



Finance & Loan Security Rights in Real Estate in the COVID-19 Era

10 Key Questions & Answers – Focus on Myanmar

OCTOBER 2020



NO.	QUESTIONS	GOVERNMENT RESPONSES
1.	<p>In light of COVID-19, are there any new government schemes covering forbearance of bank debt in Myanmar?</p>	<p>The Myanmar government released the COVID-19 Economic Relief Plan (“CERP”) on 27 April 2020 to mitigate risks related to the COVID-19 global pandemic and associated economic slowdown.</p> <p>While there is no direct action point on the forbearance of bank debt in Myanmar, the CERP has allowed for flexible provisioning norms to banks regarding capital requirements, large exposure and non-performing loans (“NPLs”) for up to 3 years. To ease the potential impact of NPLs on banks, an Asset Management Company is also expected to be established (as soon as practicable) through which potential NPLs held by banks could be set aside for 5-7 years allowing banks some breathing space and to contribute towards overall credit growth and stability.</p>
2.	<p>Can security over real property (i.e. mortgages, charges etc.) be granted to a foreign lender in Myanmar?</p>	<p>Yes, security in the form of, <i>inter alia</i>, mortgages or charges over real property can be granted to a foreign lender in Myanmar.</p> <p>There is a general concept/restriction under the Transfer of Immovable Property Restriction Act 1987 (“TIPRA”) which restricts foreigners (foreign-owned companies) from owning or acquiring property by way of any purchase, gift, pawn, exchange or <u>transfer</u>. Mortgages or charges under Myanmar law are considered to be transfers. However, upon the enforcement of the Myanmar Companies Law (“MCL”) in 2018, the proviso to section 228 states that the grant of a mortgage or charge, or the exercise of rights by or on behalf of the mortgagee or chargee under such a mortgage or charge to realize the value of any property secured by the mortgage or charge shall not be in breach of the TIPRA. Section 229 of the MCL further states that all mortgages and charges would be rendered void if not registered with the Directorate of Investment and Company Administration (“DICA”).</p>



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2.		<p>Before the enforcement of the MCL, to mitigate the TIPRA restrictions, foreign lenders used to appoint a local bank as the onshore security trustee (“OST”), and the security used to be created in the name of the OST on behalf of the foreign lender. However, even this concept was not tested in a Myanmar court. This was the most viable means of mitigating the restrictions considering that the Central Bank of Myanmar (“CBM”) approved the offshore loans where the submitted documents attested to the structure of the security along with the OST arrangement.</p> <p>There is another restriction under the TIPRA which does not permit leases of immovable property to foreigners for more than 1 year. However, as an exception, a Myanmar Investment Commission (“MIC”) approved company can obtain land rights authorization whereby they can lease land for 50 years with two 10 year extensions. Therefore, for projects which are owned by foreign investors, the Myanmar Investment Law (“MIL”) itself gives the right to create a mortgage or charge over land rights authorization in favor of foreign lenders. Further, pursuant to the MCL, a mortgage or charge over the long term lease can be granted to a foreign lender. Thus, upon reading of the MIL, along with the compliance requirements under the MCL, security over real property (in the form of a mortgage or charge over the leasehold right) can be granted to foreigners for projects owned by foreign investors. For Myanmar-owned projects where the Myanmar investor also has title over the land, the security such as a mortgage or a charge is granted over the project land itself.</p> <p>Further, for investments within the Special Economic Zone (“SEZ”), the investor (be it a citizen, foreign-national or a joint-venture), obtains land use/lease rights from the <i>Management Committee</i> of the SEZ for 50 years with an option to extend by another 25 years. Section 80 (f) of the SEZ Law also gives a right to the investors within SEZs to create a mortgage or charge over the land use/lease rights in favor of foreign lenders with approval from the Management Committee. Therefore, security over the land use or leasehold rights can be granted by the SEZ investor in favor of the foreign lender with approval from the Management Committee.</p> <p>Also, there is no restriction on obtaining offshore loans. Rather, the Foreign Exchange Management Law (“FEML”) facilitates the obtaining of offshore loans with the approval of the CBM. While previously, as a general practice, an OST was being appointed for enforcement purposes, the MCL does not make it necessary to appoint an OST for the creation of a security.</p> <p>However, as a practice, the previous workaround for TIPRA restrictions by the appointment of an OST is still being followed.</p>



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3.	Can second ranking security be taken against real property?	<p>Yes, subject to the terms of the previous deed of charge over the same real property, second-ranking security can be taken against real property. If the previous deed of charge mentions the provision of exclusivity, a second-ranking charge over such real property will not be permitted unless specific consent by way of a waiver is procured.</p> <p>Under section 198 of the Insolvency Law 2020, second-ranking debts will be repaid upon the repayment of the first-ranking debts.</p>
4.	Can security granted to a foreign lender (of any rank) be perfected by registration in Myanmar?	<p>Yes, security granted to a foreign lender can be perfected by registration in Myanmar.</p> <p>Pursuant to section 228 and 229 of the MCL, it is compulsory to register mortgages or charges (created over the assets of the company incorporated in Myanmar) with the Directorate of Investment and Company Administration (“DICA”).</p> <p>Further, pursuant to Section 16 of the Registration Law 2018, a document under which security over any immovable property is created, must also be registered with the Office of the Registration of Deeds (“ORD”).</p> <p>However, there are/were a few practical challenges with the registration of documents creating security over immovable property with the ORD. <i>Please see our response to Question 6.</i></p>



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5.	<p>Which is the authority/department in Myanmar which registers security interests over real property?</p> <p>What is the security registration process in Myanmar?</p>	<p>The ORD registers a document creating security over immovable property. Additionally, if the property is that of a company incorporated in Myanmar, then DICA will register such documents.</p> <p>The registration with the ORD is a manual process. A Myanmar language translation of the underlying document creating the security must be presented to the ORD for registration.</p> <p>The registration with DICA can be performed online. The company has to submit a duly filed Form H-1 via their online Myanmar Companies Online account to register the security.</p>
6.	<p>Are there any challenges or practical difficulties to secure registration over security interests granted to foreigners?</p>	<p>Pursuant to the TIPRA, there is a general restriction that restricts foreigners (foreign-owned companies) from owning or acquiring property by way of any purchase, gift, pawn, exchange or <i>transfer</i>. Mortgages or charges under Myanmar law are considered to be transfers. Therefore, the ORD had been refusing to register securities granted in favour of foreign lenders likely because it regarded such forms of security creation as a violation of the TIPRA. This resulted in perfection issues as the Registration Law 2018 (“RL”) as well as the erstwhile Registration Act 1908 required every security created over an immovable property to be registered to evidence rights or interests over the immovable property. The RL also states that under Section 48, without registration of compulsorily registrable documents (such as security documents) under the RL, the transfer of property will not be enforceable. <i>However, in 2019, DFDL was successful in advising and assisting a project which is believed to involve the first ORD registration of mortgages (over leasehold rights) in favor of foreign lenders. This has been a path-breaking event in the perfection of mortgages or charges since this is now believed to have become achievable.</i></p>



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7.	<p>Can a foreign lender transfer its security rights over real property to a third party? If so, can the transfer be effected without the borrower's consent?</p>	<p>Yes, a foreign lender can transfer its security rights over real property to a third party.</p> <p>If the debt along with its entailing security is transferred, subject to the terms of the contractual arrangement, the debt along with its entailing security can be transferred. However, CBM's approval will be necessary since the debt is being transferred. According to the FEML, offshore loans can be obtained only with the approval of the CBM. Since the CBM has already approved such an offshore loan in the name of a particular lender, before the transfer of this debt to a third party lender, CBM's approval must be obtained.</p> <p>The transfer of the debt and the entailing security is subject to the contract. The borrower's consent may be necessary depending on the contractual arrangement.</p> <p>Further, If there are certain additional conditions, such as the underlying property/land required an approval requirement from the landlord for creation of a mortgage or a charge in the name of a particular lender, an approval would again need to be sought when there is a change to the mortgagee or chargee. If such a security had been registered at the ORD, the details at the ORD would also need to be amended in favour of the new lender. The online registration with the DICA would also need to be registered in the name of the new lender/security holder.</p>



NO.	QUESTIONS	GOVERNMENT RESPONSES
8.	<p>Can a foreign lender take ownership of real property in the event of a foreclosure?</p>	<p>As a general concept, foreign lenders cannot hold title to the land pursuant to restrictions under the TIPRA, restricting foreigners (including foreign-owned companies) to own title over any immovable property in Myanmar.</p> <p>For projects which are owned by Myanmar companies having ownership over land, a foreign lender will not be allowed to take ownership of the land because of the general TIPRA restrictions. The secured land would have to be sold to a Myanmar party that can own such land and the foreign lender would only be entitled to the proceeds of such sale. However, there is also room for foreign lenders to own the project on a build-operate-transfer basis without title over the land. In such cases, the foreign lender would need to lease the land from the Myanmar company, and then obtain the MIC’s approval (for the transfer/project) including the land rights authorization over the land which will confer the foreign lender with leasehold rights over the land for 50 years with two 10 year extensions. For projects which are owned by foreign investors who only have a leasehold right over the property (and not the title over the land), a foreign lender has the right to enforce its mortgage/charge over the leasehold rights. In such a case, the foreign lender has the option of enforcing the security and obtaining the proceeds. Alternatively, the foreign lender can take ownership of such a project for the maximum duration of the investment period approved by the MIC for the project along with the land rights authorization. However, if the foreign lender decides to take ownership of the project, the MIC’s approval will need to be obtained for the transfer of the project to the foreign lender. Approval from the respective landlords also must be obtained provided that such an approval requirement to change the lessee is mentioned in the lease agreements.</p> <p>Even for projects in the SEZ, the investors have only the land use/lease rights and not title over the land. Foreign lenders have the right to enforce their mortgages/charges over the land use/ leasehold rights. In such a case, the foreign lender has the option of enforcing the security and obtaining the proceeds. Alternatively, the foreign lender can take ownership of the project in the SEZ (without title to the land) with the approval of the <i>Central Body</i> of the SEZ for the transfer of the project (along with the land use/lease rights) to the foreign lender.</p>



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9.	<p>Can a foreign lender take a security over rental income of a borrower or convert debt into equity?</p>	<p>Yes, a foreign lender can take security over the rental income of a borrower by way of a hypothecation or floating charge, or an assignment by way of a charge. Hypothecation or floating charges would have to be enforced by the courts and thus be a more time-consuming process.</p> <p>An assignment by way of a charge does not need to be enforced by a court. However, to enforce the assignment against third party lessees of the borrower, a notice of assignment will need to be issued to the lessee. Otherwise, the lessee cannot be compelled to directly pay the foreign lender in the event of enforcement.</p> <p>Yes, a foreign lender can convert debt to equity, through a convertible loan agreement. However, the conversion would be subject to sector-specific thresholds (such as MIC approval for transfers) and other approval requirements/restrictions of the particular project.</p> <p>Firstly, the CBM’s approval will be required if the loan structure is being changed. In practice, when approval is sought from the CBM for the offshore loan, it is sought for based on the convertible loan. In such a case, separate approval may not be required though a notice to the CBM on satisfaction of the loan may be necessary. However, if that is not the case, and the convertible aspect is an afterthought, the CBM’s approval will be required.</p> <p>Secondly, there are certain projects where land is leased from the Myanmar government on the condition that there will be no change/alteration to the equity/shareholding. In such cases, specific approval from the Myanmar government would also be required to convert the debt into equity.</p> <p>Also, corporate compliance under the MCL to convert debt into equity will need to be adhered to. Registration of shares in the name of the foreign lender will need to be updated on the Myanmar Companies Online platform once the foreign lender receives equity.</p>



NO.	QUESTIONS	GOVERNMENT RESPONSES
10.	In light of COVID-19, are online registrations being accepted or are there any other interim or modified arrangements made by the registry?	No, there have not been any interim or modified arrangements made by the ORD for online registration while registration with DICA is conducted online.



Nishant Choudhary

Partner, Myanmar Deputy Managing Director & Myanmar Head
of Banking and Finance Practice Group
nishant.choudhary@dfd.com



Rohan Bishayee

Myanmar Legal Adviser
rohan.bishayee@dfd.com

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