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MYANMAR INSIDER

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INSIDE INSIDER

Most Valuable Luxury Brands p.3

The judges have spoken: top market research and advertising agency specialist Millward Brown unveiled BrandZ Top 100 Most Valuable Global Brands 2013. Categories on the list include Technology, Fast Food, Telecoms, Tobacco, Credit Card, Retail, Cars, Global Banks, Luxury, Oil and Gas and Apparel, among others. The list is topped by technology giant Apple with an estimated brand value of US\$185 billion, closely followed by Google (US\$113.69 billion) and IBM (US\$112.5 billion).

Estate Management. Protecting your Real Estate Investment p.8

Peter Crowhurst is the Head of Real Estate Asset Management for Yoma Strategic Holdings Ltd and is based in Yangon. He has made a career in hospitality & real estate investment management for over 25 years.

Myanmar and Naga p.11

Nagaland chief minister Neiphiu Rio has met several Naga leaders and policymakers there in an effort to boost the economic development of the Naga inhabited areas during his official visit to Myanmar.



GOVERNMENT INSIDER

**A PRIVILEGED ONE ON ONE
WITH HIS EXCELLENCY** *Cover story, P.4*

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Project Finance: the importance of a CRD

By Jaime Casanova, Legal Adviser DFDL Myanmar

It is not the first, nor the second, nor the third transaction in Myanmar that I have been involved where document registration related matters have come up and one of the parties who is involved in such transaction does not see the importance of ensuring that any such documents are properly registered with the relevant authorities, or does not want to go through the hassle that such registration implies. And, in all honesty, their position is quite understandable from a business standpoint - the process is burdensome and many may end up exhausted walking down that road, notwithstanding the fact that substantial delays derive from undergoing such an exercise and this may exasperate even the most patient businessman who just wants to see the transactions materialised and finished. Yet, its importance is extreme, if not essential.

To put the matter in perspective, Section 109 of the Myanmar Companies Act, 1914 ("MC Act") provides that "every mortgage or charge created by a company and being either: (i) a mortgage or charge for the purpose of securing any issue of debentures; (ii) a mortgage or charge on uncalled share capital of the company; (iii) a mortgage or charge on any immovable property wherever situated or any interest therein; (iv) a mortgage or charge on any book debts of the company; (v) a mortgage or charge, not being a pledge on any movable property of the company except stock-in-trade, or (vi) a floating charge on the undertaking or property of the company, shall be void against the liquidator and any creditor of the company unless the prescribed particulars of the mortgage or charge, together with the instrument by which the mortgage or charge is created or evidenced (...) are filed with the Registrar for registration within 21 days after the date of its creation (...)".

At first sight, it would appear that compliance with Section 109 of the MC Act would exist upon the filing of the required documentation with the Registrar of the Companies Registration Office (CRO), but unfortunately that impression is not completely accurate and the creation of securities over movable and immovable properties requires at least one or two more twists. Indeed, as provided in Section 109 of the MC Act, the act of filing is not sufficient, per se, and applicants should seek registration of every mortgage or charge. Undeniably, Section 109 of the MC Act should be read together with Section 114 of the MC Act.

Section 114 of the MC Act provides that "the Registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of section 109 to 112 as to registration have been complied with" and, as it may be inferred, this is the step where many problems arise. Indeed, Section 114 of the MC Act requires the Registrar of the CRO to provide a certificate that would directly identify him or her, and would evidence that the mortgage or charge has been registered and is compliant with the laws of Myanmar - such certificate being the so called certificate of registration document (CRD). In this context,



considering that Myanmar is still in its early stages of development and that sometimes there is a gap between the letter of the law and the current practice, it is understandable that the Registrar of the CRO would not want to put him- or herself at an unnecessary risk. Yet, it is our obligation, as attorneys to our clients, to seek their maximum protection and to safeguard, as much as possible, that any such security may be enforceable down the line. Thus, obtaining such registration ends up being the key document to a somewhat long process, which typically requires liaising with the relevant authorities in order to get the deal through - and, even when doing, as with many things in life, there is never a guarantee of success.

Having said that, it cannot be forgotten that the ability of foreign companies in Myanmar to secure immovable property, or foreign banks located outside Myanmar to take security of immovable property for their loans or credit facilities, is limited. There is a law entitled The Transfer of Immovable Property Restriction Law, 1987, under which the following acts are prohibited: (i) transfer of any immovable property by any person to a foreigner or a company owned by a foreigner by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a mortgage, exchange or transfer, and acceptance of a transfer by any other means,

and (ii) transfer of any immovable property by any foreigner or a company owned by a foreigner by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a mortgage, exchange or transfer, and acceptance of a transfer by any other means. A foreign lender or borrower is, therefore, in principle, prohibited to take or make secured loans by way of transfer or sale and mortgage of immovable property.

However, if the project can be embedded under any of the categories that are promoted by the Myanmar Government under the Foreign Investment Law, 2012 (FIL), and many of the projects that require financing could well be, the said restriction on immovable property may be easier to overcome. Certainly, under Section 64 of the Rules to the FIL, mortgages may be allowed provided that prior consent has been obtained from the Myanmar Investment Commission (MIC), which, in turn, will scrutinise the request and decide thereupon. Thus, based on the particulars of each specific case, before proceeding straight to the Registrar of the CRO, it may be necessary to liaise with MIC and obtain their prior approval. Fortunately, an approval from MIC should help to expedite the registration of a mortgage over immovable property by the Registrar of the CRO, so it may end up being beneficial in the big scheme of the project finance. Yet, once again, there is never a guarantee of success.

There is, however, one more hurdle to be crossed. Section 112 of the MC Act provides that "the Registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, no payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge", which would be "open to inspection by any person on payment of the prescribed fee". Unfortunately, such a register is not fully "operating" as of the date of this writing, and there is no clear date as to when such a scenario may change. As with almost everything in Myanmar, it could be a matter of days or, most likely, it could be a matter of months, or even years - but it will happen eventually. Fortunately, some of us are currently working on this issue. Until then, if required, it is extremely necessary and prudent to include the relevant representations, warranties, covenants and undertakings in the relevant sale and purchase agreements in regards to existence or inexistence of mortgages, or charges, over the assets of a company. Be advised.