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in 45 jurisdictions worldwide

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1 Collateral

What types of collateral are available?

In general, the types of collateral available for secured transactions are real estate, buildings, leasehold interests, concessions, as well as moveable property including receivables, shares, securities, bank accounts and proceeds from investments. However, under the Transfer of Immoveable Property Restriction Law of 1987, mortgages of immoveable property are not available in connection with secured transactions if the lender is a foreigner, foreign company or foreign bank.

2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

The Myanmar Companies Act of 1913 (MC Act) includes, inter alia, provisions related to certain mortgages and charges to be void if not registered with the registrar of the Companies Registration Office (CRO), and accordingly, such mortgages and charges created on immoveable or moveable property of a company will be void against the liquidator and other creditors of the company unless the prescribed particulars of the mortgage or charge are registered with the CRO. In addition, mortgages on immoveable property also need to be registered under the Registration Act of 1908, which gives a list of documents which must be registered with the Office of the Registration of Deeds. Security interests in moveable property such as bank accounts and shares are made and created by way of a pledge or charge and are perfected by furnishing the secured party with control over such collateral. Creation of a security interest in favour of foreign lender requires approval from relevant government ministries and the Central Bank. The MC Act, the Myanmar Insolvency Act of 1920, the Yangon Insolvency Act of 1909, the Central Bank of Myanmar Law of 1990, the Rules Relating to Financial Institutions of Myanmar Law of 1990 and the Code of Civil Procedure of 1908 are the relevant laws that contain a number of sections dealing with priority of debts that need to be taken into account in connection with protection of secured assets from the general creditors of the borrower. Under the above-mentioned laws, certain payments have preference over payments to be made to creditors. For example, the government, local authorities, the Central Bank and state-owned financial institutions are given priority.

Security gives rise to stamp duty and registration. For example, the proper stamp duty for a mortgage deed is 5 per cent of the amount secured by mortgage deed, when possession of the property or any part of the property covered by such deed is given by the mortgagor or agreed to be given. There will be an additional 2 per cent stamp duty in the case of immoveable property in the Yangon City development area; and 2 per cent of the amount secured by

mortgage deed when possession is not given or agreed to be given. Registration fees for mortgage deeds are calculated according to the value of the right, title or interest affected. When the value exceeds 700 kyats but does not exceed 1,000 kyats the fee is charged at 10 kyats; for each additional 1,000 kyats or part thereof up to a total value of 50,000 kyats the fee is charged at 4 kyats; and when the value exceeds 50,000 kyats for each additional 1,000 kyats or part thereof, the fee is charged at 2 kyats.

There are various fees for stamp duty and registration depending on the type of security interest. Regarding fees for filing any document at the CRO the fee is 75 kyats.

There are no Myanmar reported cases or rulings that could be used as guidance dealing with the specific issue as to whether a corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party. In practice, one precedent has shown that a foreign corporate entity had been appointed as security agent on behalf of a foreign lender.

Under the Transfer of Property Act of 1882 (TP Act), in the absence of a contract to the contrary, the mortgagee has a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold. However, the TP Act mandates that this provision shall not be deemed to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to initiate a suit for foreclosure. Therefore, a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property is not authorised by the TP Act to initiate a suit for foreclosure.

Under the law of insolvency, the property of the insolvent divisible amongst his creditors will not comprise property held by the insolvent on trust for any other person, and thus, the collateral would be excluded from its estate held by the insolvent on trust.

3 Existing liens

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

Assuming existing mortgages or charges have been duly registered with the relevant government departments such as the CRO, Office of the Registration of Deeds, in theory, searches may be performed by a creditor at the relevant government departments. If a lien is in a particular type of immoveable property or moveable property, collateral is perfected only by control and not by way of a public filing, and the only possible way for a creditor to determine the absence of liens is via obtaining representations and warranties by the debtor or other relevant party to the agreement establishing such control.

4 Enforcement of collateral

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

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

In brief, the TP Act mandates that:

- a mortgagee shall have the power to sell the mortgaged property in default of payment of the mortgage money without the intervention of a court in the following cases:
 - where the mortgage is an English mortgage (an English mortgage is defined under the TP Act as “where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed”), and neither the mortgagor nor the mortgagee is a Hindu, Muslim or Buddhist or a member of any other race, sect, tribe or class from time-to-time specified in the *Gazette*;
 - where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and the mortgagee is the government; and
 - where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property was, on the date of the execution of the mortgage deed, situated within the towns of Yangon, Mawlamyaing, Patheingyi, Sittwe or in any other town or area which the government may, by notification in the *Gazette*, specify in this behalf; and
- no such power shall be exercised unless and until written notice requiring payment of the principal money has been served on the mortgagor, and default has been made in payment of the principal money or part thereof, for three months after such service, or some interest under the mortgage amounting at least to 500 kyats is in arrears and unpaid for three months after becoming due.

It should however be noted that, as mentioned in question 1, mortgages of immovable property are not available for a foreign project lender.

In addition to the above, the Myanmar Contract Act of 1872 (Contract Act) also recognises pledges of moveable property in which it is stated that if the pledgor is in default in payment of the debt or performance at the stipulated time of the promise in respect of which the goods were pledged, the pledgee may bring a suit against the pledgor upon the debt or promise, and retain the goods pledged as collateral security, or may sell the thing pledged on giving the pledgor reasonable notice of the sale. Therefore, in this situation, the pledgee may either sue for the debt retaining the pledge as collateral security or may sell the goods pledged having given reasonable notice.

Apart from the foregoing provisions of the TP Act and the Contract Act, a lender would need a court order and decree to enforce its security in connection with the sale of the mortgaged property. The rules and procedures to be strictly complied with by the parties in connection with institution of a suit are comprehensively provided in the Code of Civil Procedure of 1908 (CPC), which comprises a number of sections and orders and rules such as presenting a plaint, serving a summons, presenting a written statement, framing issues by the court, giving arguments, passing a judgment and decree, etc. There are also specific orders and rules in the CPC dealing with suits relating to mortgages of immovable property such as parties to suits,

and suits for foreclosure, sale, redemption, subrogation, interest and adjustment of account.

According to one Myanmar ruling, generally, the TP Act does not authorise the mortgagee exercising power of sale to purchase the property for himself at an auction sale, and therefore, the mortgagees (project lenders) may not participate as buyers in the sale. Moreover, according to one Myanmar ruling, if the purchaser at the auction is a foreigner, by virtue of the Transfer of Immoveable Property Restriction Law, he will not be entitled to a legal capacity to bid at the sale of immovable property. With regard to judicial sale, no rules are fixed relating to judgment currency. It is at the sole discretion of a Myanmar court to decide whether the judgment would order the payment in equivalent local currency or in a foreign currency. It is assumed, however, that the equivalent of such foreign currency would be decreed by the Myanmar court.

5 Bankruptcy proceeding

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Under the MC Act, any transfer, delivery of goods, payment, execution or other act relating to property which would be deemed a fraudulent preference is invalid. Also, any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Regarding preferential creditors' rights, as mentioned in question 2, under Myanmar law, certain payments have preference over payments to be made to the creditors, for example taxes, cesses, rates due to the government or to any local authorities, debts owed to the Central Bank and state-owned financial institutions, wages and salaries due to clerks and servants for services rendered to the company and wages of labourers or workmen.

According to the law of insolvency, corporations, associations or companies registered under Myanmar laws are exempted from insolvency proceedings.

The MC Act provides, inter alia, for the winding-up of a company by a court if the company is unable to pay its debts. A company is deemed to be unable to pay its debt if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding 500 kyats then due, has served on the company a demand requiring the company to pay the sum so due and such company has for three weeks thereafter neglected to pay said sum. An application to the court for winding-up of a company may be by petition presented either by the company or by any creditors or contributories or by all or any of those parties, together or separately, or by the registrar of the CRO.

Section 69 of the TP Act states that the mortgagee has power to sell the mortgaged property in default of payment of the mortgage money, without the intervention of the court, subject to the conditions that: the mortgage is an English mortgage; the power of sale without court intervention is explicitly conferred on the mortgagee by the deed of mortgage; and a written notice demanding payment has been served on the mortgagor and default has been made by the mortgagor in payment of the principal money for three months after such notice or interest unpaid for three months after becoming due. Therefore, in connection with an English mortgage, a receiver may be appointed by a mortgagee pursuant to section 69 of the TP Act. In this regard, any person who has been named in the deed of a mortgage and is willing to act as receiver may be appointed by the mortgagee. If no person is named or if the person named is unwilling to act, the mortgagee may appoint any person to whose appointment

the mortgagor agrees, or if there is no condition for appointing such receiver, the court may make such appointment upon an application by the mortgagee. It is important to note that the power to sell without court intervention is available only if the mortgaged property is situated in the towns of Yangon, Mawlamyaing, Patheingyi and Sittwe. Creating mortgages on and the taking of immoveable property by foreign lenders is not allowed under Myanmar law and it is thus not the same as security transactions done by local lenders and borrowers.

6 Foreign exchange

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

Foreign currency exchange is mainly governed by the Foreign Exchange Regulation Act of 1947 and its rules. As such, the use of foreign exchange and all loan agreements, including every remittance of repayment of principal or interest pursuant to loan agreements require prior approval of the foreign exchange controller, who is the governor of the Central Bank of Myanmar under the Ministry of Finance and Revenue (MFR). Moreover, approval from the Myanmar Investment Commission (MIC) is also required if the borrower is operating a business under the Union of Myanmar Foreign Investment Law of 1988 (MFIL) or under the Myanmar Citizens Investment Law of 1994. In light of the foregoing, foreign lenders and companies must obtain approval of the Central Bank/MFR through the Myanmar Foreign Trade Bank (MFTB) or the Myanmar Investment and Commercial Bank (MICB) in connection with borrowing foreign exchange from abroad, repayment of the principal and interest thereof, making any payment to any person abroad, opening accounts at a foreign bank abroad or remittance of profits. At the time of writing bank charges are €10.

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

Remittances of investment returns or any remittance of repayment of principal or interest in connection with loan agreements to parties in other jurisdictions may be made with the prior approval of the MIC or the Central Bank/Ministry of Finance and Revenue (MFR). Fifteen per cent withholding tax on interest payments made to overseas lenders must be deducted by the borrower in Myanmar. This withholding tax is a final tax under notification No. 41/2010 issued by the Ministry of Finance and Revenue dated 10 March 2010, which is effective from 1 April 2010.

8 Repatriation

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

Myanmar project companies are not required to repatriate foreign earnings.

9 Offshore and foreign currency accounts

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

Yes, project companies may establish and maintain foreign currency accounts in other jurisdictions and accounts locally with the approval of the MIC or the Central Bank/MFR.

10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

The state-owned Economic Enterprises Law of 1989 (SEE Law) specifies 12 economic activities that are allowed to be carried out only by the government such as exploration, extraction and sale of petroleum and natural gas and production of products of the same, postal and telecommunications services, air transport services, exploration and extraction of metals and export of the same, and electricity generating services. However, if it is in the interest of the state, the government may, on a case-by-case basis, by notification, specifically permit such restricted economic activities to be carried out through a joint venture with the government, or individually by any person or any economic organisation, subject to unspecified conditions. The minimum foreign capital requirement eligible under the MFIL is US\$500,000 for a manufacturing company and US\$300,000 for a services company. Depending on the economic activities to be carried out, as outlined above, approvals of the government and the MIC as well as relevant government ministries are necessary. Incorporation of a company or registration of a foreign branch must be done pursuant to the Special Company Act of 1950 (in the event of a joint venture with the government) or the MC Act. Regarding creditors, in the event of foreclosure on the project or related companies, creation of security interests in favour of a foreign lender requires approvals from the government, the MIC, relevant government ministries, the Central Bank/MFR.

11 Documentation formalities

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

According to the TP Act, if the principal money secured is 100 kyats or more, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. If the principal money secured is less than 100 kyats, a mortgage may be effected either by a registered instrument signed and attested as mentioned above, or (except in the case of a simple mortgage) by delivery of the property.

As mentioned in question 2, every mortgage or charge created on immoveable or moveable property by a company must be registered with the registrar of the CRO under the MC Act, and also, mortgages on immoveable property must be registered with the Office of the Registration of Deeds under the Registration Act.

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

12 Government approvals

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

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

13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

It is a requirement that all insurance coverage be with Myanmar Insurance under the MFR. If the foreign company wants to maintain insurance with a foreign insurance company abroad, it may do so only with the permission of Myanmar Insurance. This is generally accomplished, in practice, when the foreign investor has worldwide coverage, by an agreement between the worldwide carrier and Myanmar Insurance. Such policies may be payable to foreign secured creditors if the foreign loan transaction is approved by the government, the MIC or the Central Bank/MFR.

14 Foreign employee restrictions

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

The employment of foreign experts and technicians by a company carrying out business under the MFIL must obtain the approval of the MIC. Foreigners are not allowed to be directors of Myanmar companies wholly owned by Myanmar citizens. Currently, as a matter of policy, transfer of shares owned by a Myanmar citizen or company in a Myanmar company to a foreigner or foreign company is prohibited.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

The importation of project equipment may be made subject to the customs laws and on payment of customs duty. If incentives are granted under the MFIL are obtained, there may be exemption or relief from customs duties on machinery, equipment, instruments, machinery components, spare parts and materials used in the business required for use during the period of construction. Also, the requirements to be fulfilled prior to importation of project equipment include compulsory registrations and obtaining export or import licences, which are controlled and administered by the Directorate of Trade under the Ministry of Commerce.

16 Nationalisation and expropriation

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

The Myanmar laws relevant to nationalisation include the Agricultural Land Nationalisation Act of 1953, the Land Acquisition Act of 1894 and the Land Acquisition (Mines) Act of 1885. Most importantly, there is a provision in the MFIL expressly guaranteeing that an economic enterprise operating under the MIC permit shall not be nationalised during the term of the contract or during any extended term. Therefore, for example, a mining project operated by a foreign mining company formed under the MFIL and with a permit from the MIC is guaranteed not to be nationalised during the term of the contract or during any extended term.

17 Fiscal treatment of foreign investment

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign investors wishing to carry out business in accordance with the MFIL can obtain the following incentives:

- exemption from income tax for up to three consecutive years

- from the date of commencement of commercial operation;
- where profits of the business are maintained in a reserve fund and are subsequently reinvested within one year after the reserve fund is made, exemption or relief from income tax on these profits;
- the right to accelerate depreciation with respect to machinery, equipment, building or other capital assets used in the business, at the rate fixed by the MIC, to the extent of the original value for the purpose of income tax assessment;
- if the goods produced by any enterprise are exported, relief from income tax of up to 50 per cent on the profits accrued on the export;
- the right to pay income tax payable to the state on behalf of the foreign mining company's employees and the right to deduct such payments from the assessable income;
- the right to pay income tax on the income of the foreign employees at the rates applicable to citizens residing within the country;
- where there are expenses incurred in Myanmar with respect to research and development relating to the business of the foreign mining company, a foreign mining company is granted the right to deduct such expenses incurred from the assessable income;
- the right to carry forward and set off losses for up to three consecutive years from the year the loss is sustained;
- exemption or relief from customs duty or other internal taxes on machinery equipment, instruments, machinery components, spare parts and materials used in the business and those that are imported and required to be used during the construction period; and
- exemption from customs duty or other internal taxes on import of such raw materials and additional import of machinery, equipment and spare parts which are actually required for operation of the business for the first three years of commercial production following completion of the construction.

There is no other significant incentive or tax provided preferentially to foreign creditors. The taxes applicable to foreign investments are income tax imposed under the Income Tax Law of 1974 and relevant notifications relating to income tax as well as the commercial tax imposed under the Commercial Tax Law of 1990 and relevant notifications relating to commercial tax. Security documentation is also subject to stamp duty and registration fees.

18 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

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

- Ministry of Energy and its subordinate agencies, such as, Myanmar Oil and Gas Enterprise in the oil and gas sector;
- Ministry of Mines and its subordinate agencies and departments, namely, No. 1 Mining Enterprise, No. 2 Mining Enterprise and No. 3 Mining Enterprise, the Department of Geological Survey and Mineral Exploration, and the Department of Mines, in the mineral sector;
- Ministry of Electricity No.1 and its subordinate agencies, including the Hydroelectric Power Implementation Department in connection with hydroelectric power plants; and
- Ministry of Communications, Post and Telegraphs and its subordinate agencies, such as, Myanmar Post and Telecommunications in connection with telecommunications.

19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Myanmar is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards but is a signatory to the Geneva Convention. Myanmar enacted the Arbitration (Protocol and Convention) Act of 1937, which deals with a foreign arbitral awards and the Arbitration Act of 1944, which deals with domestic arbitration and arbitral awards made under arbitration agreements governed by Myanmar law.

The Arbitration (Protocol and Convention) Act of 1937 sets out, inter alia, provisions to be followed in enforcing foreign awards and establishes conditions for enforcement of foreign awards made on disputes relating to matters considered as commercial under Myanmar law. Under the Arbitration (Protocol and Convention) Act of 1937, any person interested in a foreign award may apply to a Myanmar court having jurisdiction over the subject matter of the award that the award be filed in court, and such application must be in writing and numbered and registered as a suit. A notice will then be given by the court to the parties to the arbitration other than the applicant requiring them to show causes why the award should not be filed. If the court is satisfied that the foreign award is enforceable under the Arbitration (Protocol and Convention) Act of 1937, it will order the award to be filed and proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree will then follow. The conditions for enforcement of a foreign award are that it must have:

- been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;
- been made in conformity with the law governing the arbitration procedure;
- become final in the country in which it was made;
- made in respect of a matter that may lawfully be referred to arbitration under Myanmar law; and
- the enforcement thereof must not be contrary to public policy or Myanmar laws.

A foreign award is not enforceable if the court dealing with the case is satisfied that:

- the award has been annulled in the country in which it was made;
- the party against whom it sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented;
- the award does not deal with all the questions referred to; or
- the award contains decisions on matters beyond the scope of the agreement for arbitration.

The party seeking to enforce a foreign award must produce the original award, or a copy thereof, duly authenticated in a manner required by the law of the country in which it was made, and evidence proving that the award has become final and such evidence to prove that the award is a foreign award and that the conditions, as mentioned above, for enforcement of foreign awards are satisfied.

The Arbitration (Protocol and Convention) Act of 1937 and the Arbitration Act of 1944 do not specifically provide that any particular class or type of disputes will be subject to automatic domestic arbitration except that, as mentioned above, to enforce a foreign award it must have been in respect of a matter that may lawfully be referred to arbitration under Myanmar law.

20 Applicable law

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

Joint venture agreements involving participation with government entities, sales contracts in connection with export or import transactions and applications and other project agreements concluded with government entities are governed by Myanmar law. However, foreign law, particularly the law of the lender country as the preferred law, may also be chosen as the governing law in loan agreements between the government and foreign entities.

21 Jurisdiction and waiver of immunity

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

The parties to a contract are not prohibited from submitting to the jurisdiction of foreign courts. However, under section 28 of the Contract Act, an agreement absolutely restricting a party from enforcing its rights under a contract by the usual proceedings in ordinary tribunals would be rendered void. A contract provision expressly excluding the courts from jurisdiction would, therefore, run the risk of rendering the contract void. There is a lack of precedent in Myanmar concerning how Myanmar courts deal with agreements containing choice a foreign law forum. Pursuant to section 13 of the CPC, a judgment of a foreign court is recognised in Myanmar except for the following cases where a foreign judgement is not conclusive:

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Myanmar in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where it has been obtained by fraud; and
- where it sustains a claim founded on a breach of any law in force in Myanmar.

Sovereign immunity can be expressly waived by state-owned economic enterprises or government entities by way of inclusion of such in a contract and the waiver of immunity clauses are effective and enforceable.

22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

In principle, title to natural resources in the ground is vested in the state. However, depending on the sector, project activities may be carried out and the rights thereto, including title to underground water as well as things growing on or living on land, may be enjoyed as permitted by law. For example, pursuant to the Myanmar Mines Law of 1994 and the Myanmar Mines Rules of 1996, rights to mineral resources by foreign or local investors may be acquired in the form of mining leases from the government. In this connection, the mineral production permit holder will have to strictly comply with the terms and legal provisions regarding the mining lease. As to mining leases for large scale mineral production, permits are granted for a maximum period of 25 years. Further extension for a period not exceeding five years at a time may also be granted by the Ministry of Mines with approval of the government. Various conditions will apply to the mining lease including the fact that the mining permit shall not be transferred by the permit holder without the permission of the Ministry of Mines or Department of Mines, and that the

prescribed dead rent and royalty must be paid to the government. A permit holder also has the exclusive right, in accordance with the conditions of the permit, to the minerals in the mining area.

23 Royalties on the extraction of natural resources

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

Royalty rates vary from sector to sector. Royalty payments in the mining sector are fixed by the Myanmar Mines Law, as mentioned below, while royalty payments in the oil and gas sector are made, in practice, by contractual obligations. Mineral production permit holders must pay royalties based on the value of the mineral sold at the time the sale takes place, under the Myanmar Mines Law and the Myanmar Mines Rules according to the rate specified by the Ministry of Mines in the conditions of the permit either in Myanmar currency or foreign currency, or both Myanmar and foreign currencies. It is the Ministry of Mines that decides on the currency in which the royalty is to be paid. With different minerals, the rates of royalty are different. There is no difference between royalties payable by domestic and foreign parties.

24 Export of natural resources

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

The export of certain natural resources requires approval of the relevant government ministries, for example, the export of timber requires approval from the Ministry of Forestry and Ministry of Commerce, export of minerals requires the approval of the Ministry of Mines and Ministry of Commerce, and an export or import licence must be obtained from the Ministry of Commerce. The export of natural resources will be subject to commercial tax at a rate of 8 per cent paid in foreign currency.

25 Environmental, health and safety laws

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

There are numerous laws, rules, regulations, orders and directives that cover various project sectors to be complied with. Depending on the project sector, there are various requirements under Myanmar law. For example, special project companies wishing to engage in oil and gas sector investment must comply with the directive of the MIC relating to environmental protection as well as environmental protection related laws and rules; companies conducting mining activities must meet the requirements in the Myanmar Mines Law and the Myanmar Mines Rules relating to working conditions, safety, health, environmental protection and other aspects; the requirements for the protection and preservation of cultural heritage must be observed under the Protection and Preservation of Cultural Heritage Law of 1998; approval from the Ministry of Forestry for commencing any project activities involving forest conservation will also be necessary under the Forest Law of 1992 and its Rules; and the provisions of labour-specific laws, including the Factories Act of 1951, relating to health and safety matters are required to be complied with. Also, project companies wishing to receive incentives under the MFIL will have to comply with the requirements of the MFIL.

26 Project companies

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

The business structures of project companies available under the MFIL are business organisations wholly owned by a foreign investor (this may be a sole proprietorship or a partnership or a limited

company), or a joint venture with a Myanmar individual, a private company, a cooperative society or a state-owned economic enterprise. If a joint venture is formed, the foreign capital to be brought in by the foreign investor must be a minimum of 35 per cent of the total capital. Project companies engaging in development, construction and hotels and the operation of such projects are commonly incorporated as private limited liability companies, approved by the MIC. Most commonly, financing in foreign currency from foreign lenders is the main source of financing available to project companies while domestic loans in local currency may be sought from government owned banks and private banks as permitted by Myanmar laws.

27 Public-private partnership legislation

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

There is partnership legislation in Myanmar enacted at state level namely the Partnership Act of 1932 which is in force across the whole country. According to the Partnership Act, the term 'business' includes every trade, occupation and profession, and 'partnership' is defined as the relationship between persons who have agreed to share the profits of a business carried on by all or any of them. As such, there may be partnerships in trade, occupations and professions.

Moreover, as mentioned in question 26, the business structures allowed to be formed in connection with foreign investment under the MFIL may be a sole proprietorship or a partnership or a limited company or a joint venture, although the projects relating to development, construction and hotels are commonly implemented in the form of private limited liability companies. The types of economic activities where foreign investment is allowed cover virtually all sectors, such as agriculture, livestock, fisheries, forestry, mining (no-metallic industrial minerals), industry, construction, transport, communication, trade and other economic activities to which the SEE Law applies in where permission of the government has been obtained. Business transactions relating to state projects are commonly carried out in the form of a joint venture.

28 PPP – limitations

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

According to the Procedures relating to the MFIL of 1988, if a business organisation is in the form of a partnership, the capital ratio and amount to be contributed by the partners, profit sharing ratio and rights and liabilities have to be described by the promoter or foreign investor in the proposal to be submitted to the MIC. In addition, a list of the names, citizenship, addresses and designations of the executives of the organisation, indicating the local and foreign capital ratio also need to be described and enclosed in such proposal.

The MFIL and its Procedures and the Partnership Act do not contain specific provisions requiring the partnership to be between the state and private participants. Most commonly, the joint venture is between a state entity and a foreign participant. It is at the sole discretion of the MIC whether the partnership may be allowed or not.

The Partnership Act, containing a number of sections, deals with the relations of partners to one another, relations of partners to third parties, incoming and outgoing partners, dissolution of a firm, registration of a firm and provides supplementary information. Under the Partnership Act, in brief, a partnership arises from contract and not from status. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, the real relationship between the parties, as shown by all relevant facts, will be taken into account.

Regarding rights and liabilities, a partner is liable to indemnify the firm for any loss caused to it by his fraud or his wilful neglect in the conduct of the business of the firm. The partners are not entitled to receive remuneration for taking part in the conduct of the business

and are entitled to an equal share of the profits earned, and must contribute equally to the losses sustained by the firm. There is also implied authority of a partner as an agent of the firm, binding them to the firm.

29 PPP – transactions

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

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

Update and trends

There are no central records of private infrastructure investment in Myanmar. According to the data of the Central Statistical Organisation under the Ministry of National Planning and Economic Development, foreign investment for 2008–2009 and 2009–2010 increased over that of foreign investment in 2007–2008. As such, it would seem that the financial crisis did not have a great impact on foreign investment in Myanmar, in part because foreign investment in Myanmar is low compared with other countries in the region. Foreign investment incentives allowed under the Foreign Investment Law are still available and have not been changed.

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