDML explicitly envisages that guarantees are for loans. This implies that guaranteed parties are lenders, but the language could include shareholder loans as well.

This may not be sufficient. For certain projects it will not be possible to find equity investors unless the Government provides a GG for specific risks, such as Government force majeure, or the credit risk on an SOE without substantial financial means.

India has not provided guarantees in favor of private companies since 2002.

In France, the guarantee is to senior lenders.

In Italy, an export credit agency provides debt service guarantees to senior lenders.

In view of the legal limitation in the PDML, we recommend that the Government presently only guarantee lenders or foreign institutions guaranteeing the lenders.

As part of a forthcoming law on PPP, we recommend that it confirm that Government departments may, with the approval of the MOPF, provide other types of guarantees, such as a guarantee to the project company for payments by an SOE.

Which risks should the Government guarantee?

There are various risks in a project which, on a case-by-case basis, might have to be assumed by the Government to make the project feasible.

- Some kind of minimum guaranteed revenue for the project company paid by an SOE or Government department
- Debt service payment default (as a result of cash flow shortfalls) (e.g. France)
- Loss from change of law
- Currency risk
- Early termination compensation (e.g. France)
- Refinancing risk
- Sub-sovereign or SOE creditworthiness risk

The PDML is not specific in this area, and requires only that the Minister assess and continue to monitor the risk for which the GG has been given (s. 31 PDML).

In the Belgium PPP school scheme, the guarantees cover trigger events such as default on senior debt service, failure to refinance and sub-sovereign status events.

In Vietnam, there are no restrictions on the type of risk that can be covered.

After a payment has been made under a GG

The borrower has to reimburse the Government

The PDML provides that the person whose loan is guaranteed (the borrower) will have to repay the principal, interest and costs upon request by the MOPF (s. 34 PDML).

The RPMGG should list the required provisions for the GG instrument in order to protect the Government's rights, such as:

1. The security for the Government and the obligation to register security
2. Shareholder recourse, if any
3. Provisions regulating the relationship of the Government with the other lenders ("inter-creditor issues" and "step-in rights")
4. Provisions about monitoring and reporting ■


"VDB Loi's banking and finance team to offer practical solutions for Myanmar's finance sector"
- Chambers and Partners

STAMP DUTY ASPECTS OF FINANCING INSTRUMENTS

Except in one respect: stamp duty. The Stamp Act of 1899 has in every material respect been kept exactly as it was and applies as such today.

Stamp duty, once described by a learned judge as "a mere incoherent list of one thing after another without any fundamental thought", is a tax paid on instruments such as contracts, the sales deed for a property, mortgages, leases, loans and so on.

For each "category" there is a rate in "the Schedule" to the Stamp Act. Rates can be very or fairly small, like K300 or K150,000, but rates for some instruments are high. For example, leases will trigger stamp duty at 0.5 percent if the duration of lease is between 1-3 years or 4pc of the lease fee if the duration of lease exceeds 3 years, sale of property 4pc of the value, bonds 0.5pc of the amount, and mortgages 4pc of the amount secured.

Not surprisingly, as these "categories" were made up in 1899, they don't work so well 117 years later. In no area this is more acutely felt as in finance.

Loan agreements, which are not mentioned in the Schedule, could fall under half a dozen categories with vastly different consequences in terms of rate. They could be a "bond" at 0.5pc duty, or a "mortgage" at 4pc, or just an "agreement" at K300.

There are differences between "bonds" and "agreements" (to lend money) and some are spelled out in the law plainly. But many differences are on a hair-thin legal line which often seems vague to officials and taxpayers, and there is plenty of room for interpretation depending on how the language of an instrument is framed.

The problem has been exasperated by a circular from the tax authorities last November, apparently a well-intended attempt to simplify the flawed process of categorisation, which suggests that every type of financing is a bond or a mortgage costing at least 0.5pc on the loan amount.

Once described as "the most boring by far of all revenue laws", stamp duty abruptly got a sharp edge in Myanmar. The sudden break with the somewhat prevailing practice of categorising loans as agreements subject to a fairly low duty is difficult to understand for taxpayers. After all, there has not been any change in the law or in the rates, and there are nearly no countries in the world that require such high amounts of stamp duty for all loans.

It's not just a problem of finding the right category (and thus rate) for a loan. Modern financing transactions, long absent from Myanmar, come with a cluster of documents and are often syndicated, involving a score of parties including several lenders, an arranger and a trustee. As stamp duty is a tax on instruments, there is a risk that one would have to pay duty on a per-instrument basis. Imagine paying 0.5pc plus 4pc, plus another 0.5pc – all on one loan. There are rules in the Stamp Act to prevent this in the case there are several instruments "in one transaction" but there is no official guidance on what forms one transaction.

Is a loan from A to B and a guarantee from C to A one transaction, or two? Is a loan by a syndicate of three banks to one borrower one loan, or three? There is no certainty on these questions, and that is scary for banks and their customers. We had these questions in Myanmar for decades, but there were no syndicated loans to speak of. Until now, of course.

A big part of why stamp duty is posing such a problem for banking and finance is because of what happens if you do not pay duty (on time). A loan or a security document which is not "duly stamped" cannot be used as evidence, for example in a court case to enforce the debt; it can be impounded and could even lead to a criminal fine.

In other words, not paying the right duty, even though there is a lot of confusion about what that should be, could mean banks might not be able to get their money back. In any case, just to rectify the problem one would have to pay 10 times the original duty.

Imagine a borrower who is already in default. Before starting a legal proceeding the lender has to first fork up another 0.5pc of the loan amount.

There is a reason why most countries which inherited stamp duty have done away with it on financing transactions. That includes the Dutch who invented it, the British who exported it, and Asian neighbours Malaysia, Thailand, Singapore and Hong Kong.

Stamp duty on bonds may have worked in 1899, but it does not work in a modern financial marketplace. A tax which is so fundamentally uncertain should not be allowed to disable a lender's right to get their money back.

By the same token, a penalty of 10 times the original tax is by modern standards repressive and unwarranted. Legally, I just don't see how we can justify these sanctions in a country where lenders have a right to their property and both borrowers and lenders have a right to a minimum of advance certainty in their tax affairs.

Economically, I believe you cannot optimally restart a country's economy, help SMEs, promote financial inclusion, alleviate poverty through microfinance, strengthen the banking system or raise money to fund desperately needed infrastructure with such an unnecessary uncertainty hanging over borrowers and lenders.

The reluctant stamp duty renaissance in Myanmar comes at the worst possible time. Just when the first foreign banks ramp up, the first international financing deals have been inked, and microfinance starts to get a foothold, lenders do not need a reminder of what could go wrong.

There are issues affecting lenders in Myanmar for which there is no quick fix, such as future currency conversion and debt enforcement by the courts. But stamp duty on loans would actually be a quick fix, in my view only requiring a regulatory clarification. Keeping a high or uncertain stamp duty for any loan is fiscally unnecessary, legally questionable and economically unwise. Let's bring Myanmar stamp duty into the 21st century.

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"Edwin is the leading international lawyer in Burma. He assisted on two of my projects in Myanmar and has been first rate."

- IFLR1000

FOREIGN LENDING AND SECURITY IN MYANMAR: OVERVIEW AND THE LATEST UPDATES

Legal framework for loans and security

Myanmar obviously shares a lot of its legal history with India, including its codifications of English common law principles in relation to areas such as property (Transfer of Property Act), contracts (Myanmar Contract Act) and trusts (Myanmar Trust Act). Despite the relevance of English law concepts, one needs to keep in mind the importance of these statutes, which do not as such exist in English law. The local practice and case law may be different. Indian case law may also be persuasive.

1. Government approvals needed for foreign loans

The Myanmar Investment Law ("MIL") and the Foreign Exchange Management Act ("FEMA") and their implementing rules clearly establish the right of foreign investors or domestic parties to avail themselves of foreign loans subject to case-by-case regulatory approval by the Central Bank of Myanmar (CBM).

The CBM needs to approve the loan at the outset, before the moneys are disbursed. The CBM will typically review the following:

- The loan agreement
- The parties involved
- The interest rate
- The purpose of the loan
- The disbursement and reimbursement schedule
- The capital situation of the borrower, among other elements

Requests are generally approved but delays and even rejections are possible in certain circumstances.

<u>*Criteria for offshore loan*</u>

CBM recently published the Criteria for Offshore Loan ("Criteria"). A resident, who wants to seek an offshore loan, to get the approval of the Central Bank of Myanmar may apply directly or through Myanmar Investment Commission to the Central Bank of Myanmar by the following documents:

1. An application which is addressed to "the Central Bank of Myanmar, Office No (55), Nay Pyi Taw".
2. Relevant documents with regard to the company's profile such as Company Registration Certificate, Form VI, Form XXVI, Memorandum of Association, Memorandum of Articles, etc.
3. If the company has been already established, financial statements for the current year and previous year as approved by an external certified auditor, who should be a Certified Public Accountant.
4. Loan Agreement (Draft) including repayment schedule for the proposed loan and other relevant data.
5. Bank Credit advices evidence of equity transferred to the company (borrower).
6. Other documentary evidence.

Based on the submitted documents, the Central Bank of Myanmar will review and scrutinize the following facts, and approve or reject the proposal:

1. Whether the amount of equity capital of the applicant exceeds USD 500,000.
2. Whether the applicant (borrower) has an access to a matching foreign exchange income or not.
3. Whether the borrower is able to repay the loan from the income generated from domestic business, and has plans to mitigate the exchange risk even if he or she does not have a foreign exchange income.
4. Whether the borrower has already transferred 80% of equity committed in MIC permit or not.
5. Whether Debt to Equity Ratio is within a maximum of 3:1 and 4:1 or not.
6. Whether there are completion and correctness of terms and conditions mentioned in loan agreement and documents or not.
7. Whether the loan tenure is medium-term or long-term, and loan repayment schedule is consistent with loan agreement or not.

In the case of an offshore loan structure (the borrower is the foreign parent company of the Myanmar project company), the foreign borrower would typically relend the funds to its Myanmar subsidiary, or use the proceeds of the loan to capitalize the subsidiary. An internal loan also requires CBM approval.

CBM approval is also required for the Myanmar company to open and operate a bank account at an overseas bank. This permission is not always granted.

Additionally, per the Foreign Investment Rules a company in Myanmar must have a foreign currency bank account to hold the foreign exchange remittances.

Further, depending upon whether the borrower has an investment license ("MIC permit"), MIC approval of the facility and the underlying security may be required, and in the case of a loan granted to a microfinance institution, the Microfinance Business Supervisory Committee's ("MBSC")'s approval may be required.

2. Main types of corporate security providers

The corporate security providers in Myanmar are primarily Myanmar companies incorporated under the Myanmar Companies Act, 1914 ("MCPA"). These companies can be both private and public (but most are private), and either a company which is wholly-owned by Myanmar citizens or a Myanmar-incorporated (partially) foreign-owned company. Note that shares in a company wholly-owned by Myanmar citizens can administratively not be transferred to a foreigner in execution of a share pledge, for example. Larger security providers may have an MIC permit, which means the investment regulator's approval is needed for various transactions. Myanmar individual residents and citizens may also give guarantees.

3. Frequently used types of commercial security and contractual comforts

A. Mortgage

It is noteworthy that in the case of immovable property being charged to a foreign lender, there is a requirement for an onshore security trustee (the services are provided by local Myanmar banks). Although there are six forms of mortgages possible under Myanmar law, in general practice, only three forms are used – English mortgage, simple mortgage or equitable mortgage. We briefly outline each of the three mortgage types below:

English mortgage

An English mortgage can only be created by way of a registered deed, whereby the mortgaged property is absolutely transferred to the mortgagee with re-transfer upon repayment of the mortgaged amount as agreed. The mortgagor under an English mortgage is bound to repay the amount on a certain date. An English mortgage can be created with or without possession as well. This possibility of possession is a key difference with the simple mortgage. An important element of the English mortgage is the right to sell the mortgaged property upon default, wherever the property is situated, without any intervention by the courts. From that perspective, the English mortgage is the strongest form offered under Myanmar law.

The "absolute transfer of property" at the outset of the mortgage does not have to discourage lenders from choosing this option. Myanmar case law interprets this absolute transfer in a highly functional manner, without transfer in fact:

"For the plaintiff it was contended that one who mortgages his property by an English mortgage has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest until the land is re-transferred to him by the mortgagee in fulfilment of the condition or proviso that this shall be done upon payment of the mortgage money. No doubt this contention would be correct if English common law were applicable to the case. But what has to be applied is the Transfer of Property Act 1882. Under this Act a mortgage is a transfer of an interest in specific immovable property for the purpose of securing (1) the payment of the money advanced or to be advanced by way of loan, (2) and existing of future debt or (3) the performance of an engagement which may give rise to a pecuniary liability. […] Consequently, although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee the [Myanmar] law does not recognize that he does so in fact, and the mortgagor remains in [Myanmar] law owner of the property subject of course to the mortgage."

Simple mortgage
Under a simple mortgage, neither ownership nor possession of the immovable property is transferred to the mortgagee. With a simple mortgage, the mortgagor keeps possession of the property and is bound to pay the amount secured by the mortgage. Upon a failure to pay the amount secured by the mortgage, the mortgagee has the right to cause the mortgaged property to be sold and to apply the proceeds towards payment of the debt owed.

Equitable mortgage
Also known as a mortgage by deposit of title deed, an equitable mortgage is completed by the deposit of the title deed by the mortgagor (or anyone duly authorized by the mortgage in this regard) with the mortgagee, with an intention to create a mortgage. Generally, there is no deed or agreement required for the creation of an equitable mortgage. The security can only be enforced through court proceedings.

The main disadvantages of the equitable mortgage are that: (i) it only applies when there are title-like documents available for this land; and (ii) it normally requires court intervention for enforcement. The main advantage is that it can be perfected without having to depend on registration with the Office of the Registrar of Deeds ("ORD"), which may be time consuming.

B. Charge

A charge can be taken over fixed or current assets, intellectual property rights, receivables, bank accounts, assignment of rights under contracts, or any other movable property, whether tangible or intangible. There are two forms of charge under Myanmar law, in following English law:

Fixed charge
Such a charge is against a specific, clearly identifiable and defined property. The property under charge is identified at the time the charge is created. The nature and identity of the property does not change during the existence of the charge. The company can transfer the property charged only after first paying the debt to the charge holder.

Floating charge
A floating charge covers property of a circulating or fluctuating nature, such as stock-in-trade, book debt, etc. It attaches to the property charged in the varying conditions in which they happen to be from time to time. Such a charge remains dormant until

the undertaking charge ceases to be a going concern or until the person in whose favor the charge was created takes steps to crystallize the floating charge. Upon crystallization, a floating charge becomes a fixed charge.

C. Pledge

A pledge of goods is where possession of the goods is handed over to the lender in order to secure payment, and if the borrower defaults, then the lender may take over the goods and sell them in order to satisfy the debt (similar to how a pawn shop works). It should be noted that a pledge may be used to secure other obligations besides a debt. Pledges are often created over shares in a company, whereby the shares held by shareholders are constructively deposited with the lender.

D. Assignment

An assignment is where one party ("the assignor") transfers or agrees to transfer its property or contractual rights to another party ("the assignee"). Contractual rights are assigned by way of a "deed of assignment" that is signed by the assignee and the assignor (and the other original party to the contract, if required). In a legal assignment, the assignee can enforce its rights against the debtor without involving the assignor; however, in such a situation the assignment must be absolute and comply with the requirements specified in the Myanmar Transfer of Property Act with regard to notice to the debtor, etc.

E. Hypothecation

Not clearly defined by Myanmar law but recognized in case law as a hybrid, having characteristics of a mortgage of movable property and a pledge (without possession), which is used to create a charge against the security of movable assets, accounts receivable, book debt, etc, but in this case, the possession of the security remains with the borrower itself. Thus, in the event of default by the borrower, the lender (i.e. to whom the goods/security has been hypothecated) will have to first take possession of the asset and then sell it. Hypothecatees generally have the right to sue the hypothecator for the debt and proceed in execution against the hypothecated goods, if they are available.

F. Guarantees

Both corporate and individual guarantees are commonly used in Myanmar. The legal rules pertaining to guarantees are set out in the Myanmar Contract Act. There are a number of reasons why a guarantee might not be valid, such as through misrepresentation by the creditor or its agents, explicit or implied release of security by the creditor, or, it seems quite strictly, as the result of "any variance" in the principal contract.

Myanmar individuals may give guarantees to third parties, but customary Buddhist matrimonial law would require that spouses agree to commit communal assets.

Myanmar-registered companies frequently have a very restrictive company objective, which arguably does not allow for the provision of guarantees, prompting an ultra vires issue. There are other company law rules to take into account, such as directors with conflicts of interest, particularly in the case of public companies.

The CBM has not yet taken an official position on whether guarantees in connection with a foreign currency must be approved in advance.

"Edwin knows more about the country's legal environment than just about anyone else."
- IFLR1000

4. *Stamp duty implications in connection with secured interests and contractual comforts*

Myanmar imposes stamp duty on a wide range of documents under the Myanmar Stamp Act 1899 and its Schedule I. There is currently a lot of uncertainty as to the application of stamp duty for modern financing and security documents. The stamp duty landscape is in rapid development in Myanmar, since an internal, non-published circular dated 30 November 2015 ("the Circular") of the tax authorities has expressed the view that all loan, security and guarantee documents (which would include bonds and mortgage deeds) are subject to 0.5% duty, regardless of their content, it seems.

A groundswell of opposition had arisen, comprising the Myanmar banking association, several international lenders and the MIC. This Circular has not been to take into account the obvious contradictions between the Circular and the actual Stamp Act and is now being followed to the teeth by several townships

However, in practice, we have seen that borrowers do not prefer paying 0.5% as it is infeasible from a commercial perspective. Our view is that 0.5%, which is the highest stamp rate, only applies to a very small and strictly defined group of instruments as per the definitions and requirements of the Stamp Act. To be taxable as a bond, for example, the instrument needs to be attested and the amount needs to be ascertained. Furthermore, the statutory definition for "bond" requires that there is an indebtedness to pay money, not just an agreement to lend money. There is case law which supports this interpretation. Our opinion is that a facility agreement or another agreement arranging for a credit line is in most cases not the same as a bond, since there is no indebtedness in and of itself in the instrument for a facility, which is required under the definitions of the Stamp Act. Instead of creating indebtedness in and of itself by the instrument ("the borrower is hereby indebted for the amount of $xx.xx to the lender") as a bond does, a facility merely sets a framework for a future indebtedness should the borrower indeed utilize it.

The Stamp Act was recently amended and duties applicable on conveyance, mortgage and gift deeds were increased from 2% to 4%. The increase in the duty on conveyancing effectively increases the applicable rates on leases for a duration in excess of 3 years or more which is considered to be conveyance.

5. *Security per type of asset*

Land and buildings

There are several categories of land in Myanmar, ranging from (rare) freehold land to grant land, permit land, farmland, garden land, etc. Depending on the land type, some of the underlying documents include permission to mortgage, transfer or create any sort of charge. However, in the absence of such, prior case-by-case permission from the relevant authorities would be required. Generally, the two categories of land that are easily charged are freehold land and grant land. To secure a charge over any immovable property, a mortgage, charge or assignment is created. The most common form of mortgage in Myanmar is an equitable mortgage, as the applicable stamp duty is lower and there is no requirement to register with the ORD.

Movable property

Movable property is generally secured by way of a pledge, hypothecation or charge. Generally, the definition of movable property in Myanmar includes plant and machinery, stock-in-trade, shares owned by the company, cash or cash equivalents, book

debt/accounts receivable, bank accounts, intellectual property, etc. Any form of security over movable property of a company (other than a pledge of movable property) requires registration with the Company Registration Office ("CRO").

Shares

The shares of a Myanmar company can also be pledged as security for financing in Myanmar. In the event of a default, the shares pledged are enforced, and control of the company is relinquished to the pledgee. If the borrower is a company that is wholly-owned by Myanmar citizens, and the lenders are non-Myanmar lenders/financial institutions, an onshore security agent would be required to enforce the pledge over the Myanmar company's shares, or the articles of the company have to be changed first to allow for foreign shareholders. Transfer of shares in a company with an MIC permit must be approved by the MIC. Change in control provisions are typically found in Myanmar telecom licenses as well as certain other licenses and concessions.

Contractual rights

Contractual rights, such as concessions, are often assigned under Myanmar law, either by way of a charge or by way of an absolute assignment, which triggers only upon default. However, in many assignments of contractual rights, where such rights are derived from the government, prior permission to that affect is required from the relevant governmental authority.

6. *Internal approvals required for granting security rights*

Under Myanmar law, the creation of any security over the assets of a company in most cases requires a specific resolution from the company's board of directors. However, a due diligence is always recommended to look at the charter documents of the Myanmar company to ascertain ultra vires issues, which are a real concern in Myanmar.

7. *Registration and perfection of security*

Broadly, the perfection requirements are two-fold in Myanmar, and differ on the basis of the security being granted. Any security over immovable property, other than a mortgage by way of a share pledge, can be perfected after registration of the underlying instrument with the ORD, and registration with the CRO within 21 days of the creation of security.

No security over the movables of a company requires registration with the ORD. However, all types of security, other than a pledge of a company's shares/ movable property, would require registration with the CRO within 21 days of its creation.

8. *Prohibitions on providing financial assistance*

Myanmar law and regulations do not impose any general restrictions or conditions on the provision of financial assistance, except for public companies and for private companies which are subsidiaries of public companies. As per the MCPA, no company limited by shares other than a private company (not being a subsidiary of a public company) shall give, whether directly or indirectly, any loan or any financial assistance for enabling the purchase of its own shares.

9. *Insolvency risk periods*

Myanmar does not have a bankruptcy law as such, but applies provisions from two insolvency laws (written for individuals but the rules also apply to

"...noted for its strengths in project services, telecommunications, energy, infrastructure and corporate law."
- Asialaw

corporates) and from the MCPA. The MCPA provides that where any dispute arises between the creditors and the company pertaining to the financial distress of the company or otherwise, the parties can enter into a compromise or arrangement to that effect. Further, such an arrangement or compromise has to be agreed to by three quarters of the company's creditors. Upon such agreement, an application to that effect is presented before the court for its sanction, which upon approval would be binding on all of the company's creditors. If they fail to reach a compromise, the company is subjected to winding-up proceedings.

In general, there are certain presumptions pertaining to any payment done by an insolvent company to be a fraudulent preference if such a transaction would be deemed a fraudulent preference under the insolvency laws in respect to an individual. Section 54 of the Myanmar Insolvency Act provides that any act done within a period of three months by an insolvent in a way to give preference to any creditor over others would be deemed fraudulent and void. This would mean that the three-month period is applicable for a company as well, and within such period any act done by the insolvent company or its officials that gives preference to one creditor over the other would be deemed fraudulent and void.

10. Enforcement of security rights

Securities such as English mortgages and certain simple mortgages can be enforced without a court's intervention. However, in the case of an equitable mortgage, a court proceeding is necessary to enforce the security. Similarly, a court's intervention is required to enforce all security over movable assets, other than a pledge. Also, where movables form part of a mortgage that can be enforced without a court's intervention, they would also be allowed to be enforced without court intervention.

However, enforcement actions in Myanmar are invariably subjected to judicial proceedings, as the borrower tries to create difficulties by obtaining injunctions, etc.

11. Priority of secured creditors in the event of insolvency

Myanmar law provides that secured creditors have priority over unsecured creditors. Furthermore, the hierarchy of payments is specified in the case of the winding-up of a company (whether insolvent or not). Tax payments due to the central government or local authorities, all wages or salaries of employees up to 100 rupees due in the last two months, all wages of laborers up to 500 rupees due in the last two months, compensation payable under the Workmen's Compensation Act, 1923, dues pertaining to any employee for a provident fund, pension fund, gratuity etc, shall have priority over any payments made to the creditors of the company.

12. Choice of governing law

Parties generally have the freedom to choose governing law, but given that the enforcement may be subject to a Myanmar court, most choose Myanmar law.

13. Existence of a trust or equivalent concept

The use of private trusts is possible in foreign lending in Myanmar. The basic reason is that foreigners cannot hold title over immovable property in Myanmar, and therefore, security trustees are hired to protect and enforce the security in any offshore lending where immovable property is part of the security package. Specifically, Myanmar has the Trust Act, which governs the rights and obligations of a trustee and the functioning of a trust. Further, the newly enacted Financial Institution Law of 2016 specifically provides for Myanmar banks to undertake the trustee business.

14. Exchange control on remittances

As per Notification 7/2014, there are two kinds of account payments permitted for transfers of money from Myanmar to overseas:

1. Current account payments: These include payments for short-term bank loans, trade, services, money transfers for family expenses, etc.
2. Capital account payments: All payments that are not current account payments are deemed to be capital account payments.

Payments of the principal amount and interest would fall within the meaning of capital account payments, and payments of fees and expenses would fall within the meaning of current account payments.

15. Withholding tax ("WHT")

Payments of interest on loans to non-residents are subject to 15% WHT. Such rate may be reduced to 10% under an applicable double taxation agreement (for example, 8% to 10% for a Singaporean entity). The WHT liability in respect of the abovementioned payments will apply to payments made by corporate entities and branch operations registered in Myanmar. The liability for the WHT rests with the remitter. WHT is a final tax for non-resident recipients who do not file tax returns in Myanmar.

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- Legal 500

A CRITICAL FIRST LOOK AT MYANMAR'S NEW ARBITRATION LAW

Myanmar has early this year enacted an entirely new Arbitration Law 2016 (Law 5/2016 – the Arbitration Law) to replace the Arbitration Act 1944, thus implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the NYC"). Although the Arbitration Law by and large follows the Uncitral Model Arbitration Law ("Uncitral Model Law"), which reflects worldwide consensus on key aspects of international arbitration practice and procedure, it would be surprising if there were no special Myanmar points of attention. So, in this note we line up the strengths and weak spots of the new Arbitration Law, and we examine just how far Myanmar courts can still interfere with foreign arbitration.

What changes with the New Arbitration Law?

Myanmar has now ratified the NYC without reservation. In a nutshell, for foreign arbitration, this means that:

- Parties can agree on arbitration for their commercial disputes and choose the seat of that arbitration to be overseas;
- If so, Myanmar courts must refer to such arbitration proceeding instead of hearing the case when any of the parties applies to the court;
- Myanmar courts must recognise and enforce a foreign arbitral award, unless one of the limited grounds for refusal in Article V of the New York Convention can be established (more on this below)…
- All other signatory countries of the NYC are under the same obligation to enforce, so you could take your award to any of nearly 160 states for enforcement.

The Arbitration Law implements these principles with clarity. The legal basis for settling disputes through foreign arbitration in Myanmar is finally there, and its, as far as we can tell right now, pretty much solid as in most NYC countries.

To which extent can Myanmar courts intervene in foreign arbitration?

The Arbitration Law is not only about foreign arbitration, but also about arbitrations with seat in Myanmar. Key provision s. 2 b) Arbitration Law determines which provisions of the law apply to arbitration with a seat outside of Myanmar.

The same combination of domestic and foreign arbitration in one law is not uncommon internationally. But in such case one needs a clear determination which provisions apply to which type of arbitration. If not, this will result in significant uncertainty, as was the case in Malaysia and India (see the various Bhatia International cases in India).

"The List: section 2 b) Arbitration Law's list of provisions of the Law which apply to foreign arbitrations:

- *s. 10 "Reference to arbitration and stay of a suit before a court"*
- *s. 11 "Power of the court to intervene in an arbitration proceeding"*
- *s. 30 "Court assisting in taking evidence"*
- *s. 31 "Court enforcement of the interim orders of the arbitral tribunal"*
- *chapter 10 "Recognition and enforcement of foreign arbitral awards*

S. 2 Arbitration Law does make it clear that The List applies to foreign awards. One of the fundamental rules which was in our view missed in that line up, is s. 7 Arbitration Law which is the equivalent of art. 5 Uncitral Model Law:

> *"Notwithstanding anything contained in any other law for time being in force, in matters governed by this Law, no court shall intervene except where so provided in this law".*

There is no doubt that this provision applies to arbitrations with seat in Myanmar. And there is a very good basis in an ordinary reading of the text to argue that s. 2 b) Arbitration Law should not be read in an exclusionary way, i.e. the provisions on the List are not the only ones which apply to foreign arbitration. After all, would not s. 3 "Definitions" (including the definition of international arbitration) and the general principles of Chapter 3 apply anyway? But if that is true, we have the problem that all provisions of the Arbitration Law might potentially be applied to a foreign award, even those which we really want to reserve only for domestic arbitrations (such as a court challenge to an appointment of an arbitrator). That is not an attractive interpretation either.

So, either way there is uncertainty here which could have been avoided in the text. We really would have rather seen s. 7 Arbitration Law mentioned in s. 2 b) Arbitration Law. It would have made the case against interventionism (courts interfering with foreign arbitrations) stronger, and it would have brought the Arbitration Law better in line with Uncitral and the NYC.

Interim measures: by Myanmar courts or by the tribunal?

The Arbitration Law supports both (i) Myanmar courts enforcing interim measures issued by the tribunal, including in case of an arbitration with seat outside of Myanmar, and (ii) parties applying to Myanmar directly for such measures.

A party can apply to a Myanmar court for various measures in terms of taking evidence, safeguarding or even selling property, appointing a receiver and other interim measures (s. 11 Arbitration Law). However, the parties can generally contractually opt out of this power for the court (in s. 11 a) Arbitration Law, but apparently not "for urgent measures" referred to in s. 11 b) Arbitration Law. The Myanmar courts seem to keep an original jurisdiction for "urgent measures relating to the preservation of evidence and property" upon the application by a party, even in connection with foreign awards. Nevertheless, the Arbitration Law has made sure that courts do not intervene in the foreign arbitration too much, by limiting its power to urgent cases, and by subjecting the court order to subsequent orders by the tribunal on the same issue (in sections 11 c) through f) Arbitration Law).

Interim measures by a tribunal may but do not have to be recognized and enforced by a Myanmar court. The interim measure would have to be assimilated with a court order, and courts are limited by their own prescriptions in the Civil Procedure Code. The burden of proof is apparently on the applicant that the measure sought falls square within the authority of the court.

Can a foreign tribunal's decision on jurisdiction or temporary measures be challenged in a Myanmar court?

Typically, arbitration tribunals have the authority to decide themselves about their own jurisdiction. That is also the case under the Arbitration Law. The Uncitral Model Law provides in the possibility for a court to intervene immediately on that decision upon the request of a party. That would almost exclusively be the case in a court in the country where the arbitration takes place. However, s. 47 b) "Appeals" in Chapter 10 "Recognition and enforcement of foreign arbitral awards" states that a "competent court" may hear appeals against an order by an arbitration tribunal determining whether it has jurisdiction. The same is provided for an order by the tribunal to grant or refuse temporary measures. So, who is this "competent court"?

As art. V 1. E of the NYC and s. 46 b) 6) of the Arbitration Law provide, the competent authority to set aside or suspend a foreign award would be the one in the country where it was made. There is ample authority for this in international arbitration law as quoted in the White Industries Australia Limited v. The Republic of India case (Steel Corp. of the Philippines v. International Steel Services, Inc., U.S. District Court for the Western District of Pennsylvania, 6 Feb. 2008 (United States); Empresa Colombiana de Was Ferreas v. Drummond Ltd., Colombian State Council, 24 Oct. 2003 and 22 Apr. 2004 (Colombia); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, High Court of the Hong Kong Special Administrative Region, 27 Mar. 2003 (Hong Kong).

It seems clear to us that "competent court" would

have to be read as "competent court in of the country in which the award was made", which eliminates the possibility that a Myanmar court might provide a second forum for a party to challenge an interim award on jurisdiction. It is a pity that the text not simply say so, particularly given the definition in s. 3 g) Arbitration Law of "court" which only refers to Myanmar courts. One can imagine, given the ambivalent wording, that there will be parties at some stage in the future whom might want to test this issue before a Myanmar court.

What happens when a claim is lodged before a Myanmar court even though the contract provides in foreign arbitration?

Obviously, it is key to the functioning of the NYC that in such a case, the Myanmar court would not allow the court case to proceed, and would just refer to that arbitration mechanism. The Arbitration Law provides in the same key principle in s. 10, which applies to arbitrations with seat within and outside Myanmar. For this to happen, one of the parties must bring it up, though. The court cannot bring it up itself.

A Myanmar court wishing to continue the court case, would have to find that the arbitration agreement is null and void, or cannot be applied. Such a court decision would in any event be subject to appeal. The decision to stay the case is not subject to appeal. The Arbitration Law thus has a baked-in preference in favour of international arbitration.

Can two Myanmar-registered companies choose for arbitration overseas instead of arbitration with a seat in Myanmar?

According to the letter of the Arbitration Law, even two Myanmar nationals or resident parties can pretty much choose for international arbitration rather than an arbitration with a seat in Myanmar. By simply choosing an arbitral site outside of Myanmar, or by "expressly agreeing that the subject matter relates to more than one country", the arbitration becomes "international" by definition. As such, those powers of Myanmar courts which only apply to arbitration proceedings with a seat in Myanmar, are ruled out. For example, a party cannot apply to a Myanmar court in order to set aside an award, or to challenge an arbitrator.

Other laws may prevent Myanmar parties from agreeing to arbitration overseas, or any arbitration at all. At this time, the Myanmar Companies Act 1914 still provides that companies and persons may agree to arbitration under the (Myanmar) Arbitration Act, which until 2016 only provided in arbitration with seat in Myanmar. It was never clear if the reference was exclusive ("may" or "may only"), and an argument could be made that the freedom of choosing dispute settlement mechanisms in Foreign Investment Law 2012 has abrogated that provision as far as foreign investors are concerned. There can be little doubt now that companies and shareholders can use foreign or domestic arbitration.

Can two Myanmar-registered companies choose to have their contract governed by foreign law?

I would normally say "yes" to this question. There are very few Myanmar laws which prescribe the governing law of a contract between two parties, although there are of course contracts that are at least to some extent governed by Myanmar law, regardless what parties have agreed. The Arbitration Law brings a potentially high-impact new element to this discussion. In s. 32 Arbitration Law it is provided that in case the seat of arbitration is in Myanmar, and it is a domestic arbitration, "the arbitral tribunal shall decide on the dispute which is to be settled by arbitration in accordance with the substantive law in

force of the Republic of the Union of Myanmar".

It is important not to read this as if all disputes between Myanmar parties (which could include Myanmar-registered subsidiaries of foreign investors) have to be decided under Myanmar law. According to the Arbitration Law, one can perfectly have an international arbitration with a seat in Myanmar. A dispute between a foreign based party and a Myanmar based party, where parties have chosen for arbitration with seat in Myanmar, is an international arbitration with seat in Myanmar, for example. Those parties may perfectly choose for their contract to be subject to English law. That is just a plain reading application of s. 3 (i) (definition of international arbitration) and s. 32 Arbitration Law.

It becomes less comfortable when two Myanmar parties have a contract governed under English law, and (i) they chose the arbitral seat in Myanmar and (ii) none of the elements defining an international arbitration of s. 3 (i) apply. Because now, s. 32 says quite clearly that this is a domestic arbitration with seat in Myanmar, and it will have to be decided with Myanmar law as the substantive law. This issue is not dramatic. The same parties can simply opt for international arbitration with seat outside Myanmar to safeguard their application of foreign law to the contract. But if Myanmar wants to develop its own domestic arbitration industry in due course, the legislator might consider fixing this.

Can Myanmar courts refuse to recognize foreign awards? The formal grounds

Courts of any signatory country of the NYC can, if they really want to, invoke one or more of the grounds for refusal to block the enforcement of a foreign award. The rationale of the NYC is that Myanmar courts are obligated to enforce foreign awards, except in case of a limited list of grounds for refusal. That fundamental principle is also found in Myanmar's implementation of the NYC. The limited grounds are found in 46 b) and c) of the Arbitration Law, and these are essentially just translated from the Uncitral Model Law.

Rephrased, the formal grounds for refusing a foreign award are the following:

1. One or more of the parties to the arbitration agreement was incapable to conclude such agreement. This could be the case when the person agreeing to arbitration on behalf of a company did so without proper authority (see for example, s. 152 Myanmar Companies Act). Internationally we also often see issues when a party is a state-owned enterprise, but in Myanmar there are no general rules preventing a state-owned enterprise from agreeing to arbitration. This question would presumably have to be decided by a Myanmar court with reference to the choice-of-law rules of Myanmar law.

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2. The arbitration agreement is not valid. This is the most frequent ground for a challenge to arbitration. A party could argue there was no consent, for example pursuant to a misrepresentation or fraud. It is also common for parties to claim that the language of the arbitration agreement is not sufficiently clear and thus inoperative. It is important to note that under the Arbitration Law, in following of the Uncitral Model Law, the validity of the agreement must be tested under the law applicable to the agreement, or, subsidiary, under the law of the arbitral seat. So, the law to apply would rarely be Myanmar law.

3. Lack of due process: the party was not given proper notice of the various steps in the arbitration proceedings or was not able to present its case. Failing to show up as such, by intention, obviously does not suffice as long as one was given ample notice (Overseas Cosmos Inc v. Vessel Corp. 148 F.3d 51 (2d Cir. 1998). Some parties try to claim that they had insufficient time to present their case, but such claims are usually not successful (Carters Ltd v Fransesco Ferraro, YCA Vol. 4, pp. 275; Obergericht Basle, 3 June 1971, YCA vol. 4 1979, pp. 309).

4. The award deals with a dispute not contemplated by or not falling within the terms of the matters to be submitted to arbitration, or it contains decisions on matters beyond the scope of those submitted to arbitration. That means the tribunal has decided claims not considered by the parties or outside the arbitration agreement. For example, the award also decided on extra-contractual liability when parties only referred a question on contractual liability to the tribunal, or the award used English law where the arbitration agreement referred to Myanmar law. Another example would be a case where the award was made outside of the time limit set by the parties in the arbitration agreement.

5. The composition or proceedings of the tribunal are not in accordance with the arbitration agreement or with the law of the arbitral site. If the agreement called for an arbitrator with certain qualifications, e.g. an architect, a Myanmar court could refuse to enforce the award if this was ignored by the appointing authority. It is not difficult for the losing party to claim that some procedural rule was infringed, but internationally courts do not easily agree that some imperfection is a sufficient reason not to enforce an award. In Tongyuan v. Uni-Clan, the High Court of Justice decided that even though the agreement called for arbitration in Beijing, the proceedings which took place in Shenzen were found not to be a violation given that the respondent had not shown any interest to show up anyway (YCA, vol. 26 2001, pp. 886).

6. The award is not yet in force or has been set aside. Myanmar courts have the authority under the Arbitration Law to adjourn its decision on enforcement if an application has been made to a court in the arbitral site to set aside the award.

Which disputes cannot be settled by arbitration in Myanmar?

In addition to the formal grounds, there are two separate so-called ex-officio grounds which Myanmar courts can use to refuse enforcing a foreign award. The first one is that the subject matter is not capable of being settled through arbitration.

The Arbitration Law in following of the Uncitral Model Law, provides that if a Myanmar court finds that the subject matter of the dispute is not capable

of settlement by arbitration under Myanmar law, the award does not have to be enforced. Myanmar law reserves certain matters for dispute settlement by the judiciary or by administrative proceedings. Such reservations exist in a number of areas such as employment relations, competition, criminal cases and bankruptcy. When the law states or implies that arbitration cannot be used by the parties, the court is allowed not to enforce the award.

Myanmar's "public policy" exit

Signatories of the NYC do not have to enforce foreign awards if the court finds that doing so would be contrary to the "public policy" of the country. The Uncitral Model Law and the NYC provide in a potentially wide escape route for local enforcement through this exception. In the Arbitration Law, which follows the same idea very closely, we have translated the corresponding term as "public interest". Unlike in Malaysia (s. 37 par 2 Arbitration Act 2005), New Zealand (s. 34 First Schedule New Zealand Arbitration Act 1996) and Singapore (s. 24 Singapore International Arbitration Act 1994), the drafters of the Arbitration Law did not take the opportunity to provide some additional guidance as to what is included in "public policy/interest". That being said, it is well recognized that the concept is not defined in any exhaustive manner in those countries either.

The Myanmar term used ("Amyo Thar Akyo Si Pwar") is not much used in connection with laws or rules, and more with society's benefit and morality. This raises the question if "public interest" in Myanmar means something different from "Myanmar law". Interestingly, the distinction between rules of law developed by courts in the public interest and the meaning of public policy has been drawn before by the New Zealand Court of Appeal (Amaltal Corporation v. Maruha (NZ) Corp Ltd [2004] NZCA 17). In other jurisdictions, a violation of "public policy" has, among other notions, been equated with a violation of substantive law (Oil and Natural Gas Corp Ltd v, Saw Pipes Ltd 2003 (5) SCC 705).

It is noteworthy that as far as the recognition and enforcement of foreign judgments is concerned, Myanmar's Civil Code of Procedure has an exception for violation of "natural justice", not "public interest" or "public policy". The statutes we referred to above from Malaysia, New Zealand and Singapore also provide that a breach of natural justice is comprised within the concept of public policy.

Internationally, the "public policy" issue has the potential of being used by national courts to escape having to enforce foreign awards. The better view is that "the exception is only applicable when enforcement would violate the forum state's most basic notions of morality and justice" (US District Court of Pennsylvania CBS and others v. Wak Orient Power & Light Ltd, Decision of 12 April 2001, No. 99-2996).

Some countries have a reputation of being more likely to obstruct foreign awards based on "public policy" than others. How will Myanmar courts interpret and apply these grounds? Unfortunately, there is no way of knowing for sure until we have a body of test cases decided before the Myanmar courts.

"...very good commercial understanding of Myanmar."
- Chambers and Partners

The Supreme Court could lend a helping hand before it gets to that stage, though. Under s. 57 Arbitration Law, the Supreme Court is permitted to issue guidance to the courts under its authority. It would be very much appreciated if the Supreme Court could use this power to restrict the judiciary's freedom of interpretation of "public interest" in advance to appropriate extreme and rare situations.

What does this mean for the Myanmar situation?

A number of the above grounds for refusal, such as the validity of the arbitration agreement and the legality of the arbitral proceedings, require a Myanmar court to make an assessment under foreign law when a party brings up the issue. That may be difficult for Myanmar courts to assess. For example, for an award about a sales agreement under New York law, the losing party might claim before a Myanmar court that the arbitration agreement was not even valid under New York law. The Myanmar court would then have to decide on such question. Normally the Tribunal, possibly with seat in the US, would have looked into such an argument earlier. Obviously the Tribunal with seat in the US or with US arbitrators would be much better placed to decide on such a US law question. It is hard to see what can be gained from letting a Myanmar court revisit this issue. But, this is the NYC system. Whether it makes sense or not, Myanmar's implementation is in line with the Uncitral Model Law.

Similarly, the losing party to a Singapore award might claim that some procedural error was made under Singapore law. Again, the Myanmar court would have to come to a finding on this.

More pressingly, what does "public interest" mean? This is a new term, and I can imagine some parties holding their breath the first time a district court or a high court will define the notion. Is this going to be given a wide application or a restrictive one? Luckily, given the jurisdiction thresholds I presume we will mostly have to deal with High Courts when it comes to international arbitration (District Courts decide cases from 10,000,000 MMK up to 500,000,000 MMK, High Courts get involved from 500,000,000 MMK). Since the term is not defined, one can almost guarantee an appeal to the Supreme Court the first time a High Court gives meaning to the term.

Is there anything you can do if a Myanmar court refuses to enforce your foreign award?

The decision by a Myanmar court not to enforce a foreign award can be appealed to its appellate court. Assuming the first court was the High Court, the aggrieved party can lodge an appeal with the Supreme Court, in the hope of a different outcome.

Even if the Myanmar courts negate a foreign award improperly there are recourses for the injured party, as became clear in an interesting ICSID case involving nearby Bangladesh (Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07). In this case Italian company Saipem commenced arbitration proceedings against government-owned Petrobangla in connection with a construction contract in the oil and gas sphere. This contract had an arbitration clause, with seat in Bangladesh. During the arbitration, Petrobangla requested several procedural measures about witness statements, which were denied by the arbitration tribunal. Petrobangla then applied to the local courts against those orders, and obtained a decree from the local court that the Tribunal's authority to conduct the arbitration is revoked. Nevertheless, the Tribunal continued proceedings, and finally made an award in favour of Saipem. The Supreme Court of Bangladesh later decreed that the award was null and void, and cannot be enforced.
Saipem then commenced an investment treaty arbitration case before ICSID on the basis of the Bangladeshi-Italian bilateral investment treaty. Saipem's main argument was that through the illegal actions of its courts, Bangladesh has expropriated Saipem's property (a contract claim) in Bangladesh. The ICSID Tribunal agreed with Saipem and ordered Bangladesh to pay the compensation of the arbitration award plus interests.

A somewhat similar case developed in connection with India. In the Uncitral arbitration White Industries Australia Limited v. The Republic of India of 30 November 2011, White Industries had prevailed in an international arbitration over Coal India, a state-owned enterprise. However, the Calcutta High Court set aside the award. An appeal by White Industries before the Supreme Court has been pending since 2004. The international tribunal found that India had violated the India-Australia Bilateral Investment Treaty's Most Favoured Nation provision.

In the end, it remains to be seen how the Myanmar courts will interpret this ground of refusal.

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UPDATE ON USE OF FOREIGN CURRENCY IN MYANMAR

On 28 May 2015, the Foreign Exchange Department of the Central Bank of Myanmar (CBM) circulated a letter indicating that private parties and government agencies should no longer use foreign currency for transactions within Myanmar (Letter 904/2015 dated 28 May 2015) ("Letter 904"). Letter 904 has very recently been followed up with a seemingly much more drastic step whereby the CBM apparently cancels the "Foreign Exchange Acceptor and Holder License" ("FEAH License") of seemingly the entire private sector, from hotels and restaurants to telecoms and supermarkets (Letter No. FE-10/365, dated 13 October 2015) ("Letter 10/365").

The move has caused consternation and uncertainty as companies are suddenly unsure if they can still collect and pay in US$, and what they are supposed to do with their current holdings of foreign currency.

What is the CBM trying to achieve and how?

The CBM is trying to eliminate the unnecessary demand for foreign currency in Myanmar. The MMK is obviously under some pressure against the US$, and the CBM hopes that when at least parties within Myanmar stop using US$ and turn to MMK, this will help. The CBM has repeatedly voiced its concern that the artificial demand for foreign currency in the country might in the view of the CBM lead to further currency destabilization.

There is actually little criticism of the CBM's purpose of reducing unnecessary dollarization within Myanmar. After all, virtually all Asian economies restrict the use of foreign currency within their borders in favour of their own national currency. Surely one did not expect that Myanmar would remain or become nearly the only country in Asia where domestic business invoice and pay each other as if there was no national currency.

But it's how the CBM goes about achieving this fairly unsurprising aim which raises eyebrows. As mentioned, in May 2015 the CBM issued the cryptic Letter 904. Letter 904 was addressed to Government departments. You can indeed see the original idea that the various Ministries would have to take additional action within their jurisdiction (e.g. Ministry of Hotels and Tourism for hotels, etc.. Although Letter 904 indeed announces restrictions in use of foreign currency in domestic transactions, its short and vague language can be interpreted in various ways.

It seems that the CBM, after nearly 6 months without any noticeable action by other Ministries, has felt the need to take an additional step itself. This has taken the form of the revocation of the FEAH Licenses.

What is this "Foreign Exchange Acceptor and Holder Licence" which has been cancelled?

The FEAH License is one of three main types of foreign exchange licenses which are issued by the CBM itself. In fact, it is the only type of license the CBM issued to general enterprises, i.e. companies who are not banks nor money changers. The other most common license types are the Authorized Dealer Licence, which have been issued to a number of the banks only, and the widespread Money Changer Licences.

The history of the FEAH License started under the Foreign Exchange Regulation Act of 1947 (FERA 1947). Under FERA 1947, specific permission from the authorities was necessary for any use of foreign currency, except for Authorized Dealers. Such permission has been granted going back to 1993. More than 1,500 businesses and organizations who received foreign currency as part of their business, such as travel and tours companies, hotels, gems and jewellery business, restaurants and souvenir shops.

What most people lose sight of, is that the FEAH License is specifically a license to receive foreign currency bank notes. So, actual physical cash. This may not be so clear from the in the meantime forgotten regulation, but it is still quite clear from the text of the FEAH License itself. A FEAH Licensee is allowed to receive and hold foreign bank notes up to a maximum ceiling, and all excess must immediately be placed on a specifically dedicated foreign currency bank account in the name of the Licensee. Below the ceiling, the Licensee can keep the physical notes.

Why all of this does not matter (much)

The FEAH Licenses are connected with the pre-2012 Myanmar forex regulatory system. In the meantime, the new and FEMA 2012 was issued, significantly altering the rights of Myanmar residents to hold foreign bank notes (up to 10,000 US$ worth, presently), and the right to open foreign currency bank accounts with Authorized Dealers (the selected banks). Pretty much all foreign owned and locally owned businesses may since FEMA 2012 open and operate a foreign currency bank account, as long as the bank account is with a therefore licensed bank.

So, basically, the same FEAH Licenses lost a lot of their relevance from 2012 onwards. That is to say, as from 2012 onwards any person can open a foreign currency bank account, the need for the FEAH License is much reduced. But not eliminated. The cash (actual physical bank notes) limit with a FEAH License is much higher (often US$50,000 or more instead of the general US$10,000). So, if you're in need of keeping larger amounts of cash around, as many local businesses like to do, you still needed and wanted an FEAH License. Perhaps that is why the CBM has kept the FEAH Licensing system in place even while FERA 1947 was replaced by the FEMA 2012.

Anyway, the cancelling of the FEAH Licenses, which are entirely cash-oriented, fits the CBM's plan to reduce demand for cash notes. Letter 10/365 states as much: "This measure is aimed at reducing the making of payments in cash […]".

Who is really affected?

Obviously, the FEAH Licensees just lost their license and they are after 30 November 2015 no longer allowed to do what the license permitted. That is, they can't take cash notes and hold the cash notes up to a ceiling, for instance US$50,000, without depositing that cash in a bank account. The language of Letter 10/365 provides an unnecessary list of groups of licensees, but actually the list refers "to all others" as well.

List of sectors mentioned in letter 10/365

1. Hotels and tourism companies;
2. Restaurants;
3. Duty free shops;
4. Airlines;
5. Hospitals;
6. Freight forwarders;
7. Telecommunications companies;
8. Others (e.g. soft drinks and beverages, courier service, pest control, media, apartment and Myanmar Economic Holdings Limited)
9. Others (e.g. lacquerware, silk, souvenir, supermarket, golf club and funeral service)

If you had an FEAH License and you need to continue to use the cash notes transactions for your business, you may be seriously affected. Businesses who have many customers who pay in foreign cash notes and who have trouble moving to bank remittances or credit cards can be affected. We can imagine there may be many such businesses, but mostly outside of the mainstream of foreign direct investment. In any case, those customers may still exchange their cash notes with licensed money changers and pay with the so obtained MMK.

Are foreign invested companies losing their right to receive and collect foreign currency?

Some foreign owned Myanmar registered companies have an FEAH License, which they are now losing.

"Edwin is very responsive to our requirements and has deep knowledge of the subject matter. We are very confident in his advice."
- IFLR1000

They are affected just as any other FEAH Licensee. But there is no reason to panic. Most foreign owned companies don't have or need a FEAH License. Under the FEMA 2012, anyone can open a foreign currency bank account with an Authorized Dealer (that is, the selected banks who have an Authorized Dealer License). Anyone who legally (remember this word) receives foreign currency remittances in Myanmar may do so using their foreign currency bank account with the same institution. What is more, the Foreign Investment Law 2012 and the Foreign Investment Rules provide in various rights for foreign investors provides in specific additional rights for those with a permit from the Myanmar Investment Commission.

The real problem

So, the problem is not that this FEAH License is gone. The problem is that it remains unclear in which cases it is legally allowed for businesses operating within Myanmar to use foreign currency, and when they must use MMK. We are back at the core question. We know since Letter 904 that the CBM does not want foreign currency used in domestic transactions. Letter 10/365 underlines that once more.

But Letter 904 nor Letter 10/365 indicate how this is supposed to be achieved. As we noted in our previous commentary, the normative content of Letter 904 is just not there. Letter 904 speaks of asking the Ministries to take the necessary steps. In the words of Letter 10/365: "We have circulated [Letter 904] to relevant ministries and region and state governments requesting the same to re-direct the organizations under the union ministries and region and state governments and related government and private enterprises and organizations to use MMK only in quoting prices or billing or collecting payments for the sale of goods and the provision of services". Letter 904 nor Letter 10/365 give us any information on what must be done, at least not in our view. Whatever these measures might be, obviously the private sector cannot implement them as there are none at this time.

To put it another way, the problem is not that companies suddenly have no way to receive and hold foreign currency. As was explained above, in all likelihood you are already allowed to open and use a foreign bank account, generally speaking. Once it is clear a business can indeed receive US$ remittances, there is no issue keeping that currency in its foreign currency bank account. The problem is that there are basically at this time no clear rules setting out when Myanmar residents may uberhaupt use foreign currency when dealing with each other, and when they may not.

Why can't we just apply Letter 904 and start using MMK from now on?

First of all, because Letter 904 does not actually create a legal obligation for private enterprises to do so. Changing the currency and thus the price to a contract in force is very controversial between the contract parties. There is always a winner and a loser. The loser will resist the change. So, you must have a clear legal basis to oblige everyone to play along. Letter 904 does not provide this. Neither does Letter 10/365, by the way, as it just cancels the FEAH License.

Secondly, too many questions remain unanswered. You can't implement a massive game change in a country's financial policy based on a letter with two paragraphs. The following are just a few of the crucial questions that need to be addressed before businesses can phase in a foreign currency restriction:

1. Are existing contracts grand-fathered in until they expire? Without clarity on this, there is just no way how the losing party to a conversion would go along.
2. As from which date would that conversion have to be done? This measure is not implementable without a cut-off date.
3. In which cases does it remain allowed to use foreign currency on transactions with a foreign (as in non-resident) counterpart? Letter 904 or Letter 10/365 do not elaborate.
4. We need a definition of "goods and services sold in Myanmar".
5. Aren't the rights of foreign investors in terms of foreign currency under the Foreign Investment Law 2012 pretty much immune anyway? There must be clarity on this, and if there isn't parties will not implement a change based on this argument.
6. Who will assume any exchange losses of a conversion? Is this to be left to the parties? What if the Government suffers the loss?
7. Do the parties have the right to agree to a MMK price which is tied to an exchange rate, thereby in effect circumventing the risk of currency fluctuation? There is no explicit guidance on this, so parties might instead of actually converting restructure their contract on this basis.
8. Is use of US$ in salaries of expatriate workers allowed, as it is in many countries? Are all salaries allowed to be agreed in US$? Contrary to statements in the press, Letter 904 does not mention any exception for salaries, so it needs to be clarified.
9. Letter 904 mentions only goods and services. How about licenses, insurance, rental, loans, lease, capital payments, subsidies, gifts, damages, claims, cost sharing, reimbursements, incentives, pensions, subscriptions, etc.?
10. There will be the need for exceptions and exemptions. All countries have them, and they have them for a reason.

How do we fix this?

Obviously, that is a matter for the Government to decide. The current chosen path seems to be to leave more detailed measures to the Line Ministries. There is a concern that this may result in a patchwork of different rules and stopgaps, and not in a uniform policy which the private sector can understand clearly.

From our vantage point, there is a great need for clarity in the Myanmar regulatory framework of foreign exchange. We are therefore more a proponent of a comprehensive and detailed regulation providing a clear set of rules for businesses and banks to follow. Both the banks and the other licensees, residents and non-residents, as well as officials of the regulator itself should be able to readily find and understand their rights and obligations for any type of payment, in any type of situation.

Foreign exchange is an area with still a lot of misunderstandings and lack of reliable information. Instead of having to bother the well-meaning and hard-working CBM officials over and over again, there is a real need for one, comprehensive, all-encompassing regulation where the public can find sufficient details to answer their many questions.

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