

AUGUST 29, 2013

MILBANK CONTACTS

**Gary Wigmore**  
Partner  
+852-2971-4815  
gwigmore@milbank.com

**Jacqueline Chan**  
Partner  
+65-6428-2433  
jchan@milbank.com

**Andrew Compton**  
Senior Associate  
+852-2971-4814  
acompton@milbank.com

DFDL CONTACTS

**James Finch**  
Partner  
+951-526-180  
james.finch@dfd.com  
jamesfinch1023@yahoo.com

## Offshore Financing in Myanmar Client Alert: The availability of customary onshore transaction security

As Myanmar's entry onto the global stage continues, the scope and complexity of transactions being undertaken in the country will undoubtedly expand rapidly. As this occurs, lenders and project investors will require the ability to take transaction security under Myanmar law over a borrower's or project's onshore assets and contractual rights.

We set out in this client alert an overview of onshore transaction security customarily required by lenders to a financing, and a discussion of the availability of such security in Myanmar today. A key threshold consideration is choosing the collateral agent or trustee that will hold the onshore transaction security. While there is no requirement under Myanmar law that onshore collateral be held by a domestic bank, we note the limited scope of licenses given to foreign banks to operate in Myanmar to date would likely preclude any such foreign bank from holding onshore collateral.

Note that we have not addressed offshore transaction security (i.e., that governed by the laws of a country other than Myanmar and pertaining to offshore assets or contractual rights) in this client alert.

### THE SPONSOR / SHAREHOLDER SECURITY BASKET

A limited though key piece of the transaction security structure is the collateral provided by the owner(s) of an onshore borrower / investment vehicle (the "**Onshore Borrower**"). The immediate parent(s) of an Onshore Borrower will customarily be required by offshore lenders or creditors (the "**Offshore Lenders**") to pledge its shares in the Onshore Borrower in favor of the Offshore Lenders pursuant to a share pledge agreement. This share pledge agreement will usually be governed by local law, or the laws of the jurisdiction in which the Onshore Borrower is incorporated. In an enforcement scenario, where the Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to enforce their rights under the share pledge agreement to become the legal owner of the pledged shares of the Onshore Borrower. We note also that the Offshore Lenders may sometimes require a second tier share pledge where an intermediate offshore holding company is positioned in the owner's capital structure above the Onshore Borrower. This approach, in an enforcement scenario, will permit the Offshore Lenders to elect to either enforce on the shares of the

Onshore Borrower or of its offshore holding company parent (with the latter approach often being adopted where the offshore holding company is incorporated in a jurisdiction in which enforcement of transaction security is viewed as more expedient).

Myanmar enacted a new foreign investment law on November 2, 2012 (the “**FIL**”). Broadly, the FIL governs all aspects of foreign investment in Myanmar. Enabling rules and a notification to the FIL were issued administratively on January 31, 2013 (the “**Rules**”). Law and practice in Myanmar would dictate that practically all project financing would be done under the auspices of the FIL. Section 128 of the Rules provides that shares in an Onshore Borrower incorporated in Myanmar and registered pursuant to the FIL may be pledged with the prior approval of the Myanmar Investment Commission (the “**MIC**”), the administrative body established to administer the FIL. We note that the MIC review process for approving such a share pledge agreement remains untested to date.

#### **THE ONSHORE BORROWER SECURITY BASKET**

The Onshore Borrower, often a special purpose company established solely to construct a project or develop an asset, is customarily required to grant a security interest to its Offshore Lenders covering all of its assets, including:

- *Contractual rights:* The Onshore Borrower will assign its rights under material agreements to its Offshore Lenders, which can include the right to receive supplies (in the case of a supply agreement) or the right to receive payment for energy delivered to a state-owned utility (in the case of a power purchase agreement). In an enforcement scenario, where the Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to retain the benefit of these assigned contractual rights and “step” into the shoes of the Onshore Borrower with respect to all rights and remedies under the assigned contracts.

Although the FIL and Rules are silent as to the permissibility of the assignment of contractual rights, experience suggests that disclosure of such an assignment would need to be undertaken as part of an Onshore Borrower’s application process to the MIC under the FIL. Section 31(d) of the Rules provides, for example, that “financial documents” of the investor have to be disclosed as part of the application process. We note that neither the FIL nor Rules define “financial documents”, and that the MIC would generally view any material project or financing agreements entered into (or to be entered into) by an Onshore Borrower incorporated in Myanmar as falling within this category.

- *Consents / governmental authorizations:* The Onshore Borrower will assign its rights under any consents or governmental authorizations received in connection with the transaction (i.e., a concession agreement or a minerals license) to its Offshore Lenders. In an enforcement scenario, where the

Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to retain the benefit of these assigned rights and “step” into the shoes of the Onshore Borrower with respect to all rights and remedies under the assigned consents and authorizations.

Under Myanmar law, the assignment of licenses granted by the government is subject to the prior approval of the ministry that granted the relevant license. As an example, the assignment of a mining license may only be done with the prior approval of the Ministry of Mines. Obtaining such approval may be time-consuming and the process for doing so remains unclear.

- *Land or land lease rights:* Where the Onshore Borrower owns the land on which a project or asset is to be developed it will assign by way of a mortgage its rights to the land to its Offshore Lenders. Where the Onshore Borrower leases the land on which a project or asset is to be developed it will assign its rights under its lease agreement to its Offshore Lenders. In an enforcement scenario, where the Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to “step” into the shoes of the Onshore Borrower to gain either title or lease rights to the land.

Section 62 of the Rules provides that an Onshore Borrower incorporated in Myanmar may mortgage its land or assign its rights under a lease by requesting approval from the MIC via either Mortgage Form (5) or Lease Form (4) (both of which can be accessed via the MIC’s website).

- *Moveable and immovable assets:* The Onshore Borrower will assign its immovable assets (i.e., a power plant complete with transmission infrastructure or hundreds of miles of natural gas pipeline) and immovable assets (i.e., inventory, spare parts, equipment) to its Offshore Lenders. In an enforcement scenario, where the Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to “step” into the shoes of the Onshore Borrower to gain title to these assets.

As with the assignment of contractual rights outlined above, the FIL and Rules do not specifically mention the procedure for an Onshore Borrower’s assignment of tangible movable and immovable property. Such an assignment is not prohibited under Myanmar law and would have to be disclosed and approved as part of the application process to the MIC under the FIL. Interests in immovable property may also be registered as mortgages under Myanmar law, as outlined above. In addition to an assignment, Myanmar law provides for chattel mortgages, which are liens over moveable property. Although not mentioned in the FIL, establishing chattel mortgages would also have to be disclosed as part of the application process to the MIC under the FIL.

- *Bank accounts:* The Onshore Borrower will assign its rights to its onshore bank accounts (and monies in such accounts) to its Offshore Lenders. In an enforcement scenario, where the Onshore Borrower defaults in its obligations to the Offshore Lenders, the Offshore Lenders will be able to “step” into the shoes of the Onshore Borrower to gain title to these monetary assets. We note, as a practical matter, that the Offshore Lenders are likely to require that the Onshore Borrower’s key project accounts be held offshore in a jurisdiction where perfection and enforcement of security interests are well established (i.e., Hong Kong or Singapore).

Under both the FIL and Rules, the Onshore Borrower has the right to open onshore accounts in both foreign currency and Myanmar kyat with the approval of the MIC. Although the FIL and Rules are silent regarding assignment of such accounts, experience and practice again suggest that such assignment would require prior MIC approval.

#### **CONCLUSION**

As foreign investors continue to seek access to the Myanmar market, they will require customary onshore transaction security when lending to a borrower or project in Myanmar. We have endeavored in this client alert to articulate key issues arising in connection with taking transaction security under current Myanmar law.

Please feel free to contact any member of the Milbank or DFDL teams to discuss any specific questions that you might have.

# Milbank

## MYANMAR FOCUS GROUP

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Myanmar Focus Group.

If you would like copies of our other Client Alerts, please visit our website at [www.milbank.com](http://www.milbank.com) and choose "Client Alerts" under "News."

This Client Alert is a source of general information for clients and friends of Milbank, Tweed, Hadley & McCloy. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

©2013 Milbank, Tweed, Hadley & McCloy LLP.

All rights reserved.  
Attorney Advertising.  
Prior results do not guarantee a similar outcome.

## SINGAPORE

12 Marina Boulevard, Marina Bay Financial Centre, #36-03 Tower 3, Singapore 018982

---

David Zemans	DZemans@milbank.com	+65-6428-2555
--------------	---------------------	---------------

---

Jacqueline Chan	JChan@milbank.com	+65-6428-2433
-----------------	-------------------	---------------

---

## HONG KONG

30/F Alexandra House, 18 Chater Road, Central, Hong Kong

---

Gary Wigmore	GWigmore@milbank.com	+852-2971-4815
--------------	----------------------	----------------

---

Andrew Compton	ACompton@milbank.com	+852-2971-4814
----------------	----------------------	----------------

---

## BEIJING

Units 05-06, 15<sup>th</sup> Floor, Tower 2, 79 Jianguo Road, Chaoyang District, Beijing, China

---

Shepard Liu	Shepard.Liu@milbank.com	+8610-5969-2774
-------------	-------------------------	-----------------

---

## TOKYO

21F Midtown Tower, 9-7-1 Akasaka, Minato-ku Tokyo 107-6221 Japan

---

Alec Borisoff	ABorisoff@milbank.com	+813-5410-2841
---------------	-----------------------	----------------

---



## YANGON

No. 134/A, Than Lwin Road, Golden Valley Ward (1), Bahan Township (Box 729 GPO), Yangon, Myanmar

---

James Finch	james.finch@dfd.com jamesfinch1023@yahoo.com	+951-526-180
-------------	---	--------------

---